SUPREME COURT OF INDIA

Kuldip Singh

Vs.

State of Delhi

Crl.A.No.814 of 2003

(N.Santosh Hegde and B.P.Singh JJ.)

11.12.2003

JUDGMENT

SANTOSH HEGDE,J.

The appellants in these appeals were convicted by the Additional Sessions Judge, New Delhi, for offences punishable under section 302 read with 34 IPC and were sentenced to undergo life imprisonment with a fine of Rs.500. They were further convicted for offence punishable under section 460 read with 34 IPC and sentenced to undergo life imprisonment with a fine of Rs.500 and also convicted for an offence under section 380 read with 34 IPC and were sentenced to undergo RI for 7 years; in default of payment of fine awarded hereinabove, they were directed to further undergo RI for 3 months on each count. The above substantive sentences were directed to run concurrently.

However, they were given benefit of Section 428 of the Code of Criminal Procedure. The appeals filed by the appellants came to be dismissed by the High Court, hence the appellants are before us in these appeals.

The prosecution case stated briefly is that one Smt. Sushma Gulati (the deceased) was a resident of B-69, Paschim Marg, Vasant Vihar, New Delhi. She was having export business under the name and style of Maharaja Exports. She had a factory at Naraina. She was also constructing another factory in Noida which work was being supervised by one Ramesh Kumar, PW-6 as a Manager. On 24.12.1997 in the evening said Sushma Gulati had left her place of work to her residence at Vasant Vihar where she was staying alone, being a divorcee. On 26.12.1997 at about 8.30 a.m., PW-6 tried to contact said Sushma Gulati over phone but could not get any response, therefore, he visited her house at Vasant Vihar at about 9.45 a.m. when he found the house door open. On entering the house, he found said Sushma Gulati lying dead in the bed- room on the first floor of her house. He also noticed that the said room had been ransacked. He immediately rang up the deceased's lawyer by name Mr. Baldev Krishan. He also telephonically informed the brother of the deceased by name Brig. S.K.Ravikant. On the advice received by them PW-6 contacted the Police Control Room telephonically.

Said lawyer Mr. Baldev Krishan and the brother Brig.

Ravikant immediately reached the place of incident. The Police also appeared there soon thereafter. On a preliminary examination by the investigator it appeared that the deceased had died due to strangulation. They also found some blood stains on the pillow, shirt and mattress. They found one tin box of toffees, a pair of spectacles and some left-over tea in a glass tumbler. Said articles were seized.

On an examination of the deceased's car they found certain papers including 2 complaints addressed to the Police, Noida. These complaints were made by the deceased in regard to an incident which took place on 23.12.1997 with one Gaurav Tyagi with whom she had an altercation. In the complaint she had stated that said Gaurav Tyagi had assaulted her causing a fracture of her finger. She also stated in the said complaint that said Gaurav Tyagi had threatened to kill her. On post mortem examination of the body which was done on 28.12.1997 the doctor opined that the death had occurred about 3 = days prior to the autopsy due to asphyxia as a result of strangulation.

During the course of investigation the investigating agency came to know that the first appellant herein Kuldip Singh was working with the deceased during November, 1997 but his services were terminated because the deceased had suspected him of having stolen certain articles in the house. The investigating agency also came to know that Kuldip was re-employed by the deceased on 20.12.1997 hence the investigators procured the said appellant for interrogation. On such interrogation having come to know the involvement of other 2 appellants, namely, Ram Singh and Om Prakash they were also apprehended. The prosecution avers that during the course of investigation they came to know that these 3 persons had gone to the house of the deceased on 24.12.1997 with a view to commit theft of the valuables which appellant Kuldip Singh had known that the deceased possessed and in the course of said theft because the deceased woke up, she was

strangulated and the accused had taken jewelleries worn by the deceased and other valuables possessed by her like gold bangles, gold kara, lady's ring of gold, gold monks, a camera, a gold locket etc. It is the prosecution case that the investigating agency during their visit to the house of the deceased had also picked up certain chance fingerprints which on an analysis were found to be that of appellant Kuldip. The prosecution further alleges that on 1.1.1998 during the course of interrogation of the accused persons, they volunteered to make a disclosure statement therefore the I.O. procured the presence of one Dalip Singh, PW-5 as a Panch witness for recording the said disclosure memo. It is the case of the prosecution that all the three accused persons made disclosure statements that the articles stolen by them from the house of deceased were shared by the 3 appellants and each one of them had concealed the said articles in their respective jhuggis. During the said statement they also offered to recover the same if they were taken to their respective jhuggis. It is on this basis sometime around the afternoon of 1.1.1998 these appellants with PW-5 and other Police officials were taken to their jhuggi area where these appellants took them to their respective jhuggis and recovered the stolen articles which were recovered by the investigating agency. The jewellery was then weighed, packed and sealed in different packets and the said articles were deposited with the Malkhana at Vasant Vihar Police Station. On completion of the investigation, a charge sheet was filed against these appellants for which they were convicted, as stated above.

The prosecution case being based on circumstantial evidence, it relied on the following circumstances to establish its case as against the appellants : (i) appellant Kuldip was in the employment of the deceased as a domestic servant till about November, 1997 and was dismissed from service but about 10 days prior to the death of the deceased was re-employed hence he had access to the house as also the knowledge of the valuables owned by the deceased and also her routine habits. He also knew that the deceased was staying alone in her house. (ii) appellants Ram Singh and Om Prakash were known to appellant Kuldip because they resided in the same jhuggi area and Om Prakash was known to the appellant as a person who was unemployed and involved in thefts. (iii) The valuables stolen from the house of the deceased were recovered from the houses of the appellants and there was no dispute that the goods recovered from the houses of the appellants were those belonging to the deceased. (iv) The fingerprints of appellant Kuldip were found on the toffee tin found in the house of the deceased.

The trial court as well as the High Court accepted these circumstances relied upon by the prosecution and convicted the appellants as stated above.

In these appeals, Mr. Rajender Kumar, learned counsel appearing for the appellants, contended that none of the circumstances relied upon by the courts below have been proved beyond reasonable doubt and all these circumstances either cumulatively or individually are insufficient to establish the guilt of the accused. The courts below also seriously erred in relying on inadmissible evidence and basing a conviction on such material which has not been proved or which are totally inadmissible in evidence. Learned counsel submitted that the fingerprints taken as a chance print were not proved to have been taken from the toffee tin and no evidence as required in law has been led in regard to this aspect of the prosecution case hence this circumstance could not have been relied on by the courts

below. He also submitted that the case of the prosecution that the appellant Kuldip was re-employed has not been established by the prosecution and this circumstance on which the prosecution relies to prove its case of circumstantial evidence has not even been put to the said accused in his examination under section 313 Cr.P.C. Most of all the learned counsel very seriously challenged the alleged recovery made at the instance of the accused. He submitted that all these accused persons were in police custody for many days prior to the recording of so called disclosure memos and the said memos are sham documents which according to learned counsel is clear from the evidence of PW-5 who is a public witness to the said recoveries. He further submitted that the material contradictions found in the evidence of PW-5 and PW-6, the I.O. in itself is sufficient in the ordinary course to reject the so called recoveries made by the investigating agency.

He also pointed out from the evidence of PW-19 the Officer-in-Charge of the Malkhana that as a matter of fact the so called recovered property was deposited in the Malkhana in the morning of 1.1.1998 itself whereas the recovery memo as also the oral evidence led in support of these recoveries showed that they were recovered late in the evening of 1.1.1998 which itself shows that these recoveries are not genuine and not made at the instance or from the place or person from whom they were allegedly recovered.

Learned counsel submitted assuming for argument's sake that the so called recoveries are to be believed then in the absence of there being other circumstances corroborating the case of the prosecution such recoveries alone cannot be the foundation of a conviction for an offence punishable under Section 302 and at the most it could prove only an offence of theft or offence of receiving of stolen property and nothing more. He placed reliance on a large number of judgments of this Court. Suffice it to say that it may not be necessary for us to refer to all the judgments relied on by the learned counsel on this question except to note the judgment of this Court in the case of Limbaji & Ors. v. State of Maharashtra (2001 10 SCC 340).

Mr. P.P. Malhotra, learned senior counsel appearing for the respondent-State countered the arguments of learned counsel for the appellants by stating that the prosecution in this case has proved beyond all reasonable doubt that the huge quantity of jewellery belonging to the deceased was recovered from the jhuggis of these appellants at their instance which fact has been established beyond all reasonable doubt by the prosecution through the evidence of PWs.5, 11 and 26. He submitted that even though PW-5 has not supported the prosecution case in its entirety during his evidence in the court, his evidence so far as it is consistent with the prosecution case, establishes the recovery of the goods from the possession of these appellants at their instance. Therefore, the fact that PW-5 is a hostile witness would not by itself take away the effect of his evidence and the courts below have rightly considered this evidence in the proper legal perspective and have come to the conclusion that the prosecution case as to the recovery of the stolen goods from the house of the appellants stands established more so when the same is fully supported by the evidence of PWs. 11 and 26. The learned counsel pointed out that minor discrepancies in the evidence of PW-19 as to the time and date of deposit of the recovered goods in the Malkhana is not so material as to demolish the prosecution case of recovery. Learned counsel further argued that assuming for argument's sake that the prosecution in this case has established only one circumstance against the appellants namely

the recovery of the goods belonging to the deceased soon after her murder, that itself is sufficient to base a conviction even for an offence under section 302 because of the Explanation to Section 114(a) of the Evidence Act. For this proposition he placed reliance on a judgment of this Court in the case of Gulab Chand vs. State of M.P. (1995 3 SCC 574). He also submitted that apart from the factum of recovery of the stolen goods the prosecution has also established the other circumstances like the appellant Kuldip's employment with the deceased which establishes that he had the necessary information and knowledge as to the possession of the valuables by the deceased and the place where the same were kept. Learned counsel fairly submitted that the existence of the fingerprints on the toffee box found in the house of the deceased may not be an incriminating piece of evidence since it is the case of the prosecution that the said appellant was employed by the deceased immediately before her death, therefore, it is possible that such fingerprints might have been found due to the nature of his employment on the articles kept in the house of the deceased. Learned counsel then submitted the fact that a specific question in regard to the re-employment of the appellant Kuldip by the deceased is not put under section 313 Cr.P.C. would not by itself make that circumstance unavailable to the prosecution unless the appellant establishes prejudice in this regard which he has not done therefore he submitted that this is not a case in which our interference is called for in a case involving concurrent findings of two courts of fact.

Having heard learned counsel for the parties and having perused the records we notice that actually if the existence of fingerprints is eschewed from consideration only two circumstances remain to establish the prosecution case against the appellants. They are the employment and re-employment of appellant Kuldip and recovery of the property belonging to the deceased which includes huge quantity of gold jewellery. So far as the fingerprints are concerned, as stated above, learned counsel for the respondent himself has rightly said that would be a neutral circumstance and in our opinion there can be no doubt as to this case if really appellant Kuldip was in the employ of the deceased as a domestic help then presence of some fingerprints on the household articles would only be common and natural and therefore this cannot be a circumstance to establish the guilt of the appellant therefore we think the courts below were not justified in relying on this circumstance as a link in the chain of circumstances.

We will now consider whether the employment and re-employment of appellant Kuldip can also be a circumstance which can be considered implicating the appellants in the crime. In regard to the factual aspect of this matter we notice from evidence of PW-6 that Kuldip was once engaged as a servant by the deceased but his services were terminated on the ground that he had stolen some time-pieces from her house. This witness does not say that Kuldip was re-employed. For the purpose of establishing that Kuldip was re-employed prosecution relies on the evidence of PW-2 who was then working as a security personnel in the factory of the deceased at Noida.

This witness in his evidence states that on 20/21.12.1997 Kuldip and deceased met him in the factory at Noida as they came together in a car and this witness asked Kuldip regarding his re-employment with the deceased for which the appellant told this witness that he had again joined service of the deceased. In the very next sentence this witness states that around 20th to 24th Dec., 1997 Kuldip did not turn up in the factory at Noida for joining his duty. A reading of the evidence

of this witness gives us the impression that he states that Kuldip was engaged by the deceased in the factory at Noida and not in her house. No other witness examined by the prosecution has stated as to the re-employment of this accused in her house and PW-2's evidence being the only evidence in this regard which as observed by us hereinabove gives us an impression that the re-employment of Kuldip was in the Noida factory, it runs counter to the prosecution case as to the re-employment of Kuldip in the house of the deceased. That apart as rightly pointed out by learned counsel for the appellants if this piece of evidence as to re-employment of Kuldip was true then it becomes a material piece of evidence as a link in the chain of circumstances relied on by the prosecution therefore this link evidence which indicates the likely involvement of the appellant in the crime ought to have been put to the accused while he was being examined under section 313 Cr.P.C. which was admittedly not done. That being the case the prosecution has disentitled itself from placing reliance on this piece of evidence. We do not agree with the learned counsel for the respondent that either it is not necessary for the prosecution to have put this circumstance to the accused in his examination under Section 313 Cr.P.C. or that he should plead and establish a prejudice caused to him by such default on the part of the prosecution. As stated above this is an incriminating circumstance upon which, in our opinion, the prosecution is relying to indicate the involvement of the appellant.

Therefore, the question of establishing prejudice does not arise as that is quite apparent, apart from the fact that the prosecution has not proved the fact that Kuldip was re- employed to work in the house of the deceased. If this circumstance is also to be excluded from consideration then what remains as to the employment of Kuldip with the deceased is only his past employment. Prosecution has not relied on his past employment solely or independent of his re-employment to establish appellant Kuldip's knowledge as to the valuables owned by the deceased as also the knowledge where the same were kept. The prosecution relies upon this circumstance of re-employment of appellant Kuldip with the deceased for not only proving the factum of knowledge of the valuables but also to prove the factum of his access to the house of the deceased since he was in her employment at the time of her death. If this proximity in the employment goes because of the failure of the prosecution to prove the re-employment of appellant Kuldip then in our opinion his previous employment will not be of any assistance to the prosecution; more so in the background of the admitted fact as is apparent from the evidence of PW-6 that the deceased was in the habit of employing domestic servants for a few days at a time and terminating their services. From the evidence of PW-6 it is also noticed that she used to employ and dismiss domestic servants very frequently and many such servants had complained to PW-6 about the non-payment of their salaries. Therefore, in this background the mere fact that appellant Kuldip was once engaged by the deceased would not be a circumstance at all indicating the involvement of Kuldip because he was not the only person employed and terminated by the deceased just prior to her death.

This leaves us to consider the only other circumstance available to the prosecution to establish its case as against the appellants that is the factum of recovery of huge quantity of gold jewellery and other articles belonging to the deceased from the house of the appellants at their instance. There seems to be divergence of opinion of this Court in regard to the legal position whether a conviction can solely be based for a larger offence than theft or for receiving stolen property in case where the prosecution relies solely on the recovery made. From a perusal of the judgments cited before us it is seen that this Court has in some cases on being fully satisfied as to the proof of recovery and on the

facts of particular cases has held that a conviction for a larger offence can also be based solely on such recoveries. But there are also a line of judgments relied on by learned counsel for the appellants especially in the case of Limbaji (supra) this Court has held that it may not be safe to place reliance on the sole evidence of recovery to base a conviction for a larger offence. In this line of judgments this Court has held that it would be safer to look for corroboration from other sources to establish the larger guilt of the accused rather than proceed to convict for such larger offence solely based on a recovery.

In this case we are spared of that problem of deciding whether we could uphold the conviction of the appellants for offences punishable under section 302 or 460 both read with 34 IPC solely on the basis of the recovery made in this case because for the reasons hereinafter to be discussed by us we think the prosecution in this case has not established the recovery of the gold ornaments and other objects from the houses of the appellants at the instance of the appellants, for more than one reason, at least beyond all reasonable doubt.

It is the case of the prosecution that these accused persons were arrested at about 2 p.m. on 1.1.1998. At that time these appellants volunteered to make a disclosure statement. To evidence the said statement PW-5 who happened to be at the bus-stand nearby the Police Station was summoned. According to prosecution the statement so made by the appellants was recorded in the presence of PW- 5 and thereafter Police Officers along with PW-5 took the appellants to their jhuggi area which took an hour's drive from the Police Station and there they were led by the appellants to their respective jhuggis and the articles were recovered at their instance which were packed and sealed in separate packets containing the goods seized from each of the appellants. The articles so seized, sealed and packed were kept in the Malkhana at Vasant Vihar Police Station to which PW-19 is a witness. If there was no challenge or doubt in regard to this factum pleaded by the prosecution as to the recovery of goods then there would be no difficulty in accepting the prosecution case as to the recovery. But what has happened in this case is that the only PW examined by the prosecution has not fully supported the prosecution case as to the recovery at its vital stage. That apart there is a serious contradiction between the evidence of PWs.5 and 26 the IO as to the manner and time at which the recovery took place. PW-5 in his statement clearly stated that though he went with the Police and the accused persons to the jhuggi area he did not enter any of the jhuggis and it is the Police with the 3 accused persons who entered the jhuggis and they came out from each of the jhuggi with a bundle purported to contain the articles seized from the respective jhuggis. Therefore, as per his evidence this witness has not seen the actual recovery and also not seen whether inside the jhuggi it was the concerned appellant who pointed to the place where the articles were hidden. Therefore, this part of the evidence of PW-5 does not support the prosecution case on the contrary, if this piece of evidence is true then the recovery cannot be accepted both in fact and in law. But the argument of learned counsel for the respondent in this regard is that this witness was making a false statement with a view to help the appellants therefore this part of his evidence should not be accepted. He further submitted that this witness having admitted the fact that he was called as a Panch witness for the recovery proceedings the later part as to the recovery as spoken by PWs. 11 and 26 who were part of the investigating team and were present at the time of recovery should be accepted as proving the prosecution case. May be if all other factors being acceptable we might have acceded to this request of learned counsel for the respondent but this is not the only deficiency we find in the procedure of recovery. It is seen from the evidence of PW-1 the disclosure statement was

made around 2 p.m. and they proceeded to the jhuggi area and reached there around 4.30 p.m. and returned back to the Crime Office from there around 7 p.m. from where he went home; whereas from the evidence of PW-26 it is seen that after recording the disclosure statement they went to the jhuggi area around 7 p.m. and the recovery proceedings went on till 10 p.m. and after completing the same he and his party returned to his office in Adarsh Nagar around mid-night. According to this witness PW-5 was relieved from the jhuggi area itself which as could be seen from his evidence can be only at about 10 p.m. or sometime thereafter. The difference in the time between the evidence of these two witnesses is not something that could be ignored as also the fact whether PW-5 went home from the jhuggi or after he came to the crime office. In the background of the fact that PW-5 has not fully supported the fact of recovery this difference in the timing of the recovery proceedings between the evidence of PWs.5 and 26 becomes very material throwing substantial doubt in our minds as to the actual recovery. This doubt of ours gets further compounded by the evidence of PW-19 who in specific terms has stated that the goods recovered from the appellants' houses were deposited by the I.O. in the Malkhana on 1.1.1998 in the morning. This indicates that the recovered goods were deposited in the Malkhana even before the recovery proceedings started. This evidence of PW-19 as stated by us hereinabove also makes the recovery suspect. More so because this statement of PW-19 is also not clarified in re-examination.

In the above assessment of the prosecution case we are left with only one circumstance namely the recovery of the property belonging to the deceased and that recovery for the reasons stated hereinabove being not beyond reasonable doubt, in our opinion, it is not at all safe or sufficient to base a conviction not only under Sections 302 read with 34 and 460 read with 34 IPC, but even for an offence under section 380 read with 34 IPC. In this background we are of the considered opinion that both the courts below fell in error in coming to the conclusion that the prosecution has established its case based on circumstantial evidence beyond all reasonable doubt. Therefore, the appellants in these appeals are entitled to succeed. Consequently these appeals are allowed, the impugned judgment and conviction imposed by the courts below are set aside. The appellants are set at liberty and they shall be released forthwith, if not wanted in any other case.