

Hariya and anr. Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-03-1987

Reported in : 1987WLN(UC)431

Judge : Shyam Sunder Byas and; Ashok Kumar Mathur, JJ.

Appeal No. : D.B. Criminal Jail Appeal No. 882 of 1976

Appellant : Hariya and anr.

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. Doongar Singh

Disposition : Appeal allowed

Judgement :

Ashok Kumar Mathur, J.

1. This appeal is directed against the judgment of the learned Additional Sessions Judge, Jalore dated 30-8-1976 whereby he has convicted the accused appellants under Sections 302, 392 and 201 read with Section 34 IPC and sentenced under Section 302/34 IPC to life imprisonment with a fine of Rs. 3000/- and in default of payment of fine to further undergo rigorous imprisonment for 6 months; under Section 392/34 IPC to five years rigorous imprisonment with a fine of Rs. 2000/- and in default of payment of fine to further undergo imprisonment for 3 months and

under Section 201/34 IPC to 3 years rigorous imprisonment with a fine of Rs. 2000/- and in default of payment of fine to further undergo rigorous imprisonment for 3 months. All the substantive sentences shall run concurrently.

2. The facts giving rise to this case are that on 17-2-1976 at 8 P.M. Lachharam son of Samela by caste Rebari resident of village Todami informed Shri Mehboobkhan Sub Inspector of Police, Station Nosaran that one Rajiya s/o Ram with his elder brother went to graze the herd consisting of 220 goats as usual on 16-2-1976 morning in the border of the village. He did not return back in the evening and only 60 goats returned to the house. Thereupon he along with his brother Dhanna had a talk with Kessa and Binja and started in search of him Kesa informed them at about 2-3 hours before the sun set that Rajiya was grazing his herd between Kundainadi to Kotabhakhar Kesa, Rawta and Dhanna went towards Kota Bhakar and he went to village. Rama went in search of Rajiya but he could not be found, Binja was sent to Bakali village but Rajiya was not found there. But in the morning of 17-2-1976 Rawta Maina came to the village and informed that Kesa had seen the dead body of Rajiya buried under the stones in valley of Kota Bhakar so they should accompany him Thereupon he along with Kesa, Deva Choudhary, Maganaji Choudhary and Thakur Madho Singh proceeded towards the valley. Before proceeding towards the valley, they informed the police also. They reached the valley and there they found that a heap of stones under the thorns from its holes a naked dead body was visible. Kesa and Dhanna were sitting there. Some more persons collected there and the dead body was taken out. Accused Hariya and Khangariya were suspected to be the killer of deceased Rajiya. The ear-rings of deceased Rajiya were also missing. This First Information Report was filed at the police station & the police registered a case under Section 302 and 379 IPC The investigation was taken up by Shri Mehboobkhan the Investigating Officer He reached at the scene of occurrence, prepared the necessary site plan, dead body was taken into custody and sent for post mortem. During the course of investigation accused Hariya and Khangariya were arrested. Both the accused persons were interrogated by the police Accused Hariya while in custody of the police gave information regarding gold ear-rings of Rajiya and about the sale of 20 goats at Jodhpur to Mohd. Shaft for a sum of Rs. 1,000/-. The gold ear-rings and Rs. 1,000/- were recovered at the instance of accused Hariya in

consequence of the information furnished by him from the place of concealment. On 20-2-1976 the goats were recovered from Abdul Rashid at Jodhpur at the instance of Hemi and Mohd. Shafi. Hariya accused also gave information which led to the recovery of 7 goats which he sold to Sakoor Kasai. Accused Khangariya was also arrested and while in custody he gave information about pair of Juti and clothes of Rajiya which were concealed by him after burning them. The Investigating Officer recovered the pair of jutti and burnt clothes at the instance of accused Khangariya, The gold ear-rings, pair of Jutti and goats were put for identification before the Tehsildar, Ahore and where these articles were correctly identified. After close of the investigation, both the accused persons were charged under Sections 302, 392 and 397 read with Sections 34 IPC Ultimately, the case was committed to the court of Sessions for trial and the learned Additional Sessions Judge framed the charges under Sections 302, 392/34 and 201 IPC.

3. The prosecution examined 14 witnesses. The statements of the accused persons were recorded. Accused Hariya denied the allegations and pleaded that due to enmity of Thakur Madhosingh this false case was foisted against him. He further submitted that this old gold ear-rings belonged to him which were recovered from his mother. Accused Khangariya has stated that the police has falsely implicated him. The learned Additional Sessions Judge after close of the trial convicted and sentenced the accused appellants as aforesaid. Aggrieved against the aforesaid conviction and sentence the accused appellants preferred the present appeal before this Court.

4. During the pendency of the appeal accused Khangariya has expired and an application has been moved by Mr. Doongar Singh along with a certificate of the Sarpanch certifying that accused Khangariya has already expired. Learned Public Prosecutor does not dispute this. Therefore, we are only concerned with accused Hariya in this appeal.

5. We have heard learned Counsel for the appellants and the learned Public Prosecutor and gone through the judgment of the learned Additional Sessions Judge, Jalore, and have perused the record.

6. Mr. Doongar Singh, learned Counsel for the appellants has submitted that the whole prosecution case depends on the circumstantial evidence as there was no direct evidence to connect the accused appellants with the crime. Learned Counsel has also submitted that the learned Additional Sessions Judge has relied upon the chain of circumstances. But the chain of circumstances even if it is taken to be correct then too the offence would not travel beyond Section 411 IPC. In order to examine the contention of Mr. Doongar Singh it is necessary to see what are the circumstances in the chain appearing in the present case. There are 15 circumstances which have been utilised by the prosecution to bring home the guilt of the accused appellants. They are as under:

(1) That Rajiya deceased left on the morning of Ekam corresponding to 16-2-1976 to graze his herd of goats. He was wearing the pair of golden murkins Ex. A 2 pair of Jutti Ex A 1 and the clothes;

(2) That Rajiya did not return to the house in the evening. Only 60 goats returned unattended;

(3) That accused Hariya and Khangariya were seen previous day i.e. on Punam by Deva PW 4 bathing in Sanwariya Nadi;

(4) That accused Hariya and Khangariya stayed for the night in village Todami at the house of Jadiya PW 2;

(5) That accused Hariya and Khangariya were seen by Kesa PW 3 and Deva PW 4 on 16-2-1976 some time before sunset coming down from Kot Bhakar and proceeding towards Punari Nadi where Rajiya was grazing his herd;

(6) That dead body of Rajiya was found in Kot Bhakar in the next day morning i.e. 17-2-1976. The dead body was buried in a pit which was covered with stones. The body was absolutely naked;

(7) Both accused Hariya and Khangariya were seen together with 27 goats by Sakur PW 6 near the village Finch and loaded the goats in the truck for Jodhpur and accompanied in the truck. Seven goats were sold to Sakur for Rs. 250/- by them;

(8) That both the accused Hariya and Khangariya were seen by Mohd. Safi PW 7 at Jodhpur with 20 goats Mohd. Safi struck the deal of 20 goats with them and paid Rs. 1020/- to Hariya accused as the sale price of 20 goats;

(9) That these 27 goats belonging to Rajiya were discovered and recovered at the instance of accused Hariya from Abdul Gaffar PW 8 on behalf of Sakur PW 6 and 20 goats were produced by Abdul Rasid in place of Mohd. Ran PW 7. The recoveries were made in consequence of the information given by accused Hariya;

(10) That pair of Murkies Ex.A 2 belonging to Rajiya and Rs. 1000/-(10 currency notes of Rs.100/- denomination Ex. A5 to Ex. A14) the sale price of 20 goats were recovered at the instance of accused Hariya from a locked small box lying in his house in consequence of the information given by him;

(11) That a pair of Jutti Ex A1 belonging to Rajiya was recovered from the place of concealment at the instance of accused Khangariya in consequence of the information given by him;

(12) That burnt clothes and a sheo were recovered at the instance of accused Khangariya in consequence of the information given by him;

(13) That pair of Jutti Ex. A 1, pair of Murkies Ex. A 2 and 27 goats belonged to Rajiya and he was in the immediate possession of these articles before he disappeared. These were correctly identified by Lachiya PW 12 before Shri Doongar Singh PW 9 who conducted the identification proceedings;

(14) That murder and robbery formed part of the same transaction;

(15) That accused failed to give any satisfactory explanation of the above circumstances.

7. So as accused Khangariya is concerned, he has already expired during the pendency of this appeal and the learned Counsel for the appellant has produced a certificate of the Sarpanch to this effect. Thus, the appeal so far as accused Khangariya is concerned abates. Now, we are concerned with only accused Hariya in this appeal. So far as accused Hariya is concerned the circumstances

which have been pressed into service by the prosecution are 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15. From the chain of these circumstances what transpires is the recovery of Murkies and goats. Learned Counsel for the appellant submits that from these two items it cannot be established that the accused appellant has committed the offence of murder. So far as the recovery of goats is concerned it is very difficult to identify them. Even if it is accepted that the same were recovered at the instance of the accused, the accused Hariya cannot be held guilty for murder of the deceased. So far as Murkies are concerned, on the basis of the recovery of these Murkies inference of murder cannot be drawn against the accused-appellant. In this connection, learned Counsel has invited our attention to *Hukum Singh v. State of Rajasthan* : 1977 CriLJ639 . In *Hukum Singh's* case (supra) their Lordships of the Supreme Court on the basis of the recovery of blood stained Kesla has drawn an inference that the appellant was found in possession of stolen property soon after the incident and this circumstance clearly justified the conviction of the appellant for the offence of theft punishable under Section 380 IPC and accordingly acquitted the accused under Section 302 IPC and convicted him under Section 380 IPC only.

8. Similarly, in *Joga Gola v. State of Gujarat* 1982 SCC (Cr.) 141; it was held that in case of circumstantial evidence the only hypothesis of the guilt of the accused should be possible then alone the conviction on such circumstantial evidence should be made. It is further held that presence of the accused around the time and place of occurrence along with the cattle of the deceased on facts by itself is not sufficient to raise an irresistible conclusion about the participation of the accused in commission of murder of the deceased. The possession of the cattle, which the deceased had taken to the field on the day of occurrence was held to be proved and the accused appellant was convicted under Section 411, IPC.

9. Likewise, in *Sanwat Khan and Anr. v. State of Rajasthan* : AIR 1956 SC54 ; it was laid down by their Lordships of the Supreme Court that no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe

to draw the inference that the person in possession of the stolen property was the murder. Suspicion cannot take the place of proof. It is further held that on account of the solitary circumstance of the unexplained recovery of the two articles from the house of the accused the only inference that can be raised in view of illustration (a) to Section 114 of the Evidence Act is that accused is either receiver of stolen property or he had committed the theft, but it does not necessarily indicate that the theft and the murder took place at one and the same time.

10. As against this, the learned Public Prosecutor has also invited our attention to *Sunder Lal v. The State of Madhya Pradesh* : AIR 1954 SC28 . In this case, it was established that the ornaments were worn by the deceased and the accused was in it in a position to give any satisfactory explanation as to how he came to be in possession of the same on the very same day on which the alleged murder was committed, the circumstantial evidence was held to be sufficient to hold the accused responsible for the murder of the deceased.

11. Similarly in *Farabhadrapa alias Krishnappa v. State of Karnataka* (1983 CAR SC 232), murder and robbery was proved to have been integral parts of one and the same transaction and, therefore, the presumption arising under illustration (a) to Section 144 of the Evidence Act was drawn that the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction. Since the appellant did not furnish any satisfactory explanation for his possession of stolen property, on the contrary he denied that the stolen property was recovered from him. The false denial by itself is an incriminating circumstance. The nature of presumption under illustration (a) to Section 114 of the Evidence Act must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. In this case the accused appellant was convicted under Section 302 IPC and sentenced to life imprisonment.

12. Now in the light of the proposition of law laid down by their Lordships of the Supreme Court there cannot be two opinions in the matter that under illustration (a) to Section 114 of the Evidence Act a presumption can be drawn in the given

circumstances of higher offence as well as of minor offence. In case on the basis of the evidence on record it is found that murder and robbery are out of the same transaction and soon thereafter the articles of the deceased are recovered at the instances of the accused then this is a very serious incriminating circumstance & in absence of a satisfactory explanation from the accused it is open to the court to draw both the presumption i.e. either the accused is a receiver of the stolen property or he has committed the theft or in a given case if the evidence so permits the inference of murder also. The total denial by the accused of the recovery at his instance is also a very important circumstance appearing against him. His wrong explanation or denial can go a long way against him.

13. The explanation of the accused in the present case is that these golden Murkies belong to him and they have been recovered from the possession of his mother who resides with him. He has further stated that he has been wrongly roped in on account of his enmity with Thakur Madho Singh. The peculiar feature in this case is that the accused has owned these Murkies and has stated that they belonged to him. Though he has not led any evidence to show that they were prepared by his gold-smith. The burden was on the accused to show that they really belonged to him. Thus, in the absence of any specific evidence the plea of the accused cannot be sustained.

14. Now, the question in the facts and circumstance of the present case is that whether an inference of murder can be drawn or not, on account of the recovery of Murkies and the goats at the instance of the accused. In the peculiar facts and circumstances of the present case, it will not be safe to draw the presumption of murder on account of these two recoveries. Thus, it will be safer to convict the accused appellant for the offence punishable under Section 411 IPC and sentence him to three years rigorous imprisonment. The accused is acquitted of the charges under Sections 302, 392 and 201, IPC. The pair of golden Murkies and Rs. 1000/- should be given to the heirs of deceased Rajiya.

15. The accused appellant is on bail and if he has already served out the sentence of three years then he need not to surrender. The Additional Sessions Judge, Jalore, should see that if the accused appellant has already served out the

sentence of three years then he need not be arrested therwise the accused appellant maybe arrested forthwith. The bail bonds of the accused appellant are cancelled.

16. In the result, the appeal of the accused appellant is allowed in part as indicated above.

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