Chandrakant Chimanlal Desai

Vs

State of Gujarat

and

Subamiya Deshmohmed

Vs

State of Gujarat

Criminal Appeal Nos. 327 and 495 of 1979

(Smt. Fathima Beevi, A. M. Ahmadi, V. Ramaswami JJ)

12.12.1991

JUDGMENT

V. RAMASWAMI J. –

1. The first accused Subamiya Deshmohmed is the appellant in Criminal Appeal No. 495 of 1979 and the second accused Chandrakant Chimanlal Desai is the appellant in Criminal Appeals No. 327 of 1979. They were charged under Section 302 read with 120-B and Section 302 read with 34, 201/34, 404 and 507, IPC for having entered into a criminal conspiracy to kidnap and murder a four year old child by name Tinu and for having committed, in furtherance of a common intention and the conspiracy, the murders of the said child. The motive of the commission of such heinous crime was stated by the prosecution to be the deep craving of the second accused, who was childless, to have a child and the confidence or advice he had received from a sadhu or a saint, who had assured him that his desire would fructify if he offered the tuft of hair of young boy to Kalka Mata a deity. The prosecution case as brought out in the evidence showed that the deceased Tinu in the son of one Budhi Prasad (PW 35) and this child was born to him after the birth of six daughters. Budhi Prasad is a Kandoi by profession and runs a shop of sweets and namkins at Prantij, a town in Gujarat State. The deceased Tinu used to go to shop of his father, which was situated near the S.T. Bus Stand, in the town and he with the father playing in or around that area. On the day of occurrence, namely. August 27, 1977 the boy was as usual with his father and around 1.30 p.m. both father and the boy went to their house for noon meal and returned around 3 or 3.30 p.m. At the time the first accused who was known to the family and who used to play with the child was also seen sitting on a bench lying near the shop. Around 4.30 p. m. Budhi Prasad noticed that his son was missing. He immediately sent his servant to find out where the child had gone. On being told that he was not found even in his house he became suspicious and made a search for the child in the entire town. Not finding any clue regarding his where about at about 7 p.m. he informed the Prantij Police that this son. Tinu was missing. It was the further case of the prosecution that around 10.30 p.m. the news of missing of the child having spread like fire, a crowd of people collected near Nagpur Panchayat Office and the people had caught hold of accused 1 obviously on suspicion. Accused 2 was also a member of that crowd. At that time accused 1 asked or enquired of Budhi Prasad who

had come there whether he had any doubts in his mind against him. Since Budhi Prasad at that time did not entertain any doubts about him he informed the people that he entertained no suspicion against him. The crowd accordingly freed accused 1. The prosecution case further went on to say that on the next day, namely. August 28, 1977 at about 5.30 p.m. Budhi Prasad was going to S.T. Bus Stand and that time he saw accused 2 sitting near the octroi cabin. Accused 2 inquired of Budhi Prasad as to whether Tinu had been traced. Budhi Prasad gave a negative reply and was proceeding further. However, accused 2 called him and told him that there was a 'Jasa Chitthi' demanding a ransom. When Budhi Prasad demanded accused 2 to give him the Jasa Chitthi the accused did not hand it over but allowed him to read the same while keeping the Jasa Chitthi in his own hand. This Jasa Chitthi cautioned that the fact of the demand should not be told to the police on pain of certain consequences. The details of the Jasa Chitthi need not be set out at this stage. Budhi Prasad went home and later in the day he sent his brother Chinubhai (PW 27) to accused 2 to bring the said Jasa Chitthi and accordingly Chinubhai went to accused 2 and got the Jasa Chitthi and handed over the same to Budhi Prasad. Later Budhi Prasad is said to have handed over that letter to one Dhirubhai (PW 28). It is further stated that on August 29, 1977 around 5.30 p.m. Budhi Prasad hard the news that a dead body of a boy has been seen in the Nalia going to village Lakroada. Budhi Prasad went with his brother and others to the spot. The dead body was identified as that of missing child Tinu. Meanwhile the President of Prantij Nagar Panchayat had informed the police that a dead body was seen at the Nalia. Budhi Prasad then gave his complaint under Section 302. Accused 1 was arrested at 9 p.m. on August 30, 1977 and on the same night in the early morning at 4.30 a.m. on August 31, 1977, accused 2 also was arrested. Accused 1 was kept in police custody until September 6, 1977 when he was remanded to judicial custody. On September 8, 1977 he was produced before the Judicial Magistrate (PW 40) on the ground that accused 1 desired to make a confessional statement. On September 9, 1977 the confessional statement given by accused 1 was recorded. As many as 12 witnesses were examined for the prosecution and a number of documents produced. The leaned Sessions Judge Sabarkantha District at Himatnagar acquitted both the accused. The State of Gujarat preferred an appeal to the High Court. A Division Bench of the High Court came to the conclusion that the prosecution has proved beyond all reasonable doubts that the accused had committed the murder and accordingly convicted them for offences punishable under Section 302 read with 34 and also 302 read with 120-B, Indian Penal Code and sentenced them to life imprisonment. We may also mention that the High Court was also of the view that both the accused are guilty of committing the other offences mentioned in the charge but it was not necessary to award any separate sentences in respect of those charges. It is against this conviction and sentences that the appellants have referred these two appeals.

2. There are no eye-witnesses to the occurrence and the whole case of the prosecution depends on the circumstantial evidence. The trial court noted the well settled principle of law that in a case depending on circumstantial evidence the prosecution must fully establish the incriminating facts and circumstances by cogent and reliable evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explain away on any other reasonable hypothesis then of his guilt. Keeping this principle in mind according to the learned Judge if the facts are analysed most of the prosecution witnesses could not be relied on and even if some of them are relied on they do not prove the guilt of the accused. As regards the confessional statement he said it was not reliable because the prosecution had not proved that it necessary precautions were taken, necessary warning were given and that it appeared that a copy of the confessional statement was in the hands of the police even on the day when the confessional statement was recorded. On these reasoning the trial court held that the prosecution had not proved the guilt of the accuse beyond all reasonable doubt and accordingly acquitted them. The High Court

also had expressly referred to the law on this subject relating to circumstantial evidence and also warned itself on two other aspects in approaching the evidence on record. Firstly, the trial court which had the opportunity of witnessing the demeanor of the witnesses had not relied on most of the prosecution witnesses and that in an appeal against acquittal in addition to the presumption of innocence of the accused the fact of acquittal had also to be kept in mind. Secondly, it appears that this case had evoked a lot of public attentions and considerable attention had also been given to the case in the press and that therefore it was required that the heinous nature of the crime or the attraction of the press of the public should not at all adversely affect the approach to the evidence and that detached approach to the whole case with an anxious desire to find out the real truth was needed. Even after taking these precautions and warning the learned Judges were of the view that the prosecution has proved the guilty of the accused and convicted the appellants of murder and conspiracy and sentenced them to life imprisonment.

3. In these appeals Mr. T. U. Mehta, who appeared for accused 2 and Mr. Y. C. Dhingra, who appeared for accused 1 took as through the entire evidence for a reconsideration of the material evidence available so as to enable us to come to an independent conclusion on the question of guilt or otherwise of the accused. We have also given our serious and anxious consideration to the entire evidence. But we think it will suffice if we notice in this judgment only some of the important aspects of the evidence without going into the minute details about the entire prosecution case though we have the full power to review at large the entire evidence and to reach an independent conclusion of out own. We have however concentrated upon such evidence and such matters on which the High Court differed from the trial court both on the credibility of the witnesses and the incriminating nature of facts and circumstances spoken to by those witnesses.

4. So far as the motive part is concerned the evidence is not direct and it does not also lead to a conclusion that the prosecution case in this regard must be true. The prosecution had established that accused 2 was a childless person, his wife was middle aged woman about 40 years old and had not reached menopause and the accused himself not being very old be being 53 or 54 at that time. In the difficult circumstances of fathoming the murky depth of the mind of the accused for tracing a motive, we may assume that accused 2 had a deep desire for a child. But we are not prepared to accept the prosecution case on the evidence available that this desire was the motive for the commission of the offence. Even the sadhu is supposed to have asked of the tuft of a child and not the head of child. Thus the motive suggested is not very strong to lead to the conclusion that accused 2 must have planned to resort to crime of this nature. Equally there is hardly any convincing evidence tendered on record to hold that accused I was hired to fetch a child. It is also difficult to believe that accused 1 would pick up this child when he would have known that he would be suspected. To put it briefly the evidence regarding motive and conspiracy is unacceptable.

5. The confession of accused 1 was retracted at the time when the accused was questioned under Section 313. In considering the reliability of this confessional statement the High Court had not kept in view the observations of this Court in Kashmira Singh v. State of M. P. (AIR 1952 SC 159 : 1952 SCR 526 : 1952 Cri LJ 839) In this decision the Supreme Court had observed; (AIR p. 159)

> "The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to

> call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an even the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

6. The High Court has on the other hand made this confessional statement as the basis and has then gone in search for corroboration. It concluded that the confessional statement is corroborated in material particulars by prosecution witnesses without first considering and marshaling the evidence against the accused excluding the confession altogether from consideration. As held in the decision cited above only if on such consideration on the evidence available, other than the confession a conviction can safely be based then only the confession could be used to support that belief or conclusion. The trial court has given cogent reasons for not accepting the evidence of PWs 7, 8 and 11 and rightly so. The High Court has not given any convincing reasons as to why PWs 7, 8 and 11 who were discarded by the trial court should be relied on. The only evidence which calls for comment is that of PW 6. Noorbibi, who is said to have seen accused 1 with the child around 7 p.m. On this aspect the trial court pointed out that in spite of the act that the missing of the child was widely talked about in the village and she was also stated to be aware of it she had not informed the police regarding this incident and that in fact neither she nor her husband to whom she had told the fact had informed this incident to anybody in the village. Further her husband has not been examined as a witness. The trial court also pointed out that this witness even after the dead body of Tinu was found out had not told anybody regarding the above incident. For this and other reasons the trial court had disbelieved PW 6 and the High Court had not traversed this aspect. On the other hand the High Court observed that she had disclosed this fact to the parents of the deceased next morning a statement which is far from accurate if we examine her evidence carefully. The trial court had rightly brushed if aside but the High Court did not analysed this part of the prosecution evidence. The trial court has also analysed the evidence of PWs 7, 8 and 11 and had discarded their evidence on number of grounds. In fact the High Court has also not relied on the evidence of PWs 7, 8 and 11. The whole approach of the High Court was to make confessional statement the basis and then fin out if the facts stated therein were corroborated in material particulars by other evidence, instead of analysing the evidence first and trying to find out whether the evidence is reliable and the facts established are consistent with the guilt of the accused. With respect, the High Court failed to realise that there were statement in the confessional statement which provided intrinsic evidence of police interference for otherwise how could accused 1 have mentioned about having seen Noorbibi when he must have seen several others also. The trial court had critically examined the recording of the confessional statement and held that the Magistrate had not taken sufficient precautions before recording the evidence in order to ensure that the statement was voluntary. In fact the trial court was of the view that the confessional statement was in the hands of the police even before the same was record by the Magistrate. Even the investigating Officer's evidence was not relied on by the trial court and the High Court had not said anything on that aspect. We also have gone into the evidence carefully and we cannot say that the Magistrate was far wrong in discarding the confessional statement. The reliance by the High Court on the evidence available that on August 27, 1977 around 8.30 p. m. both the accused were seen together, that both of them knew each other, that both of them knew each other, that late in the right on the day of occurrence accused 2 was seen in the temple of Kalka Devi situate at Prantij along with a sadhu who was not traced are all minor and flimsy circumstances which do not go to establish a chain of events pointing to the guilt of the accused. PW 17's evidence that on the night when he saw accused 2 in the temple he appeared to be little frightens was not accepted by the trial court on the ground that

there was enmity between accused 2 and the witness. There was no reason why the High Court should have discarded this reason and accepted the evidence of PW 17 in this regard. Besides such evidence is neither here nor there. The recoveries relating to grain of rice at the place of occurrence and the same type of rice at the house of accused 2 do not show any involvement of the accused in the commission of the crime. The rice is not as such a distinguishable article being one commonly found in houses and that could not be treated as any incriminating circumstance. The trial court had carefully considered the recovery of the rice as also the alleged recoveries of anklet and half pant worn by the accused on the information given by accused 1. Since we are agreeing with the trial court reasoning in preference to that of High Court we do not consider it necessary to catalogue all the reasons given by the trial court. We think the consideration by the trial court was more reasonable and conclusion more acceptable. We agree with the trial court that the prosecution has not established beyond reasonable doubt the involvement in the crime or commission of offence by the accused appellants.

7. The story reading the surfacing of the Jasa Chitthi in the early hours of 28th is far from convincing. The prosecution allege that it was written by accused 1 at the behest of accused 2. The defence version is that it is a fabrication resorted to by the police to involve the accused in the commission of crime. This Jasa Chitthi was shown to Budhi Prasad in the presence of a crowd of 50 but none therefrom came to be examined. The knowledge regarding existence of the ransom note was not confined to accused 2 and Budhi Prasad but had become public yet the police was not informed about the same. Accused 2 had also told Chinubhai to inform the police. The trial court had closely examined the evidence of the main witnesses to this development and had given cogent reasons for disbelieving this part of the prosecution case, yet the High Court merely refers to the evidence of the handwriting expert without examining the veracity of the prosecution evidence to conclude if the trial court had not correctly appreciated their evidence, not realising that the evidence of the export was not decisive unless the prosecution version inspired confidence. By relying on the opinion of the handwriting export, the High Court concluded that it lent corroboration to the confession, thus treating the confession as the base document around which the rest of the evidence must circle. We on a critical examination of the prosecution evidence in this behalf, find this part of the prosecution case highly artificial and unconvincing.

8. We accordingly allow the appeals, set aside the conviction and sentence and acquire the appellants on all the charges giving the benefit of doubt. We direct that the appellants be set at liberty forthwith.

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