

HIGH COURT OF MADHYA PRADESH AT
JABAIPUR

DIVISION BENCH: HON. SHRI JUSTICE S.K.
SETH AND SHRI JUSTICE H.P.SINGH

Cr. Appeal No.742/2017

Nagendra.

...APPELLANT

V/s.

State of M.P. Through Police Station

...RESPONDENT

Rampur Nakin Sidhi

Cr. Reference No.02/2017

JUDGMENT

(Delivered on 04th May, 2017)

PER SETH, J-

1. The death reference and connected appeal No. 742/2017 arise out of the Judgment of conviction and order of capital sentence handed down by the First Additional Sessions Judge, Sidhi holding the appellant guilty of the charges levelled against him in the trial.

2. As per prosecution case, in the night intervening 13th September and 14th September 2013, appellant along with

Nitesh @ Bholu (a juvenile separately dealt with by the Juvenile Board) committed house trespass and sexually assaulted Sushma, a young married woman (since deceased), and then turn by turn ravished her and when she resisted she was done to death by hitting her forehead with bamboo staff. Thereafter, not satisfied with rape, dead body was subjected to offence punishable under Section 377 of IPC by appellant Nagendra and the dead body was dragged to nearby pit or trench in order to conceal the crime and some jewellery articles of insignificant values were stolen.

3. At the time of the incident, deceased was all alone in her abode in small hamlet '*Bhitri*' situated within Police Station Rampur Naikin in District Sidhi. Shrinivas (PW4), her husband, a truck driver by profession, received information on 14th around 11 AM on mobile from neighbour's wife Sunita (PW6) and she informed Shrinivas (PW4) that something was amiss as deceased was found missing and blood was splattered all over the place with broken pieces of bangles lying on the courtyard (*Angan*) and things were not in order. Shrinivas (PW4) immediately contacted his brother Vinod Kumar (PW3) and asked him to go and find out as to what had happened. By the time Vinod Kumar (PW3)

reached the place of the incident, two-three villagers were already reached there and upon discovery of dead body Marg Intimation (ExP-2) was given by him, which lead to registration of FIR (Ex.P/17). After the inquest the dead body was sent for the post mortem.

4. Autopsy was performed by Dr. Sandeep Bhagat (PW5) and the post mortem examination report is Ex.P/6. In the opinion of Dr. Bhagat, deceased met with a homicidal death within 24 hours of post mortem on account of head injury and injuries on her private parts.

5. During investigation the Police arrested the accused on suspicion of being involved in the horrendous crime. The basis for the prosecution case rests on the following pillars viz. (1) the accused had motive because of the previous quarrel with the deceased; (2) he failed to account for his absence on the date of incident; (3) extra judicial confession; (4) false plea of alibi and (5) recovery of bamboo staff and jewellery.

6. After completing the investigation, Challan was filed against appellant Nagendra and he was put to trial for offenses punishable under

Sections 302, 376, 377, 460, 201, 457 and 380 of the IPC. Appellant abjured his guilt and asked for the trial.

7. Deceased died a homicidal death is not in dispute. Even otherwise, this fact is duly established by the evidence of Dr. Sandeep Bhaghat (PW-5) which is not challenged in this appeal. Therefore, this aspect of the matter need not detain us any longer.

8. In order to bring home the charges, prosecution examined 25 witnesses. Appellant examined one witness in his defense to prove that in the night intervening 13th and 14th September, he was with Ram Sunder Gupta (D.W.1).

9. The trial Court in the light of prosecution evidence found the appellant guilty on each count and sentenced him to various terms of imprisonment, but so far as offense punishable under Section 302 IPC, the trial Court awarded capital punishment. Hence this reference for confirmation of death sentence and appeal by Nagendra.

10. There is no direct evidence to connect the appellant with the crime alleged to have been committed by him.

The entire prosecution case rests on circumstantial evidence. It is well settled that when dealing with the serious question of guilt of persons charged with a crime, there must be clear and unequivocal proof of the **corpus delicti** and the hypothesis of delinquency should be consistent with all the facts proved. It is also well settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests - (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a complete chain so there is no escape from the conclusion that the crime was committed by the accused and none else. In **Brijlal Prasad Sinha V/s. State of Bihar: (1998) 4 SCALE 25 (S.C.)**, Patnaik, J. speaking for the Bench, held as under :-

“In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence;

and lastly the circumstances should to a great certainty exclude the possibility of guilt of any person other than the accused. The law relating to circumstantial evidence no longer remains res integra and it has been held by catena of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused, so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the court records conviction on the basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused."

11. It is equally well settled that where the entire prosecution case hinges on circumstantial evidence, the Court should adopt cautious approach for basing the conviction on circumstantial evidence and unless the prosecution evidence points irresistibly to the guilt of the accused, it would not be sound and safe to base the conviction of an accused person. Keeping this settled position in mind, we have examined the prosecution evidence adduced in the case

in hand. It is also noteworthy to remember that in a case involving capital punishment, while deciding the death reference we have done fresh assessment of evidence so as to reach our conclusions as laid down in **Deepak Rai vs. State of Bihar (2013) 10 SCC 421.**

Motive and Absence

12. We take the first two points, first for consideration. If these grounds are established it would be reasonable to expect some explanation from the accused to deflect the suspicion against him; and in the event of his failure to give some explanation or any explanation, adverse inference could be drawn against him.

13. It is now well settled that where there is direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. The evidence as to motive should be of the strictest kind. If, in case, motive as a circumstance is put forward, it must be fully established like any other incriminating circumstance-See **Ramgopal vs. State of Maharashtra AIR 1972 SC 656.** Failure to establish motive for the crime does not throw over board the entire prosecution case. It only casts a duty on the court

to scrutinise the other evidence with greater care. Absence of motive is of great importance in circumstantial evidence and should be regarded as circumstance in favour of the accused. It is also settled that motive alone is not sufficient to convict the accused in case of circumstantial evidence. Let us now examine the prosecution evidence regarding motive in the case in hand.

14. In order to prove motive, prosecution examined three witnesses and they are Shrinivas Shukla (PW4), husband of the deceased and Priyanka (PW16) daughter of the deceased. Critical examination of evidence of witnesses shows that about six months prior to date of incident there had been a small tiff on trivial matter relating to borrowing milk late in the night. Both witnesses in their evidence admit that there was no previous acrimony because of that incident. Shrinivas Shukla (PW4) goes on to say that their relations with the appellant were cordial and appellant used to touch the feet of deceased every day. In view of this positive evidence of husband, the element of motive pales into insignificance and cannot be used to hold that the appellant had sufficient and enough motive to make a small of the deceased. It may also be pertinent to point at this stage that

Priyanka (PW16) further stated that she suspected accused because he was not in the village on the day of occurrence. In this connection we would like to mention that absconding (though not proved in this case) by itself would not lead to the proof of commission of offence and the said fact simpliciter and the accused being scarce just immediately after the incident is no evidence by itself. Absconding **per se** is of no value and the act of absconding even if proved, is a very weak link in the chain of circumstances set up for establishing the guilt.

15. Sunita(PW8) the neighbour of the deceased suspect Gagraal Sahu as culprit because of prious ill-will. But then stops there and therefore, her evidence so far as appellant is concerned is of no consequence for the prosecution.

16. Thus on the critical analysis of prosecution evidence, we find that prosecution miserably failed to establish motive on the part of appellant to commit the crime alleged against him. Similarly there is no proof that he by making himself scare it bring home the charges levelled against him.

Extra Judicial Confession

17. Section 24 of the Evidence Act deals with admissibility of confession by accused persons in criminal cases. Confession is a species of which admission is a genus. A confession is an **acknowledgment in express words** by the accused in a criminal case, **of the truth of the guilty fact charged or of some essential part of it**. Court should be careful to avoid confusion relative to the exact meaning of the word confession and admission. A statement or declaration of an independent fact from which guilt may be inferred is not confession. It is an admission of a particular fact pertinent to the issue and evidence of that fact but it is not 'confession'. The distinction drawn between admission and confession in criminal law is a substantial one. Confession involves voluntary acknowledgment of guilt. To make an admission or a declaration, a confession, it must amount to a clear acknowledgment of guilt. The word confession used in the Evidence Act cannot be construed as including a mere inculpatory admission, which falls short of being an admission of guilt e.g. when a person admits that he was in the company of dacoits but never says that he committed dacoity, the statement is not confession. Now let us examine the evidence of Ravi Pathak (PW22) before

whom appellant is said to have made extra judicial confession. There is nothing in his evidence except that he asked appellant to make a clear brest of thing, he said he committed mistake. What mistake no further elucidation. No declaration of this fact to any one during investigation and he made the statement for first time in trial court. No corroboration by any other relevant and cogent evidence and in such state of affairs, it would imprudent to base his conviction and sentence him to the capital punishment would be judicial hara-kiri. In such circumstance, we have no option but to jettison the so called extra judicial confession. We have no hesitation to say the extra judicial confession in the case in hand is a weak type of evidence.

False plea of alibi and recovery of bamboo staff and jewellery

18. In his defece appellant examined Ram Sunder Gupta (D.W.1) in support of plea of alibi. Trial Court rightly discarded this piece of defence evidence. Careful reading of his evidence does not inspire confidence. But the question before us is, can we base his conviction on a false plea of alibi. It is now well settled that merely because accused took a false plea

of alibi would not show positively that he is responsible for the offence. Even if an alibi is not proved, the Court shall not record a judgment of conviction unless the prosecution is found to have established its case beyond reasonable doubt. See **Ritesh Chakarvati v. State of M.P. (2006) 12 SCC 321.**

19. So far as recovery of jewellery is concerned, there is no proof that it belonged to deceased. Jewellery recovered was not subjected to any identification test. So far as bamboo staff is concerned, it is very common among villagers to keep bamboo lathi. FSL report is also negative. This portion of evidence is so insignificant that it would be unsafe to sustain the conviction and sentence.

20. From the above discussion, it would be clear that the prosecution has failed to bring home circumstances against the appellant which, as already mentioned above, lead to the inevitable conclusion of guilt of the appellant. It is unfortunate a serious crime goes unpunished but the appellant can not be made a scape-goat for the lop sided investigation by the Police. The up-shot of whole discussion is that we hold that prosecution failed to prove any of the

charges levelled against the appellant and the trial court was wrong in convicting and sentencing him as stated above. As a result, we allow the appeal preferred by the appellant and set aside the judgment of the trial Court. Appellant is in jail, he be set at liberty forthwith, if not required in any other cause.

21. Ordered accordingly.

Let a copy of this judgment be kept in the record of Cr. Reference No. 02/2017.

(S.K.Seth)
J U D G E

(H.P.Singh)
J U D G E

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