

Mazahar Ali and anr. Vs. State

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SooperKanoon Citation : sooperkanoon.com/898788

Court : Jammu and Kashmir

Decided On : Jan-20-1976

Reported in : 1976CriLJ1629

Judge : Jaswant Singh, C.J. and; Adarsh Sain Anand, J.

Appellant : Mazahar Ali and anr.

Respondent : State

Judgement :

Adarsh Sain Anand, J.

1. Mazahar Ali and Jasimuddin have been sentenced by the learned Additional Sessions Judge, Jammu, to death for an offence under Section 302 R.P.C. and to three years rigorous imprisonment each for an offence under Section 201 R.P.C. by the learned Additional Sessions Judge, Jammu, vide judgment and order dated 30-1-1975 for the murder of one Raj Singh. The convicts have filed a joint appeal against their convictions and sentences and the learned Addl. Sessions Judge has also made a reference to. this Court for the confirmation of the sentence of death imposed on the said two convicts.

2. A birds eye view of the prosecution case may first be noticed. On November 25, 1971, P.W. Gurcharan Singh telephoned the officer incharge of the police post Gandhinagar, Jammu, and informed him that he had been told by Mst. Debo,

P.W., a sweepress, about the presence of a gunny bag on the road opposite his house having some blood stains. Shri Piara Lal Mattu Station House Officer, Police Station Saddar Jammu, thereupon got the first information report lodged at the police station and proceeded to the spot. The gunny bag was found opposite the house of S. Gurcharan Singh in Block B. Sector B. Gandhinagar, Jammu, and it bore blood stains on it. The gunny bag was opened and on opening it was found to contain the head of the deceased whose nose and lips had been chopped off. The fore-arms and legs of the deceased were also in the same bag. The photographs of various parts recovered from the gunny bag, exhibit P. 1 to Exhibit P. 14 were taken on the spot. The S.H.O. sent the various parts of the body to the hospital and himself also went there. At about 6 P.M. P.Ws. Dayal Singh and Kartar Singh, brother of the deceased, identified the dead body in the hospital. The various limbs of the body were put together and postmortem was performed by Dr. M. L. Gupta. Shri Mattu, the S.H.O. received information at the hospital that the convicts were the culprits and so A.S.I. Roshan Lal P.W. was deputed to arrest them. On 26th November, 1971, at about 4 A.M. while the convicts were alighting from a taxi driven by Sajjan Singh P.W. they were arrested by the police who was guarding their house. Subsequently, they were taken to the police station and were interrogated by S.H.O. Piara Lal Mattu in the presence of Gurcharan Singh, Brij Mohan and Kartar Singh P.Ws. Mazahar Ali made a disclosure statement exhibit PB to the effect that he had concealed the remaining parts of the body in the plinth of a house under construction in Gandhinagar Jammu, and led the police party to the place of concealment and got recovered a gunny bag covered by a chaddar containing the various parts of the body of the deceased. The seizure memo exhibit PC was prepared with respect to this recovery at the spot.

3. Jasimuddin convict was also interrogated by Shri Mattu and he also made a disclosure statement exhibit PD in the presence of Brij Mohan, Mohan Singh and Kartar Singh PWs. As a consequence of that disclosure statement a coat and a blood stained knife as well as some other clothes were seized by the police vide seizure memos exhibits PE and PF. The police also seized one blood stained 'Wooden Peeri' from the house occupied by the convicts and a bunch of bloods stained hair from the drain of the same house. Two photographs Exhibits P. 35 and P 36 showing the deceased with one Mst. Asma Bi in intimate caresses were

also recovered from an attache case belonging to Mazahar Ali convict by the police. A wrist watch of the deceased and two letters Exhibits P-58 and P-59 written by the aforesaid Mst. Asma Bi to the deceased were taken into possession by the police from P.W. Nazir Ahmad (to whom the same had been given by the convict in the presence of Gouri Shanker and Roop Lal P.Ws.). The convicts also made an extra judicial confession before Ghu-lam Mohd. P.W. on 25-1-1971, at Talab Khatikan, Jammu, at about 5 P.M. The convicts were remanded to Judicial custody during the investigation and while in that custody they expressed the desire to make a confession. They were accordingly produced before Shri Gopal Dutt Sharma, Municipal Magistrate, Jammu, Jasimuddin convict made a confessional statement before Shri Gopal Dutt Sharma, Municipal Magistrate, Jammu, on 8-12-1971, giving the details but Mazahar Ali convict declined to make any confessional statement. The motive for the crime is alleged to be that the deceased was having illicit affair with Mst. Asma Bi, daughter of Nazir, a brother of Mazahar Ali convict which was resented by Mazahar Ali convict on which score, he bore a grudge against the deceased and on that account he along with his co-accused Jasimuddin and with the common intention of them both to cause the murder of the deceased, committed the crime.

4. There is no eye-witness in the case, and as such, there is no direct evidence. The case depends solely on circumstantial evidence. In order to uphold the conviction on the circumstantial evidence it is now well settled that before conviction in such a case can be sustained it must be established that the evidence is of such a nature that it can lead to no other hypothesis except the one inconsistent with the innocence of the accused. There has to be sufficient material on the record, established by unimpeachable evidence unerringly pointing towards the guilt of the accused. In the light of these accepted principles we shall now examine the circumstantial evidence relied upon by the prosecution to prove the guilt of the accused. The circumstantial evidence on which the prosecution relied in the present case may be categorised as follows:

1. Motive.

2. Evidence of last seen together.

3. Disclosure statements and recoveries.
4. Medical Evidence.
5. Evidence of Extra Judicial Confession.
6. Confessional statement of Jasimuddin.
7. Conduct of the convicts

1. MOTIVE:

5. Although the presence of motive is not always essential for the establishment of the prosecution case, yet the proof of motive satisfies the judicial mind about the likelihood of the authorship of crime and motive in those circumstances assumes great relevance. In a case which hinges upon circumstantial evidence motive plays even a more important role.

According to the prosecution, motive for the commission of the alleged crime was the resentment of Mazahar Ali appellant against the deceased because the latter was having illicit relations with Mst. Asma Bi. Reliance has been placed on two photographs Exhibits P. 35 and P. 36 of Mst. Asma Bi with the deceased in support of the assertion of illicit relationship between them. Mst. Asma Bi as already stated, is the daughter of Nazir, brother of Mazahar Ali, appellant. This relationship has been amply established from the record. These two photographs were recovered from the attache case belonging to the accused from their house and were taken into possession vide memo Exhibit PK. A bare look at the two photographs Exhibits P. 35 and P. 36 shows that the deceased and the girl who has been identified as Mst. Asma Bi by Shri Gulchan Singh P.W., Principal, Luthra Academy, Gandhinagar, Jammu, where Mst. Asma Bi was studying, amply establishes that the deceased and Mst. Asma Bi were having intimate affairs;

2 EVIDENCE OF LAST SEEN

TOGETHER:

6. The next piece of evidence on which the prosecution relies is the evidence of last seen together. Romal Singh P.W. deposed that he had seen the deceased going along with Mazahar Ali to Nanakpura while Swarn Singh P.W. deposed that he had seen the deceased with Mazahar Ali in the latter's house on the evening of 24-11-1971, after he had gone to their house on learning from Romal Singh that the deceased had gone to the house of Mazahar Ali. Swarn Singh was seeking employment with the help of the deceased with Jasimuddin accused. When the witness reached the house of Mazahar Ali accused he was told that the prospect of his job would be known only after Jasimuddin returned to the house. The witness thereupon returned and on his way back found Jasimuddin going towards his house i.e. the house where Mazahar Ali and Jasimuddin used to live.

3 DISCLOSURE STATEMENTS AND

RECOVERIES

7. The prosecution has next relied upon the various recoveries and disclosure statements made by the accused persons. In the first place the incriminating recoveries on which the prosecution has relied are the recoveries of the blood stained knife and clothes of the deceased pursuant to the disclosure statement Exhibit PD made by Jasimuddin accused. Certain parts of the body of the deceased namely the trunk of the deceased (were) recovered from the plinth of a house under construction pursuant to the disclosure statement Exhibit P B of Mazahar Ali accused. The recoveries of these articles have been relied upon to connect the accused with the crime

8. The other incriminating recoveries on which the prosecution relies are the recovery of photographs Exhibits P 35 and P 36 from the attache case belonging to the accused Mazahar Ali from his house; the recovery of letters Exhibits P 58 and P 59 written by Mst. Asma Bi to the deceased from the possession of Nazir Ahmad P.W. in the presence of Gouri Shanker and Roop Lal PWs. the recovery of a pair of shoes of the deceased from the courtyard of the house of the accused which according to Exhibit PB/1 fitted on the foot of the deceased; recovery of a bunch of blood stained hair from the drain of the house of the accused and the recovery of a 'Peeri' which is blood stained from the 'house of the accused,

4. MEDICAL EVIDENCE:

9. Prosecution has next relied upon the medical evidence in support of their case. According to Dr. M. L. Gupta P.W. who performed the post-mortem examination of the dead body, he found the skull, neck, legs and forearms detached from each other and cut cleanly.

According to Dr. M. L. Gupta the legs, forearms, skull and neck of the deceased appeared to have been cut into pieces after the death of the deceased and all these injuries did not appear to be ante-mortem. Injuries on the face also according to the doctor appeared to have been inflicted after the death. The doctor had also found two bruises and three contusions on the neck of the deceased which appeared to have been caused before death and these injuries were ante-mortem. There was also the fracture of thyroid cartilage which according to the doctor had also been caused before the death of the deceased. It was opined by the doctor that the deceased had died of Asphyxia caused by throttling. The doctor testified to the correctness of the post-mortem report exhibit P. V.

5. EVIDENCE OF EXTRA JUDICIAL CONFESSION.

10. The prosecution has relied upon the extra judicial confession allegedly made by both the accused persons to Ghulam Mohd. P.W. on 25-11-1971, at Talab Khatikan, Jammu wherein they are alleged to have made a clean breast of their guilt.

6 CONFESSIONAL STATEMENT OF JASIMUDDIN

11. The next piece of evidence on which the prosecution relies is the confessional statement of Jassimuddin recorded under Section 164 Cr. P.C. by Shri Gopal Dutt Sharma, P.W. In the confessional statement the accused confessed his guilt. The statement was retracted at the trial. Mazahar Ali accused had however refused to make any confessional statement when produced before the learned Magistrate

and had pleaded before him that he was innocent.

7. CONDUCT OF THE ACCUSED:

12. The prosecution has also relied upon the conduct of the accused as showing their guilty mind. According to the prosecution the accused persons attempted to run away from Jammu and also hesitated to disclose their names to the police at the time of their apprehension.

13. We shall presently evaluate the above circumstances in seriatim and the extent to which they establish the guilt of the appellants.

14. (1) Prosecution has been able to establish that there was motive for the appellants to commit the crime. The argument of the learned Counsel for the appellants that the motive was not sufficient to commit the offence of murder does not appeal to us. Sufficiency or otherwise of motive has to be judged from the attendant circumstances. The evidence of P.W. Kartar Singh to the effect that the deceased had apprehended harm from the appellants because they nourished a grudge against the deceased for his illicit relations with Mst. Asma Bi, the niece of Muzahar Ali appellant, has not been shaken at all in the cross examination. As a matter of fact this assertion of the brother of the deceased has not been challenged in the cross-examination. The evidence of this witness with regard to the motive has been amply corroborated by the photographs exhibits P 35 and P 36 which are on the record. These photographs are quite suggestive of the intimate relationship of the deceased with Mst. Asma Bi, niece of the accused. The identity of Mst. Asma Bi has been amply proved in the photograph from the evidence of Shri Gulchain Singh, P.W. Principal of the School where Mst. Asma Bi was studying. The other piece of documentary evidence the letters Exhibits P 58 and P 59 written by Mst. Asma Bi to the de-ceased also corroborates the version of Kartar Singh P.W. regarding the relationship of the deceased with Mst. Asma Bi, It, therefore, stands amply proved from the record that the deceased was having an affair with Mst. Asma Bi and this relationship was resented by the accused. The deceased had even apprehended harm from the appellants on that score. There was thus enough motive for the accused to commit the crime. Despite strenuous attempt made by Mr. Kotwal, the learned Counsel for the appellants, the evidence

regarding the motive has not been rendered incredible at all. We, are therefore, satisfied that the appellants had a motive to commit the crime, but in cases like the present one, the motive by itself is not of much significance and it can only play a pro-bative role in the company of other factors.

15. (2) The evidence of last seen together is in our opinion a shaky piece of evidence. In the first place P.W. Swarn Singh who had gone to the house of the accused with a view to explore the prospect of some employment and was told by the deceased sitting there with Mazahar Ali accused that the prospect of employment could only be assured after the return of Jasimuddin has not received any corroboration from any other evidence on the record. Even Romal Singh, P.W. has admitted in his cross examination that he did not know whether or not Swarn Singh P.W. went to the house of the accused. Thus, there is no reliable evidence to show that he went to the house of the accused. Apart from this Swarn Singh P.W. had no experience of doing sanitary work and it does not stand to reason that he could be employed to go to Rajouri for doing sanitary work along with the appellants and the deceased; therefore, the reason as given by Swarn Singh for going to their house is also not convincing. There is one more aspect of this case. According to the prosecution Swarn Singh P.W. went to the house of the accused only after making enquiries from Romal Singh PW about the whereabouts of the deceased and the accused. Why an enquiry should have been made by Swarn Singh from Romal Singh particularly when Romal Singh in his cross examination admitted that neither the deceased nor Swarn Singh were his friends is not at all intelligible. It does not stand to reason that a person will make enquiries about some body from an utter stranger. Moreover, the main purpose, as deposed to by this witness for going to the house of the accused, was to explore the possibility of a job and he was told that the prospects of job will be known only after Jasimuddin accused returned to the house. The witness saw Jasimuddin accused going to his house on his return as per his own statement. The normal course of human conduct would suggest that the witness should have returned to the house of the accused on seeing Jasimuddin accused going to that house to know about the prospect of his employment. Swarn Singh did not do anything of the kind. His conduct therefore completely belies his testimony and falsifies the basis of the purpose of his visit to the house of the appellants. After carefully reading the

evidence of Swarn Singh and Romal Singh P.Ws. an impression has been created in our minds that both these witnesses are not the witnesses of truth. They had no friendly relations with each other yet at the crucial moment they both go to the hospital together on hearing the rumour of some murder and which murder turns out to be that of the deceased. These coincidences are too good to be true. We are not at all satisfied that there is any cogent evidence about the deceased having been last seen together in the company of the accused. This evidence appears to have been created by the investigating agency. From the perusal of the record we find that the prosecution has not been able to establish this circumstance against the accused.

16. (3) Coming now to the third circumstance relating to the recoveries and disclosure statements made by the appellants. The prosecution has relied upon the recovery of first gunny bag containing the head and some limbs of the deceased from the road opposite to the house of Gurcharan Singh P.W. This bag was first of all spotted by Mst. Debo P.W. and it had bloodstains on it. Gurcharan Singh P.W. was told about the presence of this bag on the road and he in turn informed the police on telephone about it. This recovery does not by itself implicate any of the accused persons but the same can assume importance along with the other recoveries if established in the case.

17. Mazahar Ali accused is alleged to have made a disclosure statement exhibit PB in the presence of Brij Mohan Khajuria, S. Gurcharan Singh and Kartar Singh P.Ws. and consequent upon that, the trunk of the body of the deceased was recovered from the plinth of a house under construction in Gandhinagar.

18. The main criticism levelled by the learned Counsel for the appellants against the disclosure statement of Mazahar Ali accused and the recovery in consequence thereof is that all the witnesses of disclosure statement and recovery are interested witnesses and had been propped up as witnesses because of the influence of P.W. Dayal Singh, Deputy Superintendent of Police the maternal uncle of the deceased and at the relevant time who was City Inspector Police Station Saddar Jammu. It has been urged that no independent witness of the vicinity was called at the time of recovery, rendering the recoveries doubtful. The

learned Counsel has also submitted that there are discrepancies in the statements of various witnesses with regard to the time when the recoveries were made and these discrepancies affect the recoveries. The learned Counsel has further argued that the police had planted the recovery of the trunk of the dead body on Mazahar Ali accused to buttress the false prosecution case. A serious challenge to the recovery is made by the learned Counsel for the appellants on the ground that the police had actually put the exact words of the disclosure statement in the mouth of the accused by asking as to where the accused had kept the trunk of the dead body and that would show that the recovery is false and faked.

19. We have given our careful consideration to the various submissions made by the learned Counsel.

20. P. K. Kartar Singh is an omnibus witness. He is the brother of the deceased and is naturally an interested witness. Moreover, this witness has made a very funny type of statement with regard to the recovery of the trunk. In his examination-in-chief he stated that Mazahar Ali accused disclosed (This statement was apparently made on 26-11-71) that he had kept concealed the trunk of the dead body in the plinth of a house under construction and that he would get the same recovered. Before making this part of the statement the witness deposed about his going to the hospital on 25th November, 1971, and he stated that when on 25th November, 1971, he went to the hospital to identify the dead body he found the head, both hands, arms and the trunk of the dead body and from those parts he identified that dead body to be that of the deceased. Unequivocally the witness had stated that he had seen the trunk of the dead body in the hospital on 25-11-1971, If the witness had seen the trunk of the dead body in the hospital on 25th November, 1971, how is it that the trunk is alleged to have been recovered according to the prosecution pursuant to the disclosure statement of Mazahar Ali accused on 26-11-71. This casts a serious doubt regarding the recovery of the trunk of the dead body on the basis of the alleged disclosure statement, viewed in the context of the above statement of P.W. Kartar Singh, the statement of Brij Mohan Khajuria P.W. the other witness of recovery also assumes significance. This witness deposed that the investigating officer asked the accused, 'where have you kept the trunk of the dead body' and on this the accused replied that he had

concealed it in the plinth of a house and, thereafter the recovery was made at the pointing out of the accused. The statement of Brij Mohan Khajuria is indicative of the fact that the police already knew about the trunk of the dead body and with a view to implicate Mazahar Ali accused put the words in his mouth regarding the concealment of the trunk. The disclosure statement therefore under the circumstances loses much of its importance. There is yet another aspect which belies the human intelligence. Why should the accused persons have concealed the trunk of the dead body in a plinth of the house when the other gunny bag containing the head and other limbs was found on the road side? No explanation is forthcoming. It appears to me that the police had recovered all parts of the deceased and not finding any way to connect Mazahar Ali accused, who may have been the culprit, foisted the recovery of the trunk on him. The recovery appears to be a case of police padding.

21. Coming now to the recovery of clothes and the bloodstained knife pursuant to the disclosure statement of Jasimuddin accused exhibit PD. These recoveries were also made on 26-11-71. The same criticism has been made by the learned Counsel for the appellants with regard to this recovery as was made by him with regard to the recovery of the trunk of the dead body on the basis of the disclosure statement of Mazahar Ali accused and which submissions have been noticed above.

22. Brij Mohan Khajuria PW has stated that the investigating officer asked Jasimuddin accused as to where he had kept the clothes of the deceased as well as the knife and on this questioning, the accused disclosed that he had kept them concealed in his house and could get them recovered. The fact that the exact words were put in the mouth of the accused Jasimuddin is indicative of the fact that the police knew that the offence had been committed with knife and not with any other sharp edged weapon, and also wanted to implicate Jasimuddin by asking him about the clothes. Why the investigating officer asked Mazahar Ali to disclose only about the trunk of the dead body and Jasimuddin to disclose only about the clothes and the knife is shrouded in mystery and the learned Addl. Advocate General could not offer any explanation for this. The argument of the learned Counsel for the appellants that the recoveries under these circumstances

seem to have been foisted on the accused appears quite plausible. There is yet another suspicious circumstance with regard to this recovery. Why should the accused Jasimuddin have kept these incriminating articles in the court-yard of his own house when according to the prosecution the various parts of the deed body were concealed in different places away from the house? The normal human conduct would have shown that the accused persons would not have kept these incriminating articles in their own house. Besides Manohar Lal P.W. appears to be a false witness. He has tried to make improvements in his case on all points which he considered material and I cannot persuade myself to rely on his testimony. This recovery to my mind is rather suspicious and after carefully reading the statements of the various witnesses of recovery as well as the statements of the witnesses of the disclosure statement an impression has been left on my mind that these witnesses are not truthful and the investigating agency has fabricated false clues and created false evidence relating to the disclosure statements and recoveries pursuant thereto.

23. Coming now to the recoveries of ether articles i.e. bloodstained 'Peeri' and bloodstained hair from the drain of the house of the accused as well as the recovery of a pair of shoes belonging to the deceased. All these recoveries are definitely of incriminating nature but we shall have to see how far they connect the accused with the crime.

24. The bloodstained hair recovered from the drain of the house were not sent for comparison with the hair of the deceased, and as such, there is no evidence on the record to show that the bloodstained hair recovered from the drain of the house of the accused were that of the deceased only. This lapse on the part of the investigating agency to have the bloodstained hair compared with the hair of the deceased is a serious lapse and has deprived the court of a very valuable piece of evidence which could have clinched the case specially when according to Dr. M. L. Gupta P.W. who performed the post mortem examination a few hair of scalp of the deceased were got removed by the police and packed and sealed in his presence. No explanation is forthcoming as to why these were not got compared with the bloodstained hair recovered from the house of the accused. It would not be too much in these circumstances to draw an inference against the prosecution that

had these been got compared they would not have supported the prosecution case. This recovery, therefore, does not advance the case of the prosecution nor does it connect either of the accused with the crime.

25. The recovery of the pair of shoes of the deceased from the courtyard of the house of the accused also appears to be a case of police padding. After the accused persons had taken care to conceal the weapon of offence, the parts of the dead body, the clothes of the deceased, the photographs of the deceased with Mst. Asma Bi, the letters written by Mst. Asma Bi to the deceased, and had also taken great care to wash the floor of the house which they were occupying to remove all traces of bloodstains there is no earthly reason to suppose that they would have left the pair of shoes of the deceased in the court-yard of their house to enable the police to recover the same. Apart from this there is one more significant aspect which requires consideration. There is no evidence on the record to show that this pair of shoes was the only pair of shoes which the deceased had or that when he was last seen alive he was wearing that pair of shoes. In the absence of any evidence on the record to show that immediately before the deceased was seen alive he was wearing that particular pair of shoes no inference can be drawn against the accused from this recovery of the pair of shoes. After giving my careful consideration to this aspect of the matter, I find that the so called recovery of shoes of the deceased does not advance the case of the prosecution at all. The recovery of the pair of shoes under the circumstances, does not connect the accused with the crime. The mere recovery of bloodstained 'Peeri' from the house of the accused cannot also under the circumstances of the case connect the accused with the crime specially when there was no test for blood grouping.

26. Coming now to the recovery of photographs exhibits P 35 and P 36. I have already held above while dealing with the motive for the commission of the crime that these two photographs are suggestive of intimacy between the deceased and Mst. Asma Bi but apart from that they are of no help to the prosecution case with a view to complete the chain of circumstantial evidence against the accused in this case. Letters exhibits P 58 and P 59 written by Mst. Asma Bi to the deceased are also only indicative of their friendly relations and are relevant only for judging the

motive. Apart from that they afford no corroboration to the substratum of the prosecution case. Moreover the recovery of these two letters and the wrist watch belonging to the deceased from Nazir Ahmad P.W. in the presence of Gouri Shankar and Roop Lal PWs. is suspicious. It is unlikely that these love letters would have been given by the accused to Nazir Ahmad P.W. The prosecution had got this witness declared hostile. The learned Counsel for the appellants contended that the evidence of this witness stood completely effaced by reason of the fact that he had been cross-examined by the Public Prosecutor. Reliance in this connection was placed on a pronouncement of the Supreme Court reported in AIR 1975 SC 1400 : 1975 Cri LJ 1009. I am afraid I cannot agree with this submission. Lately there has been some more rethinking about this matter and their Lordships of the Supreme Court in Bhagwan Singh v. State of Haryana : 1976 CriLJ203 have laid down : 'But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in trial.....' I, therefore, do not agree that his evidence stands effaced from the record.

27. However, the evidence of this witness does not advance the case of the prosecution any further. The witness stated that the accused were not friendly with him and therefore, it cannot be imagined that they would have given the love letters to him. Moreover the witness stated that he had been kept at the police station by the investigating agency and forced to give this evidence implicating the accused. That may or may not be true but the fact remains that the recovery of these letters and wrist watch becomes shaky and doubtful and no reliance can be placed on the same.

(4) MEDICAL EVIDENCE:

28. Coming now to the medical evidence. According to the medical evidence the deceased had been strangled and he died of Asphyxia caused by throttling. The various limbs of his body were then cut after the deceased had died and all these injuries were antemortem. The medical evidence does not by itself connect the accused with the crime as there is no evidence on the record to suggest that

the accused had throttled the deceased specially in view of the fact that I have already disbelieved the evidence relating to last seen together.

(5) EVIDENCE OF EXTRA JUDICIAL

CONFESSION:

29. The accused persons are alleged to have made a confession before P.W. Ghulam Mohd. The learned Addl. Sessions Judge in para 49 of the judgment found the evidence of this witness as not credible and the witness to be of a doubtful character. The learned Additional Sessions Judge did not rely upon his statement as he found the same to be unnatural and ruled it out of consideration. A careful reading of the statement of P.W. Ghulam Mohd. leads us to an irresistible conclusion that he is a false and got up witness. There was no occasion for the accused persons to have made the so-called confession to him. This confession has also been retracted by the accused at the trial and they have denied to have made any such statement to Ghulam Mohd. P.W. A retracted confession which may form the legal basis of a conviction must be assured by corroborative evidence before reliance can be placed on the same. In the instant case there is no such corroboration forthcoming and I find it unsafe to rely upon the so-called extra judicial confession made to the person of the type of P.W. Ghulam Mohd. Bare reading of his statement has convinced me that he is not a witness of truth, and is a false witness. The learned Additional Advocate General has not been able to challenge the finding of the learned trial court about the veracity of this witness and has conceded that this piece of evidence is of a shaky character.

(6) CONFESSIONAL STATEMENT OF

JASIMUDDIN:

30. The next circumstantial piece of evidence on which the prosecution has relied is the confession of Jasimuddin recorded by Mr. G. D. Sharma, Municipal Magistrate, Jammu. This statement has been recorded under Section 164 Cr P. C. The learned Counsel for the appellants has vehemently argued that the

confessional statement was made under the influence of the police and was not a voluntary statement and should be ruled out of consideration. Shri G. D. Sharma, Municipal Magistrate, has appeared as a prosecution witness and has given evidence with respect to the confession of Jasimuddin. The memorandum of enquiry is at page 11 of the paper-book and is exhibit P. R. Mr. Sharma deposed that he satisfied himself about the voluntary character of the statement and then recorded the statement. This Court has on numerous occasions drawn attention of the subordinate courts to the Rules and Orders (Criminal) framed by the High Court and issued for the guidance of the subordinate courts with respect to the procedure to be followed while recording the confession under Section 164 Cr. P.C. The provisions of Section 164 Cr P. C, have got a great sanctity and the conviction may be based only on a confession recorded under Section 164 Cr. P.C. by a competent magistrate which is amply corroborated by other evidence on the record, although as observed by their Lordships of the Supreme Court in 1969 Cri App Rep 444 (SC) such evidence ought to be received with caution,

31. The confession alleged to have been made by Jasimuddin before Mr. G. D. Sharma, Municipal Magistrate Jammu, has lost much of its significance as the same has been recorded in disregard of the instructions contained in Chapter XII of the Rules and Orders (Criminal) issued for the guidance of the courts subordinate to the High Court. Inter alia, the rules require that a magistrate recording the confession under Section 164 Cr. P.C. shall ascertain whether the statement is voluntary or not. This rule is the most important rule to be followed by the courts. Besides this, there are other requirements and guidelines to be followed by the magistrate recording confession under Section 164 Cr. P.C. In the present case the memorandum of enquiry prepared by Shri G. D. Sharma, the learned Municipal Magistrate, who recorded the confession does not reveal that he made any serious efforts to find out about the voluntary character of the confession. The memorandum reveals that he made no enquiry from the appellant as to the custody from which he was produced before him. He also did not enquire from Jasimuddin accused regarding the treatment that he had received prior to his production before him in order to find out whether any extraneous influence had worked on him for making the confession. The learned magistrate did not as it appears from the memorandum of enquiry, even tell the accused that he would not

be made over to the custody of the police after the conclusion of his confession so as to remove any trace or fear of police that may have been lurking in the mind of Jasimuddin which might have impelled him to make such a confession. The returned magistrate should have put all these questions besides the others to the accused to satisfy himself about the voluntary nature of the confession. Without putting these questions I fail to understand as to how the magistrate could satisfy himself about the voluntary nature of the statement. Failure to ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of Jasimuddin accused that it shall not be safe to act upon the same. In *Mst. Hashma v. State* 1976 J and K LR 1 it was held by S. M. F. Ali Chief Justice (as his Lordship then was) to whom the case was referred on disagreement between D. D. Thakur J. and Jasvwant Singh J. that the provisions of Section 164 Cr. P.C. have got a great sanctity and must be complied with in letter and in spirit Jaswant Singh J. (as his Lordship the Chief Justice then was) had observed in the same case that failure to put such questions would show that the magistrate did not make a real endeavour to ascertain the voluntary character of the confession. S. M. F. Ali Chief Justice agreed with Jaswant Singh J. that since the Magistrate did not question the accused about the custody from which he had been brought and also since the magistrate did not administer an assurance to the appellant that he would not be sent back to the police custody the confessional statement could not be used against the appellant as there was no assurance that the statement had been made voluntarily.

32. After giving my anxious consideration to this aspect of the case I find that the confessional statement made on 9-12-1971 by Jasimuddin was not recorded in accordance with procedure prescribed by law. I find a considerable force in the argument of Mr. Kotwal, that such a statement should be ruled out of consideration to determine the guilt or innocence of the accused. I would, as such, not rely on the confessional statement exhibit PR.

33. Before parting with this aspect of the case I would like to draw the attention of the subordinate courts to the importance of recording confessional statement under Section 164 Cr. P.C. The subordinate courts would be well advised to follow the directions laid down in the Rules and Orders (Criminal) framed by the High

Court in letter and in spirit. The attention of the subordinate courts in this behalf is also invited to the observations of the Division Bench of the Orissa High Court reported in AIR 1949 Orissa 67 (71) wherein Ray, Chief Justice (as his Lordship the Chief Justice of India then was) enunciated the following principles which the magistrates should bear in mind while recording the confessional statements under Section 164 Cr. P.C.

(i) Full and adequate compliance with the provisions of Section 164, Criminal P. C. is imperative and its non-compliance goes to the root of the magistrate's jurisdiction to record and reduces the statement recorded by him to a nullity.

(ii) Such compliance must not be undertaken in the spirit of being done as a matter of form but as a matter of essence.

(iii) Every enquiry must be made from the accused as to the custody from which he was produced and as to the custody to which he was to be consigned and the treatment that he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution, still lurking in the accused's mind; in case the magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during this time of reflection, he is completely out of the police influence.

(iv) Besides the warning specifically provided for in the first part of Sub-section (3) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain terms, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement.

(v) He should particularly be asked the reason why he is going to make a statement which would surely go against his self interest in course of the trial and he should, further be told in order to remove any lurking suspicion in his mind, that

even if he contrives subsequently to retract the confession, it will be evidence against him still.

(vi) The magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and that he must apply his judicial mind to the task of ascertaining that the statement he is going to make is of his own accord and not on account of any Influence on him. That is what is the meaning of voluntary statement within the provision of the section.

(vii) Lastly, he should also consider it expedient that satisfaction of his conscience as to the voluntary character of the statement is not the only act to be achieved by him but he should leave such materials on record in proof of compliance with the imperative requirements of the section as would satisfy the Court that sits en judgment in the case that the confessional statement was made voluntarily. In short the provision of the statute must be complied with both in letter and spirit.

34. (7) The last piece of circumstantial evidence on which the prosecution relies is the conduct of the accused immediately after the alleged commission of the crime by them. In this context the main plank of the prosecution case is that the accused persons immediately after the occurrence tried to run away from Jammu as is evident from the statement of Sajjan Singh P.W. whose taxi they had hired to run away. Reliance is also placed on the fact that when the accused persons were apprehended while alighting from the taxi they hesitated to disclose their names to the police officers as per the deposition of Roshan Lal P.W. I do not think that any presumption could be drawn in favour of the prosecution from the mere fact that the accused persons were trying to leave Jammu and were apprehended. It is not unknown that even an innocent man may feel panicky and try to evade arrest when wrongfully suspected of a grave crime, as such is the instinct of self preservation. The attempt of an accused person to run away after the crime is no doubt a relevant piece of evidence but too much of importance cannot be attached to this piece of evidence as this circumstance is only a very small item in the chain of circumstantial evidence. Whatever be the little evidentiary value of this conduct of the accused in running away from the scene of crime in a given case, in the

instant case this circumstance relating to the conduct of the accused cannot be used against the accused persons as these circumstances were not put to the accused persons in their statements recorded under Section 342 Cr.P.C. and it is well settled on the highest judicial authority that no circumstance can be used against an accused person unless the same has been put to him under Section 342 Cr. P.C. and he is given an opportunity to explain the said circumstance. This last piece of evidence will, therefore, have to be ruled out of consideration and I do so.

35. As a result of the above discussion and after giving my careful consideration to the entire evidence on the record relating to the various pieces of circumstantial evidence on which the prosecution relies, I find that all the pieces of circumstantial evidence are too shaky, suspicious, and fragile to furnish a sound foundation for the conviction. The test for basing conviction on the basis of circumstantial evidence have been well settled by the courts in India time and again. Their Lordships of the Supreme Court have again reiterated the guideline for the courts to follow when recording conviction on the basis of circumstantial evidence by observing in *Mahamood v. State of U.P.* : 1976 CriLJ10 that following conditions should be satisfied before conviction can be based on circumstantial evidence.

a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt.

b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.

36. In the present case the above conditions have not been satisfied. The various pieces of circumstantial evidence including the circumstance about the establishment of motive for the accused to commit the crime have only created a strong suspicion about the guilt of the appellants, but suspicion however strong cannot take the place of proof of guilt. On the material on the record the conviction of the appellants under Section 302 R P. C. cannot be sustained and the

appellants deserve to be given the benefit of the doubt and acquitted of the said charge.

37. As the evidence against the appellants regarding the offence under Section 201 R. P. C. is also substantially the same as for the offence under Section 302 R P. C. the appellants conviction for the said offence under Section 201 R. P.C. also cannot be sustained. The proof of the commission of an offence is an essential requisite for bringing home the offence under Section 201 R. P. C. and in the present case the commission of the principal offence by the accused has not been proved, their conviction for the offence under Section 201 R. P. C. also is not sustainable. Reference in this connection may be made with advantage to the observations of their Lordships of the Supreme Court in AIR 1968 SC 829 : 1968 Cri LJ 1013 and 1973 Cri App Rep 255 : 1973 Cri LJ 1585 SC.

38. As a result of the above discussion the conviction and sentences passed on the appellants for the offences under Sections 302 R. P. C. and 201 are hereby set aside and they are acquitted of both the charges. They shall be released forthwith from the custody, if not required in any other case. Their appeals are consequently allowed. The reference made by the learned Addl. Sessions Judge for the confirmation of the sentence of death is accordingly rejected.

Raja Jaswant Singh, C.J.

39. I agree.

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