SUPREME COURT OF INDIA

Nizam & Anr.

Vs.

State of Rajasthan

Crl.A.No.413 of 2007

(Dipak Misra and R.Banumathi,JJ.,)

03.09.2015

JUDGMENT

R.Banumathi,J.,

1. This appeal assails the correctness of the judgment dated 01.07.2005 passed by the High Court of Judicature at Rajasthan Jaipur Bench in Criminal Appeal No.1248 of 2002, whereby the High Court confirmed the conviction of the accused-appellants under Sections 302 and 201 IPC and sentence of life imprisonment imposed on each of them with a fine of Rs.2,000/- with default clause and also two years rigorous imprisonment with a fine of Rs.500/- with default clause respectively.

2. Case of the prosecution is that deceased-Manoj was the helper on the truck No.MP-07-2627 and had gone to Pune and thereafter to Barar alongwith his first driver Raj Kumar (PW-2) and second driver Ram Parkash (PW-1) and from Barar they loaded the truck with pipes for destination to Ghaziabad on 23.01.2001. Accused-appellants Nizam and Shafique who were the driver and cleaner respectively on the truck No.DL-1GA-5943 also loaded their truck with pipes from the same company on the same day at Barar and started for Ghaziabad alongwith truck No.MP-07-2627. During this period drivers and cleaners of both the trucks developed acquaintance with each other. While on the way to Ghaziabad, driver Raj Kumar (PW-2) of truck No.MP-07-2627 got into quarrel with some local persons and consequently Barar police detained him alongwith his truck. Faced with such situation, Raj Kumar (PW-2) instructed his second driver Ram Parkash (PW-1) to hand over the amount of Rs.20,000/- to Manoj with instructions to give the money to the truck owner. Accordingly, Manoj left for Gwalior with accused persons by the truck No.DL-1GA-5943 on 23.01.2001.

3. Dead body of deceased-Manoj was found on 26.01.2001 under suspicious circumstances in a field near village Maniya. On 26.01.2001 at about 3.00 O'clock, one Koke Singh (PW-13) went to collect the fodder and found a dead body lying in the field and the same was informed to Shahjad Khan (PW-4). Based on the written information by Shahjad Khan (PW-4), case was registered in FIR No.16/2001 under Sections 302 and 201 IPC on 26.01.2001 at Thana-Maniya, District Dholpur. Gullu Khan(PW-16)-Investigating Officer seized the dead

body and prepared a Panchnama. One bilty (Ex. P17) of Uttar Pradesh, Haryana Roadlines (Pune) and one receipt (Ex. P18) of Madhya Pradesh Government, Shivpuri Naka pertaining to truck No. DL-1GA-5943 were recovered from the pocket of trouser of deceased-Manoj and in the said bilty (Ex.P-17), name of the driver was mentioned as Nizam and truck No.DL-1GA-5943 and some phone numbers. Based on the clues obtaining in the bilty, accused Nizam and Shafique were arrested on 27.01.2001 and the truck No.DL-1GA-5943 was recovered. After due investigation, chargesheet was filed against the appellants-accused under Sections 302 and 201 IPC.

4. To bring home the guilt of the accused-appellants, prosecution has examined twenty one witnesses. Incriminating evidence and circumstances were put to accused-appellants under Section 313 Cr. P.C. and the accused denied all of them and accused stated that Manoj had never travelled in their truck DL-1GA-5943. Additional Sessions Judge, Fast Track Court No.2, Dholpur held that the appellants-accused committed murder of deceased-Manoj to grab Rs.20,000/- and the prosecution has established the circumstances proving the accused-appellants guilty under Sections 302 and 201 IPC and sentenced each of them to undergo life imprisonment with a fine of Rs.2,000/- with default clause and two years rigorous imprisonment with a fine of Rs.500/- with default clause respectively. Aggrieved by the verdict of conviction, appellants-accused preferred appeal before the High Court of Rajasthan, which vide impugned judgment dismissed the appeal thereby confirming the conviction of the accused-appellants and also respective sentence of imprisonment and fine amount imposed on each of them. Being aggrieved, the appellants have preferred this appeal.

5. Learned counsel for the appellants submitted that the "last seen theory" is not applicable to the instant case as there were serious contradictions as to the date and time in which Manoj allegedly left with the appellants. It was further argued that the amount of Rs.20,000/- which was allegedly taken by deceased-Manoj was not recovered from the possession of the appellants. Learned counsel submitted that the circumstances relied upon by the prosecution are not firmly established and the circumstances do not form a complete chain establishing the guilt of the accused and the appellants are falsely roped in.

6. Per contra, learned counsel for the respondent-State contended that the deceased having huge amount of money travelled in the company of the accused-appellants and when the prosecution has established that the deceased-Manoj was last seen alive in the company of the accused-appellants, it was for the accused to explain as to what happened to the deceased and in the absence of any explanation from the accused and based on the circumstantial evidence courts below rightly convicted the appellants and the impugned judgment warrants no interference.

7. We have considered the rival contentions and perused the impugned judgment and material on record.

8. Case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature.

Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his evidence.

9. The principle of circumstantial evidence has been reiterated by this Court in a plethora of cases. In *Bodhraj @ Bodha And Ors. vs. State of Jammu & Kashmir*[1]wherein this court quoted number of judgments and held as under:-

> "10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan*[2] *Era.du v. State of Hyderabad*[3] *Earabhadrappa v. State of Karnataka*[4], *State of U.P. v. Sukhbasi*[5] *Balwinder Singh v. State of Punjab*[6] *and Ashok Kumar Chatterjee v. State of M.P.*[7], The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab AIR 1954 SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.
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> 11. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P*[8]. wherein it has been observed thus: (SCC pp. 206-07, para 21)
> "21 . In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

10. In *Trimukh Maroti Kirkan vs. State of Maharashtra*[9], this court held as under:

> "12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence."

The same principles were reiterated in *Sunil Clifford Daniel vs. State of Punjab*[10], *Sampath Kumar vs. Inspector of Police, Krishnagiri*[11] *and Mohd. Arif @ Ashfaq vs. State (NCT of Delhi)*[12], and a number of other decisions.

11. By perusal of the testimonies of PWs 1, 2 and 3, it is seen that PW1-Ram Parkash and PW2-Raj Kumar along with deceased cleaner Manoj got their truck No. MP-07-2627 loaded with pipes at Barar and at the same time another truck No.DL-1GA-5943 of the accused Nizam and Shafique was also loaded with pipes. On the way to Ghaziabad, quarrel took place between the drivers of the truck No. MP 07-2627 and some local persons and Raj Kumar (PW-2) was detained by the police. Raj Kumar (PW-2) instructed Ram Parkash (PW-1) to hand over the amount of Rs.20,000/- to Manoj with instructions to give this money to the truck owner and he was sent along with accused Nizam and Shafique in the other truck DL-1GA-5943. PWs 1 and 2 further stated that after being released from the police station, they went to Gwalior and enquired about Manoj from their owner Rajnish Kant (PW-3) who had no knowledge about Manoj. In the meanwhile, based on the bilty and the receipt recovered from the pocket of the trouser of deceased-Manoj, Maniya police contacted PW-3-owner of the truck and on being so contacted, PWs 1 to 3 went to Maniya Police Station and identified the deceased person as Manoj through his clothes and photographs.

12. Based on the evidence of PWs 1 and 2, courts below expressed the view that motive for murder of Manoj was the lust for the money which Manoj was carrying. Courts below based the conviction of the appellants on the circumstances "last seen theory" as stated by PWs 1 and 2 along with recovery of bilty and receipt by PW-6 on which the name of the accused person (Nizam) was printed. The appellants are alleged to have committed murder of Manoj for the amount which Manoj was carrying. But neither the amount of Rs.20,000/- nor any part of it was recovered from the appellants. If the prosecution is able to prove its case on motive, it will be a corroborative piece of evidence lending assurance to the prosecution case. But even if the prosecution has not been able to prove the motive, that will not be a ground to throw away the prosecution case. Absence of proof of motive only demands careful scrutiny and deeper analysis of evidence adduced by the prosecution.

13. Apart from non-recovery of the amount from the appellants, serious doubts arise as to the motive propounded by the prosecution. By perusal of the evidence of Sudama Vithal Darekar (PW-17) it is clear that driver Raj Kumar came to the police station complaining that by five to seven people of other vehicle have robbed him and the money. However, after investigation it was discovered that Raj Kumar gave false information and a case under Section 182 IPC was registered against him. Raj Kumar was produced before the Court and court imposed fine of Rs.1,000/- on him. This fact was also verified from PW-16-investigating officer during his cross-examination.

14. Courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23.01.2001. Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory' holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the

deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory'. "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of "last mseen alive" in *State of Rajasthan vs. Kashi Ram*[13], this Court held as under :-

> "23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. (AIR 1960 Mad 218)"

The above judgment was relied upon and reiterated *in Kiriti Pal vs. State of West Bengal*[14],

16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, whether the courts below were right in invoking the "last seen theory" From the evidence discussed above, deceased-Manoj allegedly left in the truck DL-1GA-5943 on 23.01.2001. The body of deceased-Manoj was recovered on 26.01.2001. The prosecution has contended the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17. During their questioning under Section 313Cr.P.C., the accused-appellants denied Manoj having travelled in their truck No.DL-1GA-5943. As noticed earlier, body of Manoj was recovered only on 26.01.2001 after three days. The gap between the time when Manoj is alleged to have left in the truck No.DL-1GA-5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect

emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW-4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.

19. In case of circumstantial evidence, court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. In the case at hand, neither the weapon of murder nor the money allegedly looted by the appellants or any other material was recovered from the possession of the appellants. There are many apparent lapses in the investigation and missing links:-(i) Non-recovery of stolen money; (ii) The weapon from which abrasions were caused; (iii) False case lodged by PW-2 alleging that he was being robbed by some other miscreants; (iv) Non-identification of the dead body and (v) Non-explanation as to how the deceased reached Maniya village and injuries on his internal organ (penis). Thus we find many loopholes in the case of the prosecution. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts. The chain of circumstantial evidence cannot be said to be concluded in any manner sought to be urged by the prosecution.

20. Normally, this Court will not interfere in exercise of its powers under Article 136 of the Constitution of India with the concurrent findings recorded by the courts below. But where material aspects have not been taken into consideration and where the findings of the Court are unsupportable from the evidence on record resulting in miscarriage of justice, this Court will certainly interfere. The "last seen theory" seems to have substantially weighed with the courts below and the High Court brushed aside many loopholes in the prosecution case. None of the circumstances relied upon by the prosecution and accepted by the courts below can be said to be pointing only to the guilt of the appellants and no other inference. If more than one inferences can be drawn, then the accused must have the benefit of doubt. In the facts and circumstances of the case, we are satisfied the conviction of the appellants cannot be sustained and the appeal ought to be allowed.

21. The conviction of the appellants under Sections 302 and 201 IPC is set aside and the appeal is allowed. The appellants are in jail and they are ordered to be set at liberty forthwith if not required in any other case.

Judgment Referred.

[1] (2002) 8 SCC 45
[2](1977) 2 SCC 99
[3]AIR 1956 SC 316
[4](1983) 2 SCC 330
[5](1985) Suppl. SCC 79
[6](1987) 1 SCC 1
[7]1989 Suppl. (1) SCC 560
[8](1996) 10 SCC 193
[9](2006) 10 SCC 681
[10](2012) 11 SCC 205
[11](2012) 4 SCC 124
[12](2011) 13 SCC 621
[13](2006) 12 SCC 254
[14](2015) 5 Scale 319