

SUPREME COURT OF INDIA

State of Karnataka

Vs.

Chand Basha

CrI.A.No.1547 of 2011

(Pinaki Chandra Ghose and R.K.Agrawal,JJ.,)

18.09.2015

JUDGMENT

Pinaki Chandra Ghose,J.,

1. This appeal, by special leave, has been directed against the judgment and order dated 1st March, 2007 passed by the High Court of Karnataka at Bangalore in Criminal Appeal No. 1047/2003, whereby the High Court allowed the criminal appeal filed by the respondent herein and acquitted him.

2. The brief facts necessary to dispose of this appeal are that one Ganesh, a daily-wage mason, went missing on 16.01.2001. On 20.01.2001, PW1 D. Ramu, Dhobi by profession, saw a dead body floating in a well near the Dhobi Ghat with hands tied at the back and the ankles were also tied. The police recovered the dead body, shifted it to Bowring Hospital Mortuary and thereafter published the photograph of the dead body in the newspaper. From this photograph, PW3 father of the deceased, reached the Bowring Hospital and identified the body as that of his son Ganesh. PW1 lodged a complaint with K.G. Halli Police Station and investigation started, and from the apprehension of PW3, accused Chand Basha was arrested on 23.01.2001. The investigation revealed that on 17.01.2001, PW12 (Appu) told PW3 that his son had gone to a wet party with the accused on 16.01.2001. The said wet party took place at Sindhur Bar at Lingarajapuram. PW5 (the bar-boy) and PW6 (owner of the bar) testified that on 16.01.2001, the accused along with one other person visited their bar. Building further, the investigation came across with PW8 (shopkeeper) who testified that the accused along with one other person bought 2 cigarettes from his shop on 16.01.2001 at 10 p.m., and the accused thereafter was arrested on 23.01.2001, but the deceased was never seen alive again.

3. Police filed the charge sheet against accused Chand Basha, after which charges for offence punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") were framed by the Trial Court and the charges were read over and explained to the accused but he pleaded not guilty and claimed trial.

4. The Trial Court by its judgment and order dated 14.02.2003, convicted the respondent Chand Basha for the offence punishable under Section 302 IPC and sentenced him to rigorous imprisonment for life and a fine of Rs.15,000/- , and in default of payment of fine, further rigorous imprisonment for six months was awarded. Being aggrieved by the aforesaid judgment and order of the Trial Court, the respondent-accused filed an appeal before the High Court of Karnataka at Bangalore, being Criminal Appeal No.1047 of 2003. The High Court by the impugned judgment and order allowed the criminal appeal on the ground that the prosecution might have proved the motive but had miserably failed to prove the incriminating last seen circumstance and had also failed to successfully prove the discovery evidence. The High Court held that the death may be a homicidal, but there is no evidence to connect the accused with the crime. In view of the aforesaid discrepancies, the High Court set aside the order of conviction passed by the Trial Court and acquitted the respondent.

The Appellant - State has challenged before us the judgment of acquittal passed by the High Court. Learned counsel for the appellant has inter alia raised the following grounds as incriminating circumstances in this appeal. Firstly, the motive behind the murder of the deceased was consistently and cogently proved by the testimony of PW3 father of the deceased, and PW4 sister of the deceased. Agreeing to this submission, the High Court also held that motive can be successfully attributed upon the accused that he wanted to marry PW4 (sister of the deceased) which was vehemently disapproved by the deceased and PW3 (father). Secondly, the death was argued to be homicidal and there is already a concurrent finding of the courts below that the death was homicidal. Thirdly, the present case rests on the last seen theory, and by the consistent testimonies of PW5 (bar- boy), PW6 (owner of the bar), PW8 (shopkeeper) and PW12 (Appu), it was proved that on 16.01.2001 the deceased was last seen in the company of the accused. Lastly, the learned counsel for State rests her case on the recovery of the material objects at the voluntary instance of the accused. This recovery has itself been testified by independent witnesses.

5. Learned senior counsel appearing for the respondent rebutted the arguments advanced by the appellant State by putting his weight on the decision arrived at by the High Court. Learned senior counsel appearing for the respondent did not rebut the arguments put forward to prove the motive and also that the death was homicidal. However, it was argued that the 'last seen together' theory was not proved beyond reasonable doubt. The discovery of material objects was argued on the line of the High Court decision to be an artificial theory. Learned senior counsel went ahead arguing that the extra-judicial confession made by the accused to PW4, who narrated it to PW3, was not trustworthy. Attention was also drawn to the cross-examination of PW12 who contradicted his examination-in-chief that it was Raju Mistry and not the accused who hosted the wet party.

6. The Trial Court convicted the respondent on the basis of the prosecution story of 'last seen together' corroborated with 'recovery of material objects' and the 'motive of the accused'. The High Court also dealt with the issue and held that the Trial Court failed to appreciate the discrepancies occurring in the evidences. The High Court has examined at length the record of the case and reversed the finding of the Trial Court.

7. In the present appeal, we are concerned with the last two contentions as to whether the 'last seen together' theory has been proved beyond reasonable doubt and also whether the recovery is a naturally occurring fact or an artificially planted one?

8. The High Court pointed out discrepancies in the statements of PW5 and PW6. Both the witnesses stated that they did not personally know the deceased and neither of them were friends to him nor they ever took his personal details. It was only during the investigation on 24.01.2001, that the two came to know that the deceased's name was Ganesh. The High Court considered the fact of recovery of material objects, but disbelieved the recovery of Saree and shoe lace as 'artificial' as they could not adduce confidence of having occurred naturally in the chain of events.

9. We have heard the learned counsel appearing for the appellant as also the learned senior counsel appearing for the respondent and have perused the records. The prosecution story relies upon the 'last seen together' theory as its pivotal evidence which is hereunder examined. The prosecution examined PW5, PW 6 and PW8 to prove the 'last seen theory'. PW5 the bar boy claims to be the person who served the accused and one more person with 3 quarters of RR Brandi and 1 Knock-Out beer on 16.01.2001. PW6 is the owner of the bar who testified in his statement that the accused came along with one other person. These witnesses were first questioned by the Investigation Officer on 24.01.2001 and both deposed before the Court that their bar is usually crowded and they neither make personal interaction to each and every customer nor do they take details of each of their customers. PW 5 and PW6 also deposed that the two persons were also served 2 fried chicken. According to these witnesses, the two customers were served at about 8:30 PM. PW8 (shopkeeper) is another prosecution witness who testified that at about 10.00 PM on 16.01.2001, the accused along with one other person came to his shop and bought two cigarettes of Rs.2/- each. This witness has also deposed that he does not personally know the accused or the other accompanying person. On careful examination of their depositions and cross-examination and also in light of the other medical evidence, some doubt is raised upon the chain of events. PW5 and PW6 stated that they were not personally acquainted to the accused. However, during investigation when the Investigating Officer, accompanied by the accused, asked them, they were able to identify him as their customer who came on 16.01.2001 along with one other person. At this point of time, the Investigating Officer disclosed the name of that other person as Ganesh and stated that he was dead. Thereafter, PW6 did not depose about any photograph being shown to him. However, PW5 was shown a photograph of the deceased and thereby he stated that he was the same person who was present with the accused on 16.01.2001. The role of the Investigating Officer is therefore doubted, as within a very short span of time, why PW6 was not shown the photograph and only PW5 was shown the photograph of the deceased. PW5 also did not disclose the details of the photograph, but it can be presumed that he was shown the photograph of the dead body. From a perusal of medical evidence it appears that the dead body was stout, the complexion had changed and bite marks of aquatic animals were present especially on the face, since it was recovered from the well. From a perusal of post- mortem report, it transpires that the stomach contained partially digested vegetables and rice. However, PW5 and PW6 deposed that the accused and the deceased at last ordered 2 chicken fry. During investigation, PW8 was not shown the

photograph of the deceased, moreover, in the examination no question was asked about the identity of the other person who was together with the accused. This goes on to create a serious doubt on the 'last seen together' theory.

10. The prosecution pressed hard on the fact that the accused as well as the deceased were together on 16.01.2001 and the deceased was never seen again. The dead body was recovered on 20.01.2001 i.e. after 3 days and 4 nights. PW1 Dhobi deposed that he goes to the well daily to wash clothes and no question was asked as to the presence of a dead body in the well before 20.01.2001. Thus, the possibility of the deceased being thrown into the well later than 16.01.2001 cannot be ruled out completely, particularly when the post-mortem revealed that the victim last ate vegetables and rice. Even if depositions of PW5 and PW6 are relied upon, there exists a missing link between the visit to the bar and the deceased being thrown into the well i.e. the deceased having another meal.

11. The High Court rightly rejected the two recoveries made as it seems artificial that the accused intending to kill the deceased will not prepare well. Having two shoe laces at his disposal, why will he cut a shoe lace into two to tie the hands of the deceased. Similarly, the piece of Saree which was recovered near the well is doubted as an accused intentionally committing a crime will not bother to cut a piece of cloth into two before tying. These evidences were sent to FSL on 25.2.2001 i.e. after 1 month of the alleged recovery. The recovery of these material objects seems more of an unnatural occurrence. The High Court also rightly ruled out extra-judicial confession as deposed by PW4. PW4 in her cross-examination deposed that she narrated the said extra-judicial confession of the accused to her father PW3. PW3 also came to know that his son (deceased) had gone with the accused to a wet party. There arises doubt upon the conduct of PW3 who knew that his son was missing since 16.01.2001 and he also heard of extra-judicial confession of the accused, yet he did not report to the police.

12. This Court in *Bodhraj v. State of J & K*¹, held that:

“31. The last seen theory comes into play where the gap between the point of time when the accused and the 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.” Reiterating the above ratio, this Court recently in *Krishnan @ Ramasamy and Others v. State of Tamil Nadu*², held that:

“23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.” It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and deceased were last seen together. The prosecution story relies upon the 'last seen

together' theory, which resulted into the death of Ganesh. This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established. Yet, the prosecution has failed to prove the evidence which establishes the 'last seen together' theory beyond reasonable doubt to prove the guilt of the accused. The prosecution merely proved the motive which could have compelled the accused, and that the accused went to the bar with one other person, but the identity of that other person is not clearly established at all. The post-mortem report fails to specify any approximate time of death and in light of the recovery of the dead body on 20.01.2001, after 4 days, which is not a small gap since the deceased disappeared on 16.01.2001, it is not appropriate to convict the accused when his role is not firmly established.

11. Thus, in the light of the above discussion, we are of the view that the present appeal is devoid of merits, and we find no grounds to interfere with the judgment passed by the High Court. The appeal is, accordingly, dismissed.

Judgment Referred.

¹(2002) 8 SCC 0045

²(2014) 12 SCC 0279