2023 INSC 679

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal Nos. 1076-1077 of 2015

Krishan Kumar & Anr. .... Appellant(s)

Versus

The State of Haryana ....Respondent

JUDGMENT

C.T. RAVIKUMAR, J.

1. The appellants who stand convicted under Section 300 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') for the murder of one Devinder @ Kala, S/o Sukhbir Singh and sentenced to undergo life imprisonment therefor, under Section 302, IPC and also stand convicted under Section 201, IPC read with Section 34, IPC and sentenced to undergo rigorous imprisonment for two years with default fine, filed the captioned appeals. They were convicted and sentenced

as above in Sessions Case No.121/99/2000 and Sessions Trial No.17/2000 and their conviction and sentences were confirmed as per the impugned judgment and order dated 30.07.2014 passed by the High Court of Punjab and Haryana in C.R.A. No. D-671-DB of 2002 and C.R.A. No. D-685-DB of 2002.

2. The prosecution case which culminated in their conviction as above is as follows: -

Devinder @ Kala, a 10+2 student who went to irrigate his land, was found missing from 25.06.1999. On 26.06.1999 his brother Krishan Kumar (PW-9) lodged a missing report and subsequently on 28.06.1999 he filed a complaint wherein he named eight persons viz., Ranbir, Balwan, Ram Kanwar, Satpal, Rambir, Samunder, Narinder and Piare, who allegedly abducted his brother. On 28.06.1999, body of a young man was found floating under Western Yamuna Canal Bridge near Samaypur Badli. The dead body was decomposed and on seeing

tattoo of Lord Hanuman on the right hand it was identified as that of Devinder by his brothers Govind and Krishan Kumar. FIR No.220/99 was registered initially under Section 364, IPC read with Section 34, IPC in P.S. Rai Sonepat. Name of the appellants were not mentioned therein. Later, pursuant to the recording of statements from PW-10 Mukesh and PW-8 Azad, offences under Sections 302 and 201 read with Section 34, IPC were added and the appellants herein were arraigned as accused.

3. In view of the peculiar context of the case it is proper and profitable to go through the charges framed and read over to the appellants, on 15.11.1999. They read thus: -

> *"Firstly:* *That on 25.06.1999 in the area of village Nahri, you both accused in furtherance of your common intention kidnapped Devinder s/o Sukhbir in order that he be murdered and thus you both hereby*

committed an offence punishable under Section 364 read with Section 34, IPC and within the cognizance of this Court.

Secondly: *That on the said date at night in the area of village Nahri you both in furtherance of your common intention did commit murder by intentionally causing the death of Devinder s/o Sukhbir and thereby you both committed an offence punishable under Section 302 read with Section 34 IPC and within the cognizance of this Court.*

Thirdly: *That on the said dates, time and place you both in furtherance of your common intention knowing or having reasons to believe that certain offence to wit, offence of murder is punishable with death or imprisonment for life has been committed, did cause certain evidence of the said offence to disappear, to wit, thrown the dead body in the Delhi wali canal with intention of screening yourselves from legal punishment and thereby you both committed an offence*

punishable under Section 201/34 IPC and within the cognizance of this Court."

4. Consequently, they were tried on the above charges. The necessity and relevance of referring to charges would be discussed later. On appreciating the documentary as well as the oral evidence consisting of testimonies of seventeen witnesses on the side of the prosecution, the trial Court convicted the appellants herein based on circumstantial evidence. In the appeals preferred by the convicts, their conviction and sentences were confirmed. The revision, being C.R.R. No.2242/2002, filed by the complainant Krishan Kumar S/o Sukhbir Singh, heard along with their appeals, seeking enhancement of their sentence of imprisonment for life to capital punishment was also dismissed. Aggrieved by the dismissal of their appeals Krishan Kumar and Joginder Singh, the convicts have filed the captioned appeals.

5. Heard learned counsel for the appellants and learned Additional Advocate General of the State of Haryana.

6. A scanning of the impugned judgment and order would reveal that the conviction of the appellants based on circumstantial evidence, consisting of evidence of last seen, extra judicial confession, recovery of weapon of offence and motive, was confirmed by the High Court. But, before dealing with the aforesaid circumstances to consider whether they unerringly point to the guilt of the appellants in exclusion of any hypothesis as to the guilt of another person, we will firstly consider whether the death of Devinder is homicide and if so, whether it is culpable homicide amounting to murder.

7. As a matter of fact, there is no challenge against the identification of the body and also against the concurrent finding that the death of Devinder @ Kala is homicide and it is culpable homicide amounting to murder. The

evidence of PW-4 Dr. K. Goel, together with postmortem report (Ext. PD) was appreciated by the courts below to come to the said conclusion. The opinion of the doctor is to the effect that the cause of death is asphyxia due to the result of pressure over the neck structures, subcutaneous bruising, muscular bruising and subluxation of hyoid bones. They were ante-mortem in nature caused by pressure over neck during the process of strangulation by other party. PW-4 further opined that pressure over neck structure was sufficient to cause death in the ordinary course of time. This is not at all under challenge. Therefore, the concurrent finding that the death of Devinder @ Kala is homicide and that it is case of culpable homicide amounting to murder, arrived upon analysis of the aforesaid evidence, is unimpeachable.

8. When once it is found that the death involved in the case is culpable homicide amounting murder, the next

question would be who is/are the culprit(s)? It is to establish that the appellants are the culprits and for that the prosecution had relied on the circumstantial evidence referred to hereinbefore. As noticed hereinbefore the appellants were found guilty based on the circumstantial evidence and the first link in the chain of circumstantial evidence is the 'last seen' evidence. 'Last seen' as a link in the chain of circumstantial evidence, would suggest existence of oral testimony of at least one witness to establish that the deceased was last seen in the company of the accused. In this context it is relevant to refer to the following decisions: -

9. In the decision in ***State of UP v. Satish***[1], this Court held thus:

> *"The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and then the deceased is found dead is so small that*

[1] (2005) 3 SCC 114

possibility of any person other than the accused being a part of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long time gap and the possibility of other person coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

(Emphasis added)

10. This position was reiterated by this Court in ***Hatti Singh v. State of Haryana***[2]. A survey on the authorities on this issue, would reveal that this position is being followed with alacrity. Bearing in mind the said position regarding the applicability of the 'last seen' theory we will have to examine the evidence of last seen available in the case on hand.

[2] (2007) 12 SCC 471

11. As noticed hereinbefore, 17 witnesses were examined in this case on the side of the prosecution and the indisputable fact is that none among them had deposed to have seen the accused and the deceased together and alive at any particular point of time on the fateful day much less, to have seen them together and alive at any time proximate to the occurrence. We do not think that a detailed discussion or analysis on this issue is essential to hold that 'last seen' theory was totally inapplicable in the case on hand in view of the following clear finding of the trial Court, which was not interfered with by the High Court. In paragraph 10 of the judgment, the trial Court held thus: -

> *"Admittedly the deceased was not last seen in the company of the accused ...."*

12. When the categoric finding of the courts below, on appreciation of the oral testimonies of the prosecution witnesses is that none of the witnesses had spoken of

having lastly seen the deceased in the company of the accused alive and together, there cannot be any reason to hold that 'last seen evidence' is available in the instant case as a link in the chain of circumstantial evidence against the appellants.

13. It is to be noted that despite coming into such a clear finding as above, on appreciation of evidence evidently, the trial court presumed the presence of the deceased with the appellants-accused at the fodder room near Katvawala passage just prior to his death, relying on certain other circumstances. In paragraph 13 of the judgment the trial Court held thus:-

> *"No doubt Mukesh, Sarwan, Azad were present at the time of cremation of the dead body of Devinder but they did not disclose about the last seen of the accused with the deceased. In fact, Azad, Daya Nand, Mukesh and Sahab Singh have not seen the accused in the company of the deceased on the ill-fated day. But material discussed above are*

sufficient to show the presence of the deceased with the accused just prior to his murder.”

(Emphasis added)

14. Conspicuously, this circumstance of ‘last seen’ drawn on interference and not on positive evidence by the trial Court, but based on other circumstances, was not analysed and appreciated by the High Court. To wit, without marshalling and appreciating the evidence to consider whether the circumstance of ‘last seen’ is available as a link in the chain of circumstantial evidence, evidently, the High Court based on the oral testimonies of PW-10 Mukesh, PW-8 Azad and PW-7 Daya Nand accepted the prosecution story that the deceased Devinder and Poonam met at the fodder room near Katvawala passage at about 08.30 pm on 25.06.1999, they were found in a compromising position by the appellant-convicts and thereafter, the appellant-convicts snatched the *chunni* from Poonam and

strangulated Devinder and caused his death, they put the dead body in a gunny bag and placed it in the Ambassador car parked near fodder room and on being taken the corpse near to Delhi canal it was thrown into the said canal.

15. It is in the aforesaid context that the specific charges framed against the appellants, as extracted above, would assume relevance. Evidently, the very first charge framed against the appellants, as extracted hereinbefore, was under Section 364 read with Section 34, IPC. The phrase 'common intention' used in Section 34, IPC implies a pre-arranged plan and acting in concert to the plan. In the decision in ***Badruddin v. State of UP***[3] this Court held thus:-

> *"Though establishing common intention is a difficult task for the prosecution, yet, however difficult it may be, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a*

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[3] (1998) 7 SCC 300

plan or meeting of mind of all the assailants to commit the offence, be it pre-arranged or on the spur of the moment but it must necessarily be before the commission of the crime."

A bare perusal of Section 364, IPC would reveal that to establish an offence under this Section it must be proved that the person charged with the offence had the intention at the time of kidnapping or abduction to murder or to dispose of as to be put in danger of being murdered. (See the decision in ***Gopal & Ors. v. State of Tamil Nadu***)[4].

16. We have referred to the first charge framed against the appellants under Section 364 read with Section 34, IPC only to indicate that the case of the prosecution, going by the first charge, was that the appellants in furtherance of their common intention kidnapped Devinder to commit his murder. In the contextual situation it is apposite to refer to the decision of a

[4] (1986) 2 SCC 93

Division Bench of High Court of Delhi in ***State v. Sushil Sharma***[5]. It was held therein thus:-

> *"It is well settled that in criminal cases there is no room for conjectures and surmises. The prosecution is supposed to establish its case as it put forth by it and if the case is disbelieved on any aspect by the Court then the Court cannot make out a new case on its own for the prosecution."*

17. We agree with the aforesaid proposition. As a matter of fact, in the appeal which arose from the judgment in ***Sushil Sharma's*** case (supra) this Court only commuted the capital sentence to life sentence. We are not oblivious of the fact in the instant case though the prosecution did not establish its case as is put forth it cannot be said that the Court on its own made out a new case for the prosecution. In the instant case the trial Court, in its judgment held thus: -

> *"However, the offence under Section 364/34 is not made out against the accused as the prosecution*

[5] 2007 (94) DRJ 777 (DB)

has not led any evidence qua this offence. *Hence, the accused are acquitted for the offence under Section 364/34, IPC."*

(Emphasis added)

18. It is a fact discernible from the judgment of the trial Court as also that of the High Court whereunder the trial Court's judgment was confirmed that no consideration was spared about this aspect. It is evident from the aforementioned recital from the trial Court's judgment in this case though a specific charge was framed under Section 364 read with Section 34, IPC the prosecution had not chosen to adduce evidence and virtually abandoned such a case. Relying on the evidence of PWs 7 to 10 a totally different case was developed and attempted to be proved by relying on evidence of last seen, recovery of weapon viz., *chunni*, motive and extra judicial confession. As a result, a case carrying accusation of a pre-arranged plan based on common

intention to kidnap/abduct for committing murder was turned into a case of commission of murder based on motive occurred at the spur of the moment upon the alleged sight of the appellants' sister with deceased Devinder in a compromising position. In short, the prosecution had not cared to establish the charge framed against the appellants under Section 364/34, IPC and despite that it went on to put forth another case, as above.

19. Despite the aforesaid very infirmity, the courts have not taken due care and caution to analyse and appreciate the evidence of the prosecution. The *raison d'etre* for our remark would come to the fore on a bare perusal of the appreciation of evidence undertaken in the instant case. We have already found that even after finding that none had seen the deceased lastly in the company of the accused the trial Court held that the materials discussed viz., the evidence of PW-7, PW-8 and

PW-10 would be sufficient to show the presence of the deceased with the accused just prior to his murder.

20. Before appreciating the oral testimonies of PW-10, PW-8 and PW-7 and the manner of their appreciation by the courts below we think it apposite to consider the question whether the 'last seen theory', in its application, could brook presumption as to the presence of the deceased along with the accused just prior to the occurrence, as drawn by the trial Court, in the absence of positive ocular evidence of prosecution witnesses of having seen the deceased in the company of the accused together and alive at a time proximate to the occurrence.

21. We have absolutely no hesitation to answer it in the negative as otherwise the application of the theory of 'last seen' in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together would be hazardous, as held in ***Satish'*** case (supra). Its indirect application is also

impermissible. In this context, the decision of this Court in ***Hatti Singh's*** case (supra) also has relevance. In that case it was held that unless the time gap between the deceased having been seen lastly in the company of the accused persons and the murder, is proximate it would be difficult to prove the guilt of the accused only on that basis. Furthermore, it was held that the last seen theory would come into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased was found dead is so small that a possibility of any person other than the accused being the author of the crime would become impossible. Above all, it was held that even in such a case Court should look for some corroboration. The same view was reiterated by this Court in the decision in ***Chattar Singh & Anr. v. State of Haryana***[6].

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[6] AIR 2009 SC 378/ (2008) 14 SCC 667

22. We will now refer to the other circumstances relied on by the Courts, virtually, to presume the presence of the deceased and accused at the same point of time in the fodder room near Katvawala passage in the evening of 25.06.1999. We may hasten to add that the High Court had not discussed the correctness or otherwise of the said presumption drawn by the trial Court and even without such an exercise, relied on the other circumstances to confirm the conviction. Firstly, the trial Court relied on the oral testimony of PW-10. PW-10 Mukesh deposed that he was a friend of deceased Devinder and that on 25.06.1999 at about 2.00 pm when he along with Devinder and one Sarwan were indulged in gossiping at the house *(ghar)* of Sukhbir Singh (father of Devinder), Devinder divulged his love affair with Poonam and also about her promise to meet him in the evening on that day at the fodder room near Katvawala passage. He also deposed that at about 08.30 pm when

he was returning home from field in his tractor, he saw both the appellants viz., Joginder Singh and Krishan Kumar going towards the fodder room. We may hasten to note here that a scanning of the deposition of PW-10 would, however, reveal that after confronting him with Ext.DD (his previous statement) contradictions/ omissions that militate against the core of the prosecution case were brought out. As relates the place towards which the appellants were seen going at about 08.30 pm on 25.06.1999 he stated during chief-examination that while returning from the field by about 08.30 pm he saw the appellants going towards the fodder room near to Katvawala passage. However, while being confronted with Ext.DD during his cross-examination it was brought out that the location of his seeing the appellants at about 08.30 pm on 25.06.1999 as 'fodder room near to Katvawala passage' was not stated to the police. This cannot be taken as a mere omission as it

militates against the core of the prosecution case that deceased Devinder told PW-10 that he was in love with Poonam and that she had promised to meet him in the evening of 25.06.1999 at a fodder room near Katvawala passage and later, upon such eventuality the appellants caused the murder of Devinder by strangulation at the fodder room near Katvawala passage.

23. Bearing in mind the afore-mentioned crucial aspects, now, the evidence of PW-10 has to be analysed so as to consider whether it constitutes positive evidence for applying 'last seen' theory and if not, what is the other positive evidence to justify taking of 'last seen evidence' as a link in the chain of circumstances in this case. This question has to be addressed in the light of Section 60 of the Evidence Act, 1872 which postulates that oral evidence must be direct in all cases. However, it is inadmissible only when it proposes to establish the truth of the statement but not the factum of the statement by

other persons. There is a fine distinction between proving the factum of a statement by other persons and proving the truth of such statement. This position was explained by this Court in the decision in ***J.D. Jain v. The Manager of SBI***[7]. In para 10 of the judgment, it was held thus: -

> *"The Privy Council in the case of Subramaniam v. Public Prosecutor, (1956) 1 WLR 965 observed, "Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made."*

[7] (1982) 1 SCC 143

24. It can be seen that PW-10 had only spoken about the factum of deceased Devinder's divulgation that he is in love with Poonam and also about her promise to meet him in the evening of 25.06.1999 at the fodder room near Katvawala passage. That apart, the fact is that though he had deposed that he had seen the appellants herein at about 08.30 pm he did not depose, even vaguely, that he had seen either deceased Devinder and Poonam together at any time proximate to the occurrence. We have already taken note of his material omission. Thus, in the light of the aforesaid position, applying Section 60 of the Evidence Act, even if it is taken that evidence of PW 10 is admissible to the extent that deceased Devinder revealed about his love with Poonam and her promise to meet Devinder in the evening of 25.06.1999 to PW-10 the evidence of PW-10 could not be taken as admissible as relates the truth of the said statement. To wit to prove that Poonam and Devinder were in love and

that in the evening of 25.06.1999 they actually met at the fodder room in Katvawala passage.

25. In this context, it is also relevant to note that PW-10 with whom Devinder claims to have shared his personal secrets, as above deposed that he did not participate in the funeral of Devinder. He would also depose that he is not related to Devinder. That apart, his evidence is to the fact that prior to 03.07.1999 he did not divulge about the aforesaid facts to anyone. It is also relevant to note at this juncture that it is not his specific case that he went to the police station or to the investigating officer or to any other police officer and on his own made a statement. In such circumstances the question is how the fact that he was having knowledge / information on such matters came to the knowledge of police. Thus, viewing from all angle, it can be seen that the evidence of PW-10 is not free from suspicion and at any rate, it cannot be taken as a positive evidence sufficient to justify the application of

the theory of ‘last seen’ or to presume the presence of Devinder in the company of the appellants in the evening of 25.06.1999, describing it as ‘last seen’ evidence.

26. PW-8 Azad is the father of PW-10 Mukesh. He would depose before the court that on 25.06.1999 at about 08.30 pm while he was returning from his field, he saw the appellants taking out a gunny bag from their *Kotha* and putting it in an Ambassador and taking it towards Katlapur village. According to him though he had seen such an incident, he did not reveal the said facts to anyone till he made the statement to the police. He admitted the fact that Mukesh (PW-10) is his son and that PW-7 Dayanand is his brother. It is also worthy to note that he did not deny the suggestion that his grandfather Jug Lal and the grandfather of Sukhbir Singh, the father of the deceased, were real brothers and what he had deposed was that they might have been real brothers.

27. While testing the trustworthiness of the version of PW-8, certain aspects have to be taken into account. His version before the Court is that he had seen an old model white Ambassador car parked near the plot of Zile Singh and Balwan Singh at about 08.30 pm on 25.06.1999 and further that he had seen, at that time, the appellants taking out a gunny bag from their *Kotha* and putting it in the said Ambassador car and took it towards Katlapur village. On being confronted with Ext.PB the statement that the car was taken by the accused towards Katlapur village was not recorded by the police, was brought out. PW-10, his son, deposed that at about 08.30 pm when he was returning from the field, he had seen the appellants, going through a short route. Thus, their versions are not tallying with each other. If they were actually returning from their field though not along with the other, and reached near the place in question almost at the same time viz., about 08.30 pm on 25.06.1999 this kind of

discrepancies could not have been there in their versions. We have also seen the improvements both of them had made to their previous statements, brought by confronting with them. Taking into account the discrepancies in their version it is relevant to refer to the oral evidence of PW-9 Krishan Kumar, the brother of the deceased Devinder. Going by the FIR his case is that it was about 08.30 pm in the evening of 25.06.1999 that his brother Devinder left the house. Before making further scrutiny of the versions of PW-8, PW-9 and PW-10 it is very relevant to refer to the evidence of PW-4 Dr. K. Goel who conducted autopsy on the body of Devinder and prepared Ext.PD.

Postmortem Certificate.

28. The Ext.PD would reveal that he conducted the postmortem on the body of Devinder on 29.06.1999 at 02.30 pm. He opined that the time lapsed between death and the time of post mortem is about 3 ½ days. Thus,

going by his opinion as to the time of death it would have been in and around 02.30 am on 26.06.1999. It is true that considering the fact that the body was floating and remaining in water it may not be possible to pinpoint the exact time of death.

29. There is yet another aspect which assumes relevance in this context. The evidence on record would reveal that inquest was conducted on 28.06.1999 at 10.30 am. Column 17 in the inquest report is with respect to the condition of the body. As relates the question "is the body stout thin or decomposed" the answer was given thereunder viz., "Healthy and strong, fleshy." True that as per the report of the postmortem conducted on the next day the body was seen decomposed. At any rate, all the aforementioned circumstances would be sufficient to cast suspicion on the oral testimonies of PW-8 and PW-10. What makes their version susceptive to further suspicion is their evasive answers during cross-

examination to conceal their relationship with the deceased Devinder. PW-10 would depose in that regard that it would be incorrect to suggest that deceased was his cousin and further that it would be incorrect to suggest that his great grandfather and great grandfather of deceased Devinder was Jug Lal. PW-8 who is his father would admit that his grandfather was Jud Lal and would state that Sukhbir who is the father of the deceased is the grandson of Shri Ram and Jug Lal and Shri Ram might have been real brothers, but he did not know. But PW-9 Krishan Kumar who is the brother of deceased Devinder would depose during his cross examination thus:-

"Total family members including the witnesses cited in this case were present at the time of cremation i.e. Azad and Mukesh were also present".

Further, the oral testimony of PW-10 would reveal he categorically deposed that he did not join the cremation of Devinder. The contradictions brought out

from PW-8 and PW-10 by confronting with their previous statements, not inspire confidence."

30. In the contextual situation, one may really feel that the prosecution had withheld their best evidence, for reasons best known to them. Obviously, in respect of the questions whether Poonam is the sister of the appellants; whether she was in love with the deceased Devinder; if so, whether she promised Devinder to meet at the fodder room near Katvawala passage in the evening of 25.06.1999; whether they had actually met at the said place near about that time; whether the appellants reached there and snatched her *chunni* and whether they strangulated the deceased using her *chunni*, the best witness ought to have been Poonam herself. But the fact is that she was not examined by the prosecution. Nothing is discernible from the records as to her questioning during investigation. What is more disturbing in this context is the observation of the trial Court that Poonam

had not been examined by the accused to distort the motive of the occurrence.

31. When the prosecution comes out with a motive and the motive is either not proved or held to be insufficient, the evidence of witnesses of the said fact has to be scrutinized with great care and caution. It is so held by this Court in ***State of U.P. v. Babu Ram***[8]. There cannot be any doubt with respect to the position that in India the burden to prove the prosecution case in criminal matters involving offences in respect of which the appellants were made to stand the trial, is on the prosecution. If the prosecution got no good reason for not producing the best evidence, in the sense, the best witness who could help the prosecution to establish their case, then adverse inference could have been taken only against the prosecution and certainly that cannot be a reason to hold that the defence could have distorted/ disproved the

[8] AIR 2000 SC 1735

motive that was projected by the prosecution by examining that witness. In the decision in ***Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.***[9] this Court held thus:

> *"It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference"*

32. There can be no doubt that the obligation/onus of the defence would arise only when the prosecution discharged its burden in such matters. By not examining Poonam the prosecution had actually withheld the best

[9] (2006) 3 SCC 374

evidence. Perhaps, by examining her this case would have turned to a case of direct evidence, if the prosecution story is to be believed as in respect of many of the questions, she could have thrown light.

33. Now, before dealing with the oral testimonies of the other witnesses we think it apt and appropriate to deal with the aforesaid link in the chain of circumstances viz., 'motive', a little more. It is true that in a case of circumstantial evidence motive does have significance, but that is no reason to say that in the absence of motive, conviction, based on circumstantial evidence, cannot be made. (See the decision of this Court in ***Jagdish v. State of Madhya Pradesh***[10]). 'Motive' is something which makes a man to do any particular act and it must, in all probability, exist behind every voluntary act. Initially, PW-9 suggested an incident that occurred on 29.05.1999 as motive. According to him on that day his father

[10] (2009) 9 SCC 495

Sukhbir Singh and brother deceased Devinder were assaulted by eight persons and somehow, Devinder had managed to escape. But the appellants were not named as assailants in connection with that incident. We are at a loss to understand how that could be a motive. The appellants are also not named among the suspected abductors/kidnappers. The motive thereafter projected by the prosecution against the appellants-convicts is that they found their sister, Poonam, in a compromising position with deceased Devinder in the evening of 25.06.1999 in the fodder room near Katvawala passage. Though, as noted earlier, this was the motive as per the prosecution projected through PW 7, a scanning of the entire oral evidence of all witnesses would reveal that none of them had actually spoken to the effect that he had seen the deceased and sister of the appellants Poonam either inside the fodder room near Katvawala passage at the relevant point of time or even at any time proximate

to the occurrence near the aforesaid place. As a matter of fact, none had spoken to the effect of even seeing Poonam and Devinder together, on the day of occurrence, much less in a compromising position. The said motive has been ascribed on the appellants, virtually, based on the extra judicial confession allegedly made by them before PW-7 Daya Nand. Of course, as per the prosecution motive was also revealed as part of the extra judicial confession. We will deal with the admissibility or otherwise of the extra judicial confession a little later. It is the prosecution case that it is the sight of their sister, Poonam, in a compromising situation with the deceased Devinder at the aforesaid place that prompted them to commit the aforesaid offence. However, no evidence was adduced on the side of the prosecution to establish that Poonam is actually the sister of the appellants or at least one of them. The materials on record would reveal that Poonam is the

daughter of one Balwan Singh, and the first appellant Krishan Kumar is the son of one Om Prakash and the second appellant Joginder Singh is the son of one Zile Singh. This fact, which is evident from the evidence on record, would undoubtedly reveal that they are not sibship and then, the question is what is the proximity of the blood between them. Virtually, no evidence was adduced by the prosecution in that regard and in fact, on that aspect also prosecution relies only on the extra judicial confession made by the appellants before PW-7.

34. As noted hereinbefore the next link in the chain of circumstances relied on by the prosecution is the extra judicial confession allegedly made by the appellants to PW-7. True that the extra judicial confession cannot always be taken as a weak piece of evidence and the question whether it is worthy to be taken as admissible and to form basis for conviction in a criminal trial would

depend upon veracity of the witness to whom the confession was allegedly made.

35. In the decision in ***Chattar Singh and Anr. v. State of Haryana***[11] this Court held that after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility the extra judicial confession could be accepted and it could be the basis of a conviction if it passes the touchstone of credibility.

36. In the decision in ***Balwinder Singh v. State of Punjab***[12], this Court held thus: -

> *"An extrajudicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance."*

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[11] AIR 2009 SC 378; (2008) 14 SCC 667

[12] 1995 Supp (4) SCC 259

37. In ***Ajay Singh v. State of Maharashtra***[13], this Court held thus:-

> *"8. We shall first deal with the question regarding claim of extra-judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra-judicial confession, court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra-judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will*

[13] (2007) 12 SCC 341

depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by the accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra-judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may be many who are possessed of normal memory and do so. It is for the court to judge credibility of the witness' capacity and thereafter to decide whether his or her evidence has to be accepted or not. If

court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous."

38. PW-7 Daya Nand is the witness to whom extra judicial confession was allegedly made by the appellants herein. True that both the Courts held it as admissible and accepted it as a strong link in the chain of circumstantial evidence. Going by the deposition of PW-7 Daya Nand, the appellants herein, (named by him as Joginder and Krishan), came to him while he was sitting in his *Baithak* and told him about the factum of commission of murder of Devinder s/o Sukhbir Singh, manner of murder and causing disappearance of evidence etc. He would depose during his chief examination thus:-

> *"On 09.07.1999, I was sitting in my Baithak, in the meantime, Joginder and Krishan accused came to*

me and told me that they have committed the murder of Davinder son of Sukhbir and have thrown his body in a canal. The accused also told me that on 25-6-99 they went to fodder room of Zile Singh, where they found Davinder And Poonam in a compromise position. They gave beating to Poonam and sent her away but they snatched her chunni and strangulated Davinder for his acts and put his body in a gunny bag. The accused also told me that have put the body in their Ambassador Car and thrown it is the Delhi Canal. They also requested me that the C.I.A. staff is in their search. So, they wanted my help that they should be produced before the C.I.A. staff by me. When I alongwith the accused now present in the Court coming to the Sonepat then the CIA staff person met me and I handed ovr the accused to them. The accused also confessed their guilt in my presence as well as before the Police. My statement was recorded by the police."

39. The guilt of the appellants herein was sought to be brought home mainly relying on the extra judicial confession. Hence, the question is whether the evidence

of PW-7, in that regard, would inspire confidence. While considering this relevant aspect certain factors revealed from the evidence on record require attention. Obviously, going by the case of the prosecution the murder had taken place in the evening, at about 08.30 pm on 25.06.1999. The dead body was recovered on 28.06.1999 from Delhi Canal and on 03.07.1999 statements of PW-8 Azad and Azad's son, PW-10 Mukesh were recorded by police. We have already referred to their version. PW-8 is the brother of PW-7 and PW-10 is the son of PW-8. PW-7 claims that on 09.07.1999 the appellants herein came to him and confessed as extracted hereinbefore. He was examined before the trial Court on 02.03.2001. His oral testimony would reveal that he is the *Tau* (uncle) of deceased Devinder and at the same time a scanning of his evidence would reveal his feeble attempt to show that he is equi-related to the deceased and the accused (appellants herein). It

would reveal that he could not rather, did not depose as to what exactly is his relation with the appellants herein. He deposed that he could not tell the name of grandfather of accused Joginder. Though he deposed precisely the date on which the appellants came to him and also the exact date of occurrence his cross-examination would reveal that he is oblivious of (or not telling truth on) most of the other incidents and matters related to the death of Devinder. This is revealed from the following recital from his cross-examination: -

> *"I have no knowledge that on 28-6-1999 Krishan and Govind told me that the dead body of Davinder has been found by them. I cannot tell the exact date of cremation of Davinder but he was cremated in my presence. I do not know whether my brother Azad, his son Mukesh and Sharvn son of Ram Kishan were present of not. I do not know whether the police was present at the time of the cremation or not. I also did not see the police on the next date of cremation. I have not seen the police prior to 9-7-1999. If the police had come to the village I have not seen.*

When the accused were produced before the police, then PW Govind only was present with me. None else was present there. There are large number of shops in village Nahri. All the shops were opened at the time but none came out of the shop."

40. In this context it is worthy to note that even after the recording of the statements of PW-8 and PW-10, as revealed from their depositions, there was no evidence as to how the appellants came to know that Devinder was in the fodder room (if at all they were there) and what was the motive etc. Taking into account all the aforementioned aspects revealed from the records, but were not at all considered by the trial Court and the High Court, we are of the considered view that evidence of PW-7 on extra judicial confession could not inspire confidence.

41. Now, we will consider the other link in the chain of circumstances relied on to convict the appellants. It is recovery of the weapon viz., the *chunni* used for

strangulation. The findings of the Courts are to the effect that it was not recovered from a public place. In this context, it is to be noted that the sole independent witness for the recovery is Sri. Gobind, who is the brother of the deceased was not examined by the prosecution. That apart, PW-6 who was the then Inspector, SHO, PS Meham and then posted as S.I. C.I.A staff, Sonipat deposed that he joined the investigation along with PW-14 Ram Kala. He deposed during his cross-examination regarding the recovery of *'chunni'* and purse thus: - "*It is correct that these types of chunni and purse are usually available in the market. There is a common passage near the place of recovery of chunni and purse, a number of persons uses that passage and is accessible to all.*" PW-14 also deposed in regard to the said recovery that it is correct that the place of recovery is an open place and is accessible to all. In the aforesaid circumstances non-examination of the independent

witness along with the deposition of PW-6 and PW-14 as above, would make the recovery of *chunni* and purse inconsequential.

42. Having carefully considered the rival contentions and perusing the evidence on record, which made us to make the observations, conclusions and findings as above, we have no hesitation to hold that the trial Court as also the High Court have appreciated the evidence in an utterly perverse manner viz., against the weight of evidence. In view of our findings on each of the links in the chain of circumstances no conviction can be entered against the appellants under Sections 201, 300 and 302, IPC read with Section 34, IPC. They are individually or even collectively not sufficient to connect the appellants with the crime. Consequently, the impugned judgment of High Court in C.R.A. No. D-671-DB of 2002 and C.R.A. No. D-685-DB of 2002 that confirmed the judgment of the trial Court in Sessions Case No.121/99/2000 and

Sessions Trial No.17/2000 by Additional Sessions Judge, Sonepat are set aside. The appellants are acquitted granting benefit of doubt. Since the appellants are already on bail, their bail bonds are discharged. The appeals are allowed as above.

……………………, J.
(C.T. Ravikumar)

……………………, J.
(Sanjay Kumar)

New Delhi;
August 08, 2023