

Sukhpal at Sonu Vs. State

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Court : Delhi

Decided On : Nov-02-2011

Judge : S.Ravindra Bhat, J.

Acts : Indian Penal Code (IPC) - Section 302; Code of Criminal Procedure (CrPC) - Sections 313, 161; Indian Evidence Act - Sections 27, 25, 26

Appeal No. : CRL.A. 834 of 2011

Appellant : Sukhpal at Sonu

Respondent : State

Judgement :

1. This appeal is directed against a judgment and order of the learned Additional Sessions Judge dated 9.12.2010 and the order of sentence dated 14.12.2010 by which the appellant was convicted for the offence punishable under Section 302, IPC and sentenced to undergo life imprisonment besides payment of fine.

2. The prosecution's allegations briefly were that on the night of 17.5.2007, the appellant went to PS Shalimar Bagh; he claimed to be a resident of 9, Shalimar Bagh when he used to live with his wife Geeta. The Appellant was a tenant in the premises and used to work as a driver. He had married Geeta in the year 2000 and had two sons. The Appellant is further alleged to have said that on 16.5.2007 at about 06:00 PM, he returned home and did not find his wife. He is alleged to have become aware that she had gone to Sheeshmahal, Haiderpur, where he

went in search of her, but could not find her. He returned later and found Geeta at home. The appellant is alleged to have enquired from her where she had gone, to which, she was unable to give any satisfactory reply; he allegedly then decided to kill her and around 08:00 PM, he took her to a vacant ground situated by the side of railway track, at DA Block, Shalimar Bagh. Near the boundary wall of that ground he pressed her neck, as a result of which, she became unconscious and fell down. He then strangled her with a chunni. It is also alleged that he claimed to have gone to Rani Bagh and then to the Police Station and made a complaint on which D.D. No.6A was recorded; that document also bore his signature. The prosecution further claimed that the case was assigned to Inspector Rajnish Parmar who took the Appellant to the spot; he led the police party to the concerned vacant ground near DA Block, Shalimar Bagh and took them by the side of the boundary wall, pointing out to the dead body of Geeta. The Crime Team was called; photographs were taken. The accused was arrested at 06:00 AM. The postmortem on the body was conducted; according to the Doctor, the cause of death was asphyxia as a result of ligature strangulation. After conclusion of the investigation, the Appellant was charged with committing the offence. He entered the plea of not guilty and claimed trial.

3. In the course of the proceedings, the prosecution relied upon the testimony of 19 witnesses and also placed on record several documents and exhibits. The Trial Court, upon an overall consideration of these materials and on the basis of submissions of the parties, rendered its findings convicting the appellant, and sentencing him as described previously in this judgment.

4. Ms. Anu Narula, learned counsel, attacked the findings in the impugned judgment. It was urged that the Trial Court overlooked a very important circumstance i.e. the prosecution's inability to prove motive. Highlighting this aspect, it was urged that through the testimonies of PW-2, 11, 14 and 17, the prosecution sought to establish that the Appellant suspected his wife's fidelity; more specifically he had suspicion that she had an illicit relationship with one Mohd. Furkan. Elaborating on this, Ms. Narula pointed to the testimonies of PW-2, 14 and 17 who were confronted on the issue of appellant's suspicion about her conduct and about allegations regarding Mohd. Furkan. Although these witnesses

appeared to have stated that the Appellant had voiced his suspicions to them, yet, on this question, they remained silent during their testimonies in the Court. It was thus argued that in a case which is entirely based on circumstantial evidence, proof of motive becomes crucial. Unlike criminal cases based on direct circumstance of ocular evidence, the role played by motive is crucial and the prosecution's inability to establish it or at least prove it in a manner made out by it casts grave doubts on the entire story.

5. Learned counsel next submitted that the impugned judgment is unsustainable so far as it recorded that the Appellant was last seen in the company of the deceased Geeta. It was argued on this score that the testimonies of PW-2 and 17 were taken into account by the Trial Court in the impugned judgment. However, the contradictions between the previous statement of the witnesses recorded during the investigation where some of them particularly, PW-2 and 11 had mentioned about the role played by Mohd. Furkan and the subsequent quarrel after which the appellant is alleged to have led away his wife, rendered the whole story unbelievable. It was submitted that the findings of PW-17 which were heavily relied upon by the prosecution as well as the Trial Court was in fact contradicted by the testimonies of PW-2 and 11. Having regard to this state of evidence, the explanation given by the Appellant that he had returned from his work and not finding his wife, went to report this to the Police Station, was a plausible one. Counsel further argued that in reply to the questioning by the Trial Court under Section-313, Cr.PC the Appellant had also stated that he was taken to the hospital and after he identified his wife's body, he was implicated in commission of the crime.

6. It was submitted that the Trial Court fell into serious error in considering the statement made by the appellant, recorded as D.D. No.6A (Ex.PW-5/B). Learned counsel relied upon the rulings reported as *Hussaina v. Emperor*, AIR 1936 Lah 386; and *Aghnoo Nagesia v. State of Bihar* AIR 1966 SC 119 to say that intimation to the police or the first information by an accused is inadmissible if it inculpatates or in any manner incriminates him. Such being the case, Ex.PW5/B ought not to have been looked into in first place by the Trial Court to deduce that the Appellant had made any statement which tended to incriminate him. Learned Counsel also relied

upon Sections-25 and 26 of the Evidence Act in this regard. It was further argued on behalf of the appellant that even otherwise the recovery of the dead body, or for that matter, any article from an open place accessible to all, or of articles or objects which could be discovered in the normal course of events could not have to been treated as incriminating circumstances to implicate the appellant. She relied upon the decision reported as Gopal v. State, 1977 CriL LJ 358, Amin v. The State, AIR 1958 All 293, Vijay Kumar and Anr. v. State, 1995 (4) Crimes (Del) 189. In this case, the testimonies of PW-15 and 18 clearly proved that the body was recovered around 2-2:30 AM in the morning of 17.5.2007 whereas the disclosure is alleged to have been made later i.e. around 04:00 AM (by Ex. PW-15/A). Such being the position, the Appellant could not have been implicated. Learned counsel highlighted that the DD - Ex.PW-5/B did not contain any statement by which the Appellant could be conceivably said to have volunteered to take the police to the spot to assist in the recovery of the dead body or other incriminating articles. In the light of these circumstances, the recovery of the body at a time before the disclosure is alleged to have been made itself cast a grave doubt about the veracity of the prosecution to which the Trial Court ought to have been alive.

7. Learned counsel submitted that the recovery of the body as well as the articles could not further have been believed because the police choose not to join any public witness even though it was possible for them to do so. Learned counsel here relied upon the rough sketch as well as the scaled plan produced during the trial by the police and submitted that the open plot was from where the body was recovered appeared to have been well lit. Furthermore, she submitted that the body was in an open area by the side of the fairly busy road and could have been noticed by anyone. The absence of a public witness and the nature of the place from where the articles as well as the body was found, suggested that the possibility of manipulation by the police could not be ruled out. In view of these infirmities and inconsistencies, submitted the counsel, the findings in the impugned judgment about the Appellant being "last seen" in the company of the deceased, had not been proved beyond reasonable doubt; further, the prosecution did not prove all links in the chain, or each circumstance, to unerringly show that the Appellant and none else was alone the author of the crime.

8. Learned APP submitted that the impugned judgment does not call for interference. It was submitted that the testimonies of PWs-2 and 17 who are neighbours (the latter being the landlord of the premises where the deceased and the appellant used to live) is natural. Counsel urged that even though PW-2 did not depose all the facts that he had mentioned in the statement under Section-161 Cr.P.C. particularly vis-à-vis the suspicion of the Appellant about the deceased's loyalty to him and her affair with Mohd. Furkan, yet the testimonies clearly showed that the couple was seen by him leaving the vicinity. This was in fact corroborated by PW-17. Learned APP pointed to the deposition of PW-17 to the following effect:-

"Name of wife of accused was Geeta. On 16.05.2007, at about 6.00 pm, when I was standing outside my house, I saw accused and his wife quarreling with each other. Thereafter, I saw the accused going somewhere with his wife. When I inquired, as to where they are going, accused told me that he is going to the village. Thereafter, accused and his wife did not return to the room."

9. It was further submitted that the PW-17 lived in the same premises and had a shop on the ground floor of that house. Having regard to these facts, the testimonies of two independent witnesses clearly proved that the Appellant and the deceased had some kind of difference of opinion. Even though PW-2 did not fully support his previous statement, what emerged from his testimony in Court that accused had asked him "to take care of his wife". The appellant also told the witness "dekh pandit duniya mein kya kya ho raha hai". Both PW-2 and 7, however, unanimously mentioned that the appellant and his wife left the vicinity or the area, together, that day in the evening.

10. The learned APP argued that the that the decision in Aghnoo Nagesia no doubt is an authority for the proposition that an FIR by itself cannot be looked into if made by the accused and if it contains a confession. However, submitted the APP, if the document contains materials which leads to the discovery of the fact, or an article then that part of the statement can be looked into by virtue of Section-27 of the Evidence Act. Learned APP further submitted that there is no blanket rule preventing the Courts from going into the information given by someone who

later turns out to be an accused. For this purpose, he relied upon the decision reported as Faddi v. State of M.P., 1964 (6) SCR

312. It was submitted that in the present case, the appellant himself went to the Police Station and mentioned the facts which included the description of the place where the body could be located. This was an extremely important circumstance because the body was in fact recovered from that place. Therefore, the fact that the body was recovered, pointed out to the appellant's knowledge regarding its location which in turn incriminated him.

11. Learned APP argued that the medical evidence in this case, particularly the testimony of PW-7 clearly established that death was caused by strangulation. The time of death could also be fixed at around 08:45 PM on 16.05.2007. This was because the postmortem of the body commenced at 12:45 PM on 18.05.2007. The approximate time given since death was 40 hours, thus fully corroborating the appellant's involvement in the crime.

12. Learned APP urged that the appellant did not lead any evidence or give any explanation except stating that he returned home at 07:30 PM on 16.05.2007 and did not find his wife as a result of which he went to lodge a complaint with the police. However, this had to be considered in the background of the testimonies of two witnesses PW-2 and 17 who very clearly stated that he left with his wife. Having regard to all these factors, contended the learned APP, the judgment and order of the Trial Court would not call for any interference.

13. As may be seen by the preceding discussion, the prosecution relied on the theory of "last seen". The Supreme Court, in Om Prakash v. Ashwani Kumar Bassi, (2010) 9 SCC 183 explained the theory in the following terms:

"8. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this Court. In State of U.P. v. Satish, (2005) 3 SCC 114, it was noted as follows: (SCC p.123, para 22)

"22. The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the

deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of PW 2."

9. In *Ramreddy Rajesh Khanna Reddy v. State of A.P.* (2006) 10 SCC 172 it was noted as follows: (SCC p. 181, para 27)

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration."

As far as the evidence goes, PW-2 and PW-17 support the last seen theory. Although PW-11 and PW-14 too deposed for the prosecution, they chose not to support the previous versions recorded under Section 161, Cr. PC. Learned counsel for the Appellant highlighted this, particularly from the angle of absence of motive, and sought to urge that the silence about the last seen aspect, in the deposition of those witnesses, is fatal to the prosecution story. This court is conscious that the two witnesses to a large extent departed from the statement recorded at their behest, during the course of investigation. However, what they chose to remain silent about was regarding the allegations concerning the Appellant's suspicions about his wife being involved with Furkhan. It was after the alleged altercation with his wife, that the couple left the vicinity together. However, the inability of the prosecution to prove a clear cut motive is altogether different from whether it has proved the circumstance of "last seen". The evidence of PW-7, who also authored the postmortem report, proves that Geeta's approximate time of death was 8:45 PM on the night of 16-05-2007. PW-2 mentions that the couple (i.e

the deceased and the Appellant) left together, in front of him, the same evening. PW-17 not only supports this, he even mentions that before they left, they had quarreled, and when asked, the Appellant told the witness that they (the couple) were leaving for his native village. These testimonies clearly prove that the husband and wife, left the neighborhood together, around 6 PM, on the day of the incident. However, the wife was not seen later; her body was recovered at around 2:00 AM the next morning, and the medical evidence pointed to the time of her death as 8-45 PM on 16-05-2007. The court sees no reason to disbelieve the testimonies of PW-2 and PW-17, who were independent natural public witnesses, in a position to observe what used to transpire daily in the neighborhood. For these reasons, the court holds that the finding of the Trial Court that the Appellant was last seen in the company of the deceased, was justified.

14. Motive, undoubtedly is a strong factor to be proved in prosecutions based entirely on circumstantial evidence, unlike in cases based on eyewitness testimony, where it pales into relative insignificance. However, when the prosecution is unable to clearly prove motive, that would not necessarily be fatal to the case. This was recognized by the Supreme Court in *Ujagar Singh Vs. State of Punjab*, (2007) 13 SCC 90 . In *State of U.P. Vs. Kishanpal & Ors.*, (2008) 16 SCC 73 the Supreme Court held that: "The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eyewitnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

15. In this case, PW-11 and PW-14 did not support the versions recorded under Section 161, Cr PC, when they had earlier mentioned about the Appellant harboring suspicion about his deceased wife's involvement in an affair with

Furkhan, and the further allegation that on the fateful day, he saw her coming out of Furkhan's house, and got angry. The silence of these witnesses, however means that the prosecution could not prove that fact. However, what has been proved is that the Appellant told PW-2 to "look after" his wife, and that the couple quarreled in front of PW-17, and later left together. These show an extent of discord, between the husband and wife, though the precise degree or seriousness of such disharmony is unknown. The event shows some quarrel, and an obscure and not clearly discernable motive. If the approach indicated in Ujagar Singh and Kishanpal is to be applied, that would mean that the absence of a clear motive would not automatically deliver a fatal blow to the prosecution story.

16. Now, turning to the admissibility of contents of the intimation, or FIR itself. The Appellant argued that the document was inadmissible; reliance was placed on the ruling in Aghnoo Nagesia (supra). The earliest judgment on the point is Nissar Ali v. The State of Uttar Pradesh, AIR 1957 SC 366, where the Supreme Court outlined the position as follows:

"A First Information Report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under s. 157 of the Evidence Act or to contradict it under s. 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. In this case, therefore, it is not evidence."

In Nagesia, the court clarified the position as follows:

"If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by s.

25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of s. 25 is lifted by s.27." The matter was put to rest, in the judgment reported as Khatri Hemraj Amulakh v. State of Gujarat, AIR 1972 SC 922, where the Supreme Court held that: "...no part of a first information report lodged by the accused with the police could be admitted into

evidence if it was in the nature of a confessional statement. The statement could, however, be admitted to identify the accused as the maker of the report. The part of the information as related distinctly to the fact discovered in consequence of the information could also be admitted into evidence under Section 27 of the Indian Evidence Act if the other conditions of that section were satisfied."

17. It is thus clear that if the first information report, or intimation of the crime, is by the accused, courts cannot look into portions containing confessional statements; however, the exception is that if the statement contains reference to objects, facts or incriminating articles, which can, on their basis be recovered, those portions are admissible in evidence. In this case, learned counsel had argued that the disclosure statement was recorded later, and the body was recovered earlier, and that the FIR does not contain any statement by the Appellant, volunteering to lead the police to any spot to recover articles or the body. This court is of opinion that the latter submission is unfounded. The construction sought to be advanced for Section 27 of the Evidence Act, is unduly and illogically narrow. All that the provision requires is the mention of facts, leading to their recovery, or mention of details, which enable the police during investigation to recover objects or articles. So far as the first argument is concerned, the court feels that it only requires to be noticed to be rejected, because the FIR itself mentions where the body was kept by the Appellant; it was recorded at 01:10 AM in the morning of 17-05-2007. The body was recovered subsequently at around 2:30 AM.

18. As to whether the recovery of a dead body stands on the same footing as the recovery of any other object, cannot be open to debate. The position was spelt out clearly in *State of Maharashtra v. Suresh* : (2000) 1 SCC 471 where the Supreme Court observed that:

"Three possibilities are there when an accused points out the place where dead body or an incriminating material was concealed without stating that it was concealed by him. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was

on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

Again, in *Hosamani and Ors. Vs. State of Karnataka and Ors.* (2009) 14 SCC 582 where the dead body was recovered pursuant to disclosure of appellant from the canal, the Supreme Court held as under:-

"9. xxxxx xxxxx xxxxx xxxxx xxxxx xxxxx

As regards accused Nos. 1 and 2, since the dead body of Namadev was recovered in furtherance of the voluntary information furnished by them, the natural presumption, in the absence of explanation by them is that it was those two persons, who had murdered Namadev and had buried the dead body."

Similarly, in *Deepak Chandrakant Patil Vs. State of Maharashtra*: (2006) 10 SCC 151, the Supreme Court observed as follows:

"Apart from being last seen with the deceased, there is evidence to the effect that he pointed out the place where the body of the deceased was lying which was in the garden behind the house of A-1. The motorcycle of the deceased was also recovered from the same spot. The evidence is thus conclusive that the appellant and the deceased travelled from the house of the deceased to the point where he was assaulted and killed. The objective findings also prove that the appellant had brought the deceased towards the house of A-1 and that in fact he had told the deceased that he was required by A-1. Learned counsel submitted that the statement made by the appellant that he had a fight with the deceased and that he could show the place where his body was lying, is not admissible as it was made in the presence of a police constable. Assuming that the inculpatory part of the statement may not be admissible in evidence, the statement, so far as it relates to other parts disclosed leading to recovery, is admissible."

The Appellant's counsel had argued that the body was recovered from an open place, from an area, which was quite well lit. Therefore, the court should not have given the alleged recovery much credence, and convicted the Appellant on that circumstance. This court is of opinion that the discovery of a dead body, at the behest of the Appellant, in this case, was a very strong incriminating circumstance. The body was in fact recovered around 02-30 AM. The body was no doubt in an open field; however, it was kept close to a nearly four foot high wall. The possibility of its being noticed by passing motorists was remote, in the present case. Furthermore, having regard to the time of recovery, the failure to involve members of the public cannot cast doubts on the event, or how it took place.

19. Having regard to the above discussion, this court is of opinion that the prosecution had proved the "last seen" circumstance, as well all other circumstances, pointing only to the hypothesis of the Appellant's guilt, and rule out the possibility of involvement of any other person, in the crime. The court holds that the impugned judgment does not merit interference. The Appeal, consequently has to fail and is therefore, dismissed.

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