

SUPREME COURT OF INDIA

Sk.Yusuf

Vs.

State of West Bengal

Crl.A.No.831 of 2007

(B.S.Chauhan and Swatanter Kumar,JJ.,)

14.06.2011

JUDGMENT

Dr.B.S.Chauhan,J.,

1. This criminal appeal has been preferred against the judgment and order dated 28.06.2006 passed by the High Court of Calcutta in C.R.A.No. 229 of 2000, by which it dismissed the appeal of the appellant against the judgment and order of conviction dated 26.5.2000 passed by the Additional Sessions Judge, First Court, Burdwan in Sessions Trial No. 7 of 1999, convicting the appellant under Sections 302 and 201 of the Indian Penal code, 1860 (hereinafter referred to as 'IPC') and appellant has been imposed the sentence to suffer rigorous imprisonment for life under Section 302 IPC and sentence of one year under Section 201 IPC. Both the sentences have been directed to run concurrently.

2. The facts and circumstances giving rise to this case are that:

“(A) On 31.08.1991, Sahanara Khatun, daughter of Abdul Rajak, resident of village Batrish Bigha, PS: Jamalpur, aged 13 years, had gone to pluck jhinga at about 9.30 A.M. from her jhinga field. She did not return till 10.30 A.M., her father Abdul Rajak alongwith Habibur Rahaman and Sirajul Islam went to search her, however, could not trace her in the jhinga field. They looked for her in bamboo grove in nearby graveyard and found a freshly dug earth, thus, they removed the soil and found the dead body of Sahanara Khatun.

(B) Imdad Ali (PW.1) lodged the FIR on the same day at 12.05 hours under Sections 302 and 201 IPC at Police Station Jamalpur, District Burdwan at a distance of 8 kilometres from the place of occurrence, wherein the appellant was named as accused on the suspicion that appellant was seen by Abdul Rashid (PW.5) and Swapan Murmu catching fish in the canal adjoining his jhinga field and was also seen talking with deceased. The appellant was having a spade in his hand, when it is inquired from the appellant, he replied that he had gone to catch the fish near railway track.

Subsequently, the appellant absconded. In the FIR, it had already been mentioned before committing the murder, Yusuf, the appellant tried to commit rape and on being resisted by the deceased, the appellant assaulted her on her head with spade and murdered and buried her in the graveyard. Thus, investigation ensued. The appellant was arrested on 7.9.1991 by the villagers in the paddy fields near Batrish Bigha and handed over to the police. It was on his disclosure that an old spade, one ghuni and one enamel thala (plate) were recovered. After completing the investigation, chargesheet was filed against the appellant. He denied his involvement in the crime pleading not guilty. Thus, he was put to trial. The prosecution examined 19 witnesses to prove its case.

(C) After conclusion of the trial, the Additional Sessions Judge, Burdwan, vide judgment and order dated 26.5.2000 found the appellant guilty of offences punishable under Sections 302 and 201 IPC and sentenced him to life imprisonment and fine of Rs.1,000/- under Section 302 IPC and further sentenced to one year rigorous imprisonment and fine of Rs.500/- under Section 201 IPC.

(D) Being aggrieved from the aforesaid judgment, the appellant preferred Criminal Appeal No. 229 of 2000 in the High Court of Calcutta which has been dismissed vide judgment and order dated 28.6.2006. Hence, this appeal.”

3. Shri R.K. Gupta, learned Amicus Curiae, has submitted that it is a case of circumstantial evidence. There is no evidence on record that Sahanara Khatun, deceased, was seen with the appellant at the place of occurrence. The spade recovered by the Investigating Officer during investigation had not been sent for chemical analysis. The trial court as well as the High Court placed a very heavy reliance upon extra-judicial confession allegedly made by the appellant before Nurul Islam (PW.11) and Ali Hossain (PW.13) and others though there was no such confession. Nurul Islam is the brother-in-law of Abdul Rajak (PW.2), father of the deceased. Ali Hossain (PW.13) is a resident of the village of Nurul Islam (PW.11). He did not support the version of extra-judicial confession put forward by Nurul Islam (PW.11). There are contradictory statements regarding catching hold of the appellant at Jamalpur after one week of the incidence. There is no evidence of sexual assault on the deceased. Dr. Samudra Chakraborty (PW.18), who conducted the post-mortem on the body of Sahanara Khatun (deceased) did not mention in his report that any sexual assault was made on the deceased prior to her death. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri Tara Chandra Sharma, learned counsel appearing for the State, has vehemently opposed the appeal contending that there are concurrent findings of fact which do not require any interference by this Court. Undoubtedly, the case is based on circumstantial evidence but chain is complete and the circumstantial evidence is so strong that it unmistakably points to the guilt of the appellant and that circumstances are incapable of explanation upon any other reasonable hypothesis that of the guilt of the appellant. There have been sufficient material on the basis of which the two courts below have convicted the

appellant and the said judgments do not require any interference. The appeal lacks merit and is liable to be dismissed.

5. We have considered the submissions made by the learned counsel for the parties and perused the record. Before proceeding further, it may be necessary to refer to the findings recorded by the courts below briefly.

6. Trial Court's findings:

“I. It appears from the evidence of Nurul Islam (PW.11) and Ali Hossain (PW.13) that the accused made an extra-judicial confession before them and also before other villagers when he was caught by them about 7 days after his leaving away from his village after the date of occurrence. The court further held that there was no direct evidence and it was a case of circumstantial evidence and there was enough evidence on record, particularly, of Imdad Ali (PW.1), Abdul Rajak (PW.2), Habibar Rahaman (PW.3), Abdul Majid Mallick (PW.4), Abdul Rashid (PW.5), Alirul Rahmal (PW.6) and Abdul Salam Mallick (PW.7) that accused was present near the place of occurrence at the relevant time when Sahanara Khatun, deceased went to jhinga field and the accused was carrying at that time one spade.

II. It appears from the evidence of Abdul Rashid (PW.5) and Alirul Rahmal (PW.6) that there was no one else at the place of occurrence adjacent to jhinga field and the accused was carrying one spade on the basis of which the trial Court came to the following conclusion:

"So there may be a reasonable inference that the accused, who had one spade in his hand and who was engaged in catching fish near the P.O., suddenly attacked the victim- Sahanara when she came to the jhinga field and thereafter attempted to rape her and when he was resisted by her he became violent and murdered Sahanara with the help of his spade. The medical evidence given by Dr. Samudra Chakraborty (PW.18) will corroborate that Sahanara was murdered by Yusuf with a sharp-cutting weapon, which may be a spade and also by suffocation. The accused only had the opportunity to assault Sahanara in such a way as he carried the spade with him at that time and there is no evidence from any side that except the accused such a spade was carried at that time by anybody else. Moreover, the accused himself had admitted in his extra-judicial confession before Nurul Islam (PW.11) and Ali Hossain (PW.13) and others that he murdered Sahanara at the relevant time when he was resisted by her from committing rape upon her at the relevant time".

III. Extra-judicial confession came from the mouth of the witnesses who appeared to be unbiased and not even remotely inimical to the accused. Undoubtedly, Nurul Islam (PW.11) was a maternal uncle of the deceased but another witness in this regard i.e. Habibar Rahaman (PW.3) had no relationship with the family of the victim. Therefore, his evidence to the extent of extra-judicial confession would be legally and

validly taken into consideration. The trial Court basically found the incriminating circumstance against the appellant as he is absconding and ultimately it found that there was cogent evidence against the appellant.

7. High Court's findings:

“The High Court has accepted the judgment of the trial Court in toto observing that depositions of the witnesses, particularly, Abdul Majid Mallick (PW.4) and Abdul Rashid (PW.5) remained unshaken to the extent that at the material time they found the accused near the place of graveyard with spade in his hand. Another circumstance which swayed with the High Court had been that just after the incident the appellant ran away. The High Court has accepted non- examination of some material witnesses, particularly, Swapan Murmu, Rejaul and Sirajul, accepting the explanation furnished by Abdul Majid Mallick (PW.4) that at the relevant point of leading evidence, none of these persons was available in that area. The extra-judicial confession made by the appellant-accused before Nurul Islam (PW.11) and Ali Hossain (PW.13) in presence of others has also been accepted. Further, the High Court had accepted the explanation furnished by the prosecution that in case there has been some laches on the part of the Investigating Officer in sending the spade etc. for chemical analysis, no adverse presumption can be drawn against the prosecution. The motive had been found as to the possibility of the accused trying to commit sexual assault. All these factors had been found by the High Court of the conclusive nature as to exclude every other possibility except the accused being guilty of the offence.”

8. The case requires to be examined as to whether the aforesaid findings are sustainable in the eyes of law.

LAST SEEN THEORY:

9. The courts below have concluded that there was sufficient material on record to show that the deceased and the appellant were seen together at the place of occurrence. Abdul Rashid (PW.5) is alleged to have stated in this regard. The relevant part of his statement reads as under:

"When I was returning from my field at 9.00 A.M., I saw Yusuf, appellant, catching fish near the jhinga field adjacent to the graveyard. I talked with him there and thereafter returned home. I did not see anybody else near that place. At about 10.45 A.M., I heard that the dead body of the Sahanara Khatun was recovered from the graveyard as she had been murdered by someone. I went to graveyard alongwith others. When the police officer asked me as to who was the person, I told him that I saw Yusuf, appellant, catching fish in a nala near the graveyard."

(Emphasis added)

10. Another star witness Abdul Majid Mallick (PW.4) stated :

"I alongwith Rezwan Ali went to the house of Yusuf, appellant. We saw at the time that Yusuf, appellant, was going to his house with a spade and thala. Yusuf, appellant reported to us that he went to catch fish beside the nala. Rasid and Swapan firmly stated that they saw Yusuf, near the jhinga field. I again went to the house of Yusuf, and saw he fled away. Therefore, we could not apprehend Yusuf, in our village."

11. Abdul Majid Mallick (PW.4), a resident of the same village deposed that alongwith other persons particularly Rezwan Ali, he went to the house of Yusuf, appellant, and saw that he was going to his house with a spade and thala and Yusuf had told them that he had gone to catch fish beside the nala. He stated as under:

"I do not know as to why Sahanara Khatun was murdered. Swapan Murmu is not a resident of our village. I cannot say where he is now residing. Rejowan Ali is an ailing person. Sirajul is now residing in Punjab. I saw Yusuf coming to his house carrying spade and a plate in his hand. I heard from Rashid and Swapan that they had seen the accused near the place of occurrence."

12. Imdad Ali (PW.1), informant has deposed that Abdul Rashid (PW.5) and Swapan Murmu (not examined) saw that Yusuf was talking with the deceased, Sahanara Khatun. Abdul Rajak (PW.2), father of the deceased had deposed as under:

"I came to know that Yusuf murdered my daughter ... I cannot say what was the reason for murder of my daughter".

13. The persons particularly Rezwan Ali and Sirajul who had told these witnesses that they had seen the appellant-accused near the jhinga field at the relevant time had not been examined. More so, it has not been stated by any of the aforesaid witnesses or persons not examined that Sahanara Khatun (deceased) was also seen there alongwith Yusuf, appellant. It has not been deposed by any of the witnesses that deceased was seen talking with the appellant at all.

14. The last seen theory comes into play where the time gap between the point of time when the accused and 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. (Vide: *Mohd. Azad alias Samin v. State of West Bengal*¹, and *State thr. Central Bureau of Investigation v. Mahender Singh Dahiya*²,

15. From the above, it is evident that neither Abdul Majid Mallick (PW.4) nor Abdul Rashid (PW.5) had stated that either of them had seen Sahanara Khatun (deceased) alongwith Yusuf, near the place of occurrence in close proximity of time. All the witnesses deposed that appellant alone was seen near the place of occurrence with spade as he had gone there for catching the fish. Thus, there is no evidence to the extent that the deceased and appellant were seen together at the place of occurrence or nearby the same in close proximity of time.

16. While the appellant-accused was examined by the trial Court under Section 313 of Code of Criminal Procedure, 1973 (hereinafter called as Cr.P.C.), he was asked the question that during that time Abdul Rashid (PW.5) and Swapan Murmu (not examined) had seen him talking with the deceased. The appellant replied that he was innocent.

17. We fail to understand as no witness had deposed seeing Sahanara Khatun, deceased talking with the appellant/accused, how such a question could be put to the accused.

EXTRA-JUDICIAL CONFESSION:

18. Nurul Islam (PW.11), maternal uncle of the deceased, resident of village Rupsona, is not a witness of incident, rather deposed that he was the person who chased and apprehended the appellant after about 7 days of the incident. The relevant part of his statement reads as under:

"After 6-7 days, when I went to Shyamsundar Bazar for my business, I saw Yusuf on the roof of a bus. He got down from the bus after seeing me. He told me that he did the wrong and begged apology for that and pleaded not to assault him but take him to Jamalpur Police Station. I took Yusuf towards Batrish Bigha village by boat and when we crossed the river Damodar, Yusuf started running. I chased him but failed to catch him and then cried for help. Thereafter, public caught Yusuf at Jamalpur Poolmatha. When we took him to the village, Yusuf admitted to him and others that he murdered Sahanara Khatun and, thereafter, he asked the persons to take him to Jamalpur Police Station. Yusuf told them that he attempted to commit rape upon Sahanara Khatun and when she resisted, he assaulted her with the spade on her head and killed her and concealed the dead body in the graveyard".

(Emphasis added)

In his cross-examination, PW.11 repeated the same about the confession made by Yusuf, appellant before him in presence of other persons of the village.

19. Ali Hossain (PW.13) is a resident of the village of Nurul Islam (PW.11) and deposed :

".....I went to Shyamsundar Bazar for purchasing goats. At that time, we see the accused on the roof of a bus. My friend Nurul Islam who was with me asked the accused to come down and he came down from the roof of the bus and requested us not to assault him and to take him at the Police Station Jamalpur and thereafter Nurul Islam took the accused towards Jamapur Police Station."

In the cross examination, his deposition is as under:

"I did not state to I.O. that after crossing the river at Karalaghat the accused ran towards Jamalpur. I did not chase the accused by crying - catch, catch. I did not state to I.O. that some persons of Jamalpur caught the accused. I alone went to

Shyamsundar Bazar. Thereafter I purchased goats from Shyamsundar Bazar. I cannot say anything more about the occurrence."

20. By comparison of the statements of Nurul Islam (PW.11) and Ali Hossain, (PW.13), it is evident that Nurul Islam (PW.11) did not state anywhere in his statement in the court that at the time of apprehending the accused, Ali Hossain (PW.13) was also with him. It is only Ali Hossain (PW.13) who stated that his friend Nurul Islam (PW.11) was with him. He further stated that it was Nurul Islam who asked the accused to come down from the roof of the bus and the accused came down. The statement of Nurul Islam (PW.11) is otherwise that he saw Yusuf, appellant, on the roof of the bus. Yusuf, appellant, got down from the bus after seeing him and told him that he did the wrong and begged apology for that. Ali Hossain (PW.13) did not speak anywhere regarding any confession, though stated that the accused requested them not to assault, rather to take him to police station. The material contradictions are there in respect of the manner in which the appellant had been apprehended. Ali Hossain (PW.13) did not state that appellant made an attempt to runaway after making the said witness.

21. Digambar Mondal (PW.19), the Investigating Officer has deposed that he had noticed the marks of injury on the cheek, forehead and head of the deceased. The wearing apparels of the victim were not soaked with blood. He only sent the wearing pant of the victim for chemical examination. He seized spade but did not sent it for chemical analysis. In his cross-examination he has stated as under:

"The witness Nurul Islam stated to me that the accused was caught by some persons at Jamalpur Poolmatha and thereafter police came and at that time the accused stated before those persons and police that he tried to commit rape Sahanara on 31.8.1998 and when she resisted the accused hit her with a spade and thereafter hid her body in the court-yard by digging some earth there".

(Emphasis added)

22. Both, Nurul Islam (PW.11) and Ali Hossain (PW.13) are chance witnesses as they alleged to be in Shyamsundar Bazar on that date for marketing and none of them had regular business in that bazar. The Court while dealing with a circumstance of extra-judicial confession must keep in mind that it is a very weak type of evidence and require appreciation with great caution. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The "extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility". (See: *State of Rajasthan v. Raja Ram*³, and *Kulvinder Singh & Anr. v. State of Haryana*⁴,

23. Nurul Islam (PW.11) who is maternal uncle of the deceased had deposed about extra-judicial confession made by the accused in presence of others, though he was not able to explain who were the other persons as no other person has been examined in this respect.

Digambar Mondal (PW.19) had deposed that Nurul Islam (PW.11) had told him about the confession by the accused in presence of other persons and police personnel. The accused had told him also that dead body was buried in the courtyard. Thus, the theory of extra-judicial confession revealed by Nurul Islam (PW.11) does not get corroboration from the statement of Ali Hossain (PW.13) or any other independent witness or police personnel. Nor the body of the deceased was recovered from the courtyard. While considering the material contradictions in the statement of Nurul Islam (PW.11) and Ali Hossain (PW.13), we do not consider that it would be safe to accept his version in this respect.

24. Dr. Samudra Chakraborty (PW.18), who conducted the autopsy on the body of Sahanara Khatun found the following injuries:

- i) One incised wound 4" x 0.2" x scalp deep over middle 3rd of left parietal region (vault of the scalp) cutting through the skin, pussa, muscle, vessel and nerve and being placed 1.2" left on mid-line of the body;
- ii) Bruises over 1" x 0.6" x over left side of forehead and being placed 0.5" left of mid-line of the body;
- iii) One lacerated wound 0.6" x 0.4" muscle and bone deep over left molar region with extra-vesation of blood and blood-clot in around the wound;
- iv) Haema toma (red) 3.2" x 1.5" in area over left temporal parietal region;
- v) Subdural haemorrhage of both sides of tempero parietal region of the brain. In the opinion of the doctor, death was due to combine effect of injuries and suffocation. The incised wound could be caused by a hit of sharp edge of the spade. The haema toma on the victim could be caused by a hit of heavy blunt weapon. This witness did not speak of any sign of sexual assault on the deceased before or after her death."

ABSCONDANCE:

25. Both the courts below have considered the circumstance of abscondance of the appellatant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. (Vide: *Matru @ Girish Chandra v. The State of U.P.*⁵, *Paramjeet Singh @ Pamma v. State of Uttarakhand*⁶ and *Rabindra Kumar Pal @ Dara Singh v. Republic of India*,⁷ Thus, in view of the law referred to hereinabove, mere abscondance of the appellatant cannot be taken as a circumstance which give rise to draw an adverse inference against him.

26. CIRCUMSTANTIAL EVIDENCE:

Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Vide: *Sharad Birdhichand Sarda v. State of Maharashtra*⁸, *Krishnan v. State represented by Inspector of Police*⁹, and *Wakkar & Anr. v. State of Uttar Pradesh*¹⁰,

27. No presumption could be drawn on the issue of last seen together merely on the fact that Abdul Rajak (PW.2), father of the deceased had stated that Sahanara Khatun had gone to pluck the jhinga and her dead body was recovered from there. The witnesses merely stated that the accused was present in the close proximity of that area. That does not itself establish the last seen theory because none of the witnesses said that the accused and deceased were seen together. Most of the witnesses had deposed that the accused was having spade. It may connect the appellant to the factum of digging the earth. A person going for catching fish normally does not take a spade with him. The nature of the admissibility of the facts discovered pursuant to the statement of the accused under Section 27 of Indian Evidence

Act, 1872 is very limited. If an accused deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, and as a result of such disclosure, recovery of the weapon is made, no inference can be drawn against the accused, if there is no evidence connecting the weapon with the crime alleged to have been committed by the accused. Be that as it may, the spade had not been sent for chemical analysis as admitted by Digambar Mondal (PW.19), I.O. himself and there was no explanation furnished as for what reason it was not sent. In case of circumstantial evidence, not sending the weapon used in crime for chemical analysis is fatal for the reason that the circumstantial evidence may not lead to the only irresistible conclusion that the appellant was the perpetrator of the crime and none else and that in the absence of any report of Serologist as to the presence of human blood on the weapon may make the conviction of the accused unsustainable. (Vide: *Akhilesh Hajam v. State of Bihar*¹¹). There is no medical evidence or suggestion by any person as to the sexual assault on the deceased. Therefore, it merely remained the guesswork of the people at large. Mere imagination that such thing might have happened is not enough to record conviction.

28. This incident had occurred in a broad day light at 9.30 a.m. in the month of August in the agricultural field surrounded by agricultural field of others. Therefore, the presence of a large number of persons in the close vicinity of the place of occurrence can be presumed and it is apparent also from the statement of Aliful Rahmal (PW.6). Thus, had the deceased been with

the appellant, somebody could have seen her at the place of occurrence. It cannot be a positive evidence as concluded by the courts below that none other than the appellant could commit her murder because no one else had been there at the place of occurrence. In fact, nobody had ever seen the deceased at the place of occurrence. Digging the earth by a single person to the extent that a dead body be covered by earth requires a considerable time and there was a possibility that during such period somebody could have seen the person indulged in any of these activities, though no evidence is there to that extent. The circumstances from which the conclusion of guilt is to be drawn in such a case should be fully established. The circumstances concerned "must or should" and "not and may be" established. In the instant case, the circumstances have not been established.

29. In view of the above, we are of the considered opinion that the courts below convicted the appellant on a mere superfluous approach without in depth analysis of the relevant facts.

30. In the facts and circumstances of the case, the appeal succeeds and is allowed. The appellant is given benefit of doubt and acquitted of the charges of offences punishable under Sections 302 and 201 IPC. Appellant is in jail. He be released forthwith unless his detention is required in any other case.

¹(2008) 15 SCC 0449

²(2011) 3 SCC 0109

³(2003) 8 SCC 0180

⁴(2011) 5 SCC 0258

⁵AIR 1971 SC 1050

⁶AIR 2011 SC 0200

⁷(2011) 2 SCC 0490

⁸AIR 1984 SC 1622

⁹(2008) 15 SCC 0430

¹⁰(2011) 3 SCC 0306

¹¹(1995) Supp 3 SCC 0357