SUPREME COURT OF INDIA

Bharat

Vs.

State of M.P.

Crl.A.No.488 of 1996

(Y.K. Sabharwal and H.K. Sema JJ.)

30.01.2003

ORDER

Y.K. Sabharwal, J.

1. The appellant was convicted by Court of Sessions for an offence under Section 302, IPC and sentenced to life imprisonment. He was also convicted for offence under Section 394, IPC and sentenced to four years rigorous imprisonment. Both the sentences were directed to run concurrently. The appeal of the appellant was dismissed by High Court by the impugned judgment. The appellant is in appeal, on grant of leave.

2. The conviction of the appellant is based on circumstantial evidence.

3. In brief, the case of the prosecution is that the appellant is a village artisan being a carpenter. Deceased Phullobai was a widow. She was a village nurse who used to attend to the health of women and help them during pregnancy. She was living with her son Paltoo (PW8) and mother Jhuttobai (PW15). According to Paltoo the appellant came to their house in the evening of 8th January, 1981 and said to deceased that his mother has developed some stomach pain and her services were required. On this representation the deceased went with the appellant to his village. At that time she was wearing silver ornaments, namely, Toda and Khagwari. Paltoo and Jhuttobai waited for the return of the deceased till the evening of the next day. When she did not return Paltoo went to village Mijwani to the house of the appellant. There he could meet only the father of the appellant. On Paltoo making enquiries about his mother the father of the appellant was unable to give any information. Paltoo then went to village Vidisha and reported the fact of missing of his mother to his maternal uncle Halke (PW7). Halka advised him to go to village Barkhera and make a search for her and also to report the matter to the Village sarpanch and chowkidar of the village. Paltoo made a report of the incident to village chowkidar on whose advice he along with PW7 lodged a report to the police, Vidisha on 12th January, 1981 under Section 498, IPC stating therein that on 8th January, 1981 the deceased had gone with the appellant for delivery and had not returned back till that date. The further case of the prosecution is that on 13th January, 1981, PW7 made enquiries from the appellant about the whereabouts of the deceased. The

appellant then confessed to him having killed her and thrown her in Ulati river. On that information PW7 went to the river side and found that the dead body of Phullobai was lying by the side of the river partly covered by earth and a small portion of cloth was visible.

> The post-mortem on body was conducted by Dr. KC Bagrecha (PW13). There were the following external injuries on the body:-
>
> "(a) Multiple abrasions at forehead more on left side. Size varying from 1"x1/4" to 1/4" x1/4".
>
> (b) Contusion at face covering whole of the nasal area, both eyes, cheeks and both upper and lower lips and both lids of left eye and right lower lid.
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> (c) Multiple abrasion and contusion at ante-lateral aspect of the neck on both sides. Anteriorly 2-1/2" in width and extending upto nestroid process and on right upto the angle of mandibular. Multiple abrasion of neck. Incised wound at right side neck below mandibular area. Left ear was found missing. Ear was cut from its base."
> The internal injuries were these :-
>
> "Brain was congested. Lungs were congested. Left heart chamber was empty, right contained clotted blood. Other organs were also congested."

4. The cause of death as was opined by the doctor was "asphyxia due to throttling and due to suffocation because of the pressure applied at nose, mouth and neck". Recovery of kudali and silver ornaments, i.e. Toda and Khagwari were made at the instance of the appellant.

5. The defence of the appellant was that of a complete denial.

6. The two circumstances on basis whereof the appellant has been convicted are (i) the appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance.

7. Learned counsel Ms. Sudha Gupta contends that the chain of circumstances is not complete and, therefore, the conviction of the appellant is not liable to be sustained. Further contention of learned counsel is that assuming the prosecution has been able to establish the circumstances of last seen together, namely the deceased having left with the appellant on 8th January, that by itself would not connect the appellant with the commission of crime, particularly when the date of death has not been established to be on 8th January or soon thereafter.

8. Having heard learned counsel for the parties and on perusal of the record, we find no reason to disturb the finding of the courts below that the deceased left with the appellant on 8th January, 1981 in the manner projected in the case of the prosecution. We are, however, unable to accept the contention of Mr. Sidharth Dave, learned counsel for the State that the death of Phoolobai had taken place on 8th January, 1981. Dr. Bagrecha (PW 13) has given

the duration of death of be 1 to 4 days prior to post mortem. Post mortem on the body was conducted on 14th January, 1981. As per the opinion of the doctor the death could be earliest on 10th January and latest on 13th January. Though Mr. Dave rightly contends that in winter decomposition of the body takes more time but we have no reason to doubt that the doctor had not taken this factor into consideration while giving opinion about the date of the death.

9. In the present case, while considering the two circumstances on basis whereof the appellant has been found to be guilty, it would also be useful to bear in mind that in so far as the extra judicial confession alleged to have been made by the appellant to PW7 which led to the recovery of the body by PW7 whereafter the matter was reported to the Police and second FIR under Section 30 registered, has been held to be unnatural and unbelievable. The courts below, in our view, rightly came to the conclusion that the extra judicial confession was unnatural and unbelievable. The said finding was neither challenged nor could be challenged.

10. Reverting now to the circumstances of recovery of the aforesaid ornaments from the house of the appellant and the identification of those ornaments, the High Court has committed a serious illegality in relying upon the factum of recovery as a circumstance against the appellant despite coming to the conclusion that the ornaments had not been duly identified. It stands established that the ornaments Toda and Khagwari were not of any peculiar design. Similar Toda and Khagwari were with every family in the village. In the cross-examination of PW18 in whose presence those ornaments are alleged to have been identified by PW8 and PW15, it has come that Ornaments of that design were available in the market and ladies of the village have them. He is said to have purchased Toda and Khagwari from the market and mixed with those with allegedly recovered ornaments from the house of the appellants. What is of importance is that some portion of the paper had been stuck to the recovered ornaments. That paper was visible at the time of identification. The High Court also held that the ornaments had not been properly identified but at the same time strenuously relied upon the recovery thereof as a circumstance in proof of the guilt of the accused. Mr. Dave also places strong reliance on the circumstance of recovery of ornaments from the house of the appellant. Playing on the case of *State Govt. of NCT of Delhi v. Sunil & Anr.*[1] learned counsel contends that there is no reason to disbelieve the evidence of the Police to doubt the recovery. The submission is that seizure memo need not be attested by any independent witness and that the evidence of Police officer regarding recovery at the instance of the accused should ordinarily be believed. The case, relied upon, has no relevance to the facts of the present case. In the instant case, learned counsel for the appellant is right in her submission that the evidence of the police officer is unreliable in view of ample material on record that the witnesses were signing at the instance of on the dotted lines. It is also not a case where there was no independent witness of recovery. PW14 was an independent witness of recovery. He was also a witness to Ex. P.15, namely, the statement of the appellant under Section 7 of the Evidence Act which, led to recovery or ornaments from his house. The recovery document is Ex. P.16. In cross-examination, P.W.14 has deposed that he had put the signatures on both Exs. P15 & 16 after recovery of ornaments from the house of the appellant. P.W. 14 has also deposed that the thumb impressions of the appellant on both documents were obtained at that time. It is thus evident that after the alleged recovery the document pursuant to which the recovery was supposed to be made was got signed from the

witness and thumb impression of the appellant taken. Therefore, no reliance in regard to recovery of ornaments can be placed on the testimony of police officer. Para 21 of Sunil & Co. case (supra) also makes clear that no reliance can be placed on the testimony of a police officer who is shown to be unreliable. Reliance on the case of *Mohibur Rahman & Anr. v. State of Assam*[2] for the proposition that despite holding on facts that the recovery statement under Section 27 of the Evidence Act is not admissible so also the recovery in consequence of that statement, it could still be relied upon as a circumstance is misplaced, on the facts of the present case regarding preparation of Exhibits P.15 & P.16 as aforesaid. Reference may usefully be made to *Hardyal/Prem v. State of Rajasthan*[3], relied upon by learned counsel for the appellant wherein while considering various circumstances, the two circumstances that were taken into consideration by this Court to doubt the recovery of the ornaments were the common pattern of ornaments which was worn by ladies in Rajasthan, and another, that the same had been kept for long in the house. Under these circumstances, the Court held that evidence relating to recovery of ornaments was not at all worth accepting.

11. Under the aforesaid circumstances, we are of the view that there was neither proper and legal identification of the ornaments nor the recovery as a consequence of the statement of the appellant. The finding of the courts below that the appellant must have killed Phullobai in the greed of ornaments which were robbed by him and subsequently recovered from his house, on exclusion of the evidence of recovery and identification of ornaments, cannot be sustained as this Court is left with the only circumstance of the deceased having left with the appellant on 8th January, 1981. On this circumstance alone, in the instant case, it cannot be held that prosecution has established the charge against the appellant only on the ground that appellant has failed to offer any explanation in his statement under Section 313, Cr.P.C. We have already come to the conclusion as above that the prosecution has failed to establish that the death of Phullobai took place on 8th January, 1981, the earliest it could be on 10th January, 1981. There is nothing to show as to what transpired between these dates. Mere non-explanation cannot lead to the proof of guilt against the appellant. The prosecution has to prove of guilt against the appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the appellant. There is thus no substance in the contention urged on behalf of the State that this Court may not interfere in the concurrent findings of fact of the courts below. There has been a complete mis-carriage of justice to the appellant. Thus, we are unable to sustain the conviction of the appellant.

12. In view of the foregoing reasons we allow the appeal and set aside the impugned judgment and orders of the courts below. The appellant is on bail. The bail bonds are cancelled and sureties discharged.

Appeal allowed.

[1][2001(1) SCC 652] *[2][2002(6) SCC 715]* *[3][1991 (Suppl.1) SCC 148]*