

(2017) 07 AHC CK 0059
In the Allahabad High Court
Case No : 1687 of 1997

Bachchu @ Tinda @ Nabab Singh

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision : 28-07-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 302](#), [Section 201](#), [Section 376](#), [Section 313](#) - Permission to conduct prosecution - Procedure by Magistrate not competent to take cognizance of the case - No appeal in petty cases - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 302](#), [Section 201](#), [Section 376](#), [Section 300](#), [Section 375](#), [Section 299](#) - Punishment for murder - Causing disappearance of evidence of offence or giving false information to screen offender - Punishment for rape - Murder - Rape - Culpable homicide

Citation : (2017) 07 AHC CK 0059

Hon'ble Judges : Bharat Bhushan, Kaushal Jayendra Thaker

Bench : Division Bench

Advocate : S.C.Verma

Final Decision : Allowed

Judgement

1. By way of this appeal accused-appellant Bachchu@Tinda@Nabab Singh was tried in Sessions Trial No. 243 of 1996 for the alleged offence under Sections 376, 302 and 201 I.P.C. in First Information Report lodged with Police Station-Kotwali, District-Farrukhabad.

2. Trial Court convicted accused under Section 302 I.P.C. for life, under Section 376 I.P.C. for rigorous imprisonment for life and under Section 201 I.P.C. for rigorous imprisonment of 3 years alongwith fine and in default 2 years of rigorous imprisonment. The learned Judge passed the judgement on 1.8.1997 in Sessions Trial No. 243 of 1996. The accused was under trial prisoner.

3. The incident is of 1996, the appeal was preferred in 1997, we are in the year 2017. The accused is in jail since 1996 i.e. since the date of offence.

4. The brief facts leading to the filing of prosecution case against the accused are that an F.I.R. was lodged by informant P.W. 1 Suresh father of deceased-victim stating that on 12.1.1996 at 7:30 a.m. accused Bachchu @ Tinda @ Nabab Singh, S/o Ram Kishan came at the shop of informant and purchased peanuts and jaggery (Gurh). At that time his daughter aged about 7 years was playing near the shop. Accused induced the victim to go with him by giving her peanuts. The informant and his wife saw the victim going with accused, besides them Nanhi, w/o Pal Singh, P.W. 2 Ramvir, s/o Darbari Lal and Roop Kishore, s/o Bechelal also saw the victim is going with accused in guava grove near the village. When her daughter did not return till late night, he searched. Kalloo and Rajvir P.W. 3 and P.W. 4 resident of same village informed the informant that they saw the accused running from guava grove. In the morning at about 5:00 clock when informant reached guava grove, he found naked dead body of victim under the guava tree. Her clothes were put besides her. It was found that rape was committed. The injury showed that she was strangled and done to death after she was ravished by the accused in the mid of the night in the orchard grove.

5. The investigation started on lodgement of F.I.R. The Investigating Officer S.I. Kali Ram, P.W. 7 prepared site plan and also visited the place of incident. The investigation concluded into a charge-sheet being laid against accused before the competent court. The accused was committed to the Court of Session as he was tried for offences which were triable by Court of Sessions. On being summoned from jail. On 6.7.1996 charge was framed against the accused for committing offence under Section 376 read with 302 read with 201 of Cr.P.C. He pleaded not guilty and wanted to be tried.

6. Postmortem of the corpse was conducted by P.W. 4 Dr. P.N. Singh on 23.1.1996 at 2:50 p.m. The Doctor found the following injuries on the body of the deceased :-

(i) Contusion 2 c.m. x 1.5 c.m. Over forehead just above right eyebrow.

(ii) Abrasion 1.5 c.m. x 1 c.m. on right side of face.

(iii) Contusion on 7 c.m. x 2 c.m. on front neck in middle part.

(iv) Lacerated wound 4.5 c.m. x 3 c.m. x muscle deep on vul vagina had contused wound.

Cause of death according to the Doctor was asphyxia on account of strangulation.

7. So as to bring home the charge levelled, the prosecution examined as many as seven witnesses in support of the charge framed :-

1. Deposition of Suresh 20.9.1996 P.W. 1

2. Deposition of Ramvir 4.11.1996 P.W. 2
3. Deposition of Rajvir 4.11.1996 P.W. 3
4. Deposition of Kalloo 20.11.1996 P.W. 4
5. Deposition of Hawaldar Singh 13.11.1997 P.W. 5
6. Deposition of R.N. Singh 5.3.1997 P.W. 6
7. Deposition of Kali Ram 3.4.1997 P.W. 7
8. The prosecution even produced documentary evidence to bring home the charges against the accused, which are as under :-
 1. F.I.R.
23.1.1996 Ext. Ka. 2
 2. Recovery memo of blood stained & plain earth 23.1.1996 Ext. Ka. 9
 3. Postmortem Report 23.1.1996 Ext. Ka. 4
 4. Charge-sheet 6.7.1996
 5. Site Plan 23.1.1996 Ext. Ka. 10
9. On evidence of prosecution being led and completed, the learned Trial Judge examined the accused under Section 313 Cr.P.C. the accused examined D.W. 1 Munnu @ Hansraj as his witness.
10. It is submitted by learned counsel for appealnt that P.W. 1 the complainant, who has stated that Kamla was also present when the accused induced the minor child to go with him has not been examined. There are lot of variations in the testimony of P.W. 1 Nani and Roop Kishore was said to have seen the accused taking the minor child with him have not been examined. P.W. 1 was told by P.W. 2 about the incident P.W. 3 Rajvir. It is submitted that chance witness Bachhu is seen coming out from grove he did not catch hold of Bachhu nor did he make any inquiries. Despite the fact that he says that he saw accused running he never saw Babita going with Bachhu.
11. It is submitted that the dead body was recovered in the morning at 6:00 a.m. from the orchard. P.W. 4 does not throw much light on the incident. The medical evidence of Doctor P.W. 6 shows that the death was at about dawn and nobody has seen the accused after 11:00 p.m. in the Orchard. It is submitted that if it was a case of rape, the medical examination of accused should have been performed there are no such injuries on the body of the deceased or accused, which itself shows that the finding of facts of the trial court are based on surmises, conjectures and hypothesis. It is submitted that this is case of circumstantial evidence and in absence of chain being completed, the accused could not have been convicted.

12. In support of his aforesaid contention, the learned counsel for appellant has placed heavy reliance on the following judgements :-

(i) Sharad Vs. State of Maharashtra, AIR 1984 SC 1622;

(ii) Raj Kumar Singh Vs. State of Rajasthan, 2013 (82) ACC 431; and

(iii) Padala Veera Reddy Vs. State of Andhra Pradesh, 1990(27) ACC 32

13. On the basis of these decisions it is submitted that this is case where the matter hinges on circumstantial evidence. The fulcrum of the prosecution rotates around the only one fact the accused was last seen with the deceased. No other incriminating circumstance necessary for convicting the accused approved. It is submitted that the principles enunciated in the aforesaid decision and the latest decision in H.D. Sikand Vs. CBI and Another (2017) 2 SCC 166 and has submitted when there are missing links in the chain the appellant be acquitted by giving benefit of doubt.

14. As against this learned counsel for State has submitted that this is a case of fulfilling the lust by the accused. He took the child with him in the mango orchard and committed gruesome murder. The finding of facts and postmortem report conclusively proved the offence of the accused, which has been rightly appreciated by the learned Trial Judge and has convicted the accused as there were internal injuries on the internal parts of the minor child and the death is by strangulation at night and has relied on the decision in Madan Gopal Kakkad Vs. Naval Dubey and Another, (1992) 3SCC 204.

15. In Mohd. Mannan Vs. State of Bihar (2011) 5SCC 317, Apex Court held that :-

"To bring home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case."

16. In Wakkar & Another Vs. State of U.P. (2011) 3 SCC 306, Apex Court held that :-

"Reiterated, for basing a conviction on the basis of circumstantial evidence is that

each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. It is also well settled as held by this Court in more than one decision that the Courts have to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometime, unconsciously it may happen to be a short step between moral certainty and legal proof."

17. In *Birendra Poddar Vs. State of Bihar* (2011) 6 SCC, Apex Court held that:-

"Reiterated, for appreciating circumstantial evidences, the court has to be cautious and find out whether the chain of circumstances led by the prosecution is complete and the chain must be so complete and conclusive as to unmistakably point to the guilt of the accused. It is well settled that if any hypothesis or possibility arises from the evidences which is incompatible with the guilt of the accused, in such case, the conviction of the accused which is based solely on circumstantial evidences is difficult to be sustained."

18. Now the next question, which arises for the consideration of this Court is, as to whether the prosecution successfully proves that it was the accused-appellant, who perpetrated the crime. Before we proceed further to examine the aforesaid aspect, it would be relevant to note that in this case, there is no eye-witness of the alleged incident, and therefore the entire case of the prosecution hinges on the circumstantial evidence. In other words, this Court has to examine, as to whether the chain of circumstances pointed out by the prosecution lead only to the guilt of the accused-appellant.

19. After hearing the learned counsel for the parties and after going through the records of this matter, including the evidence, as analyzed by the Trial Court, it appears that the case in hand is totally dependent upon the circumstantial evidence. We have examined the evidence laid in course of the arguments and have specifically considered the tests which have to be met by the prosecution to get success in the matter as laid down in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, (1984) 4 SCC 116, wherein the tests have been specifically given and it appears to us after analyzing the facts and evidence in this case, that the prosecution has failed to pass such tests to bring home the guilt of the accused. Accordingly, in our opinion, the Trial Court has erred in law. In our opinion, the arguments which have been put forward in the matter by learned counsel for appellant, are much more acceptable in the facts and circumstances of this case. The findings recorded by the Trial Court are perverse, erroneous and cannot stand the scrutiny of law and do not command for affirmation. Thus, we do not have any hesitation to hold that the lower Court has erroneously come to the conclusions with the reasons given therefor.

20. Before accused can be convicted of murder after rape, it is necessary to prove that the death of the deceased was caused by the act of the accused alone

and no one else. There is no direct evidence in this case that the accused had fulfilled his desire on the 8 years old child and then murdered her. The medical evidence shows that she died due to strangulation and therefore in light of the principles enunciated in *Sharad Birdhichand Sarda* (Supra). Paragraph 153 of above judgement will have to be looked into.

21. This is a case based on circumstantial evidence. It is an admitted position of fact that no witness has been examined, who can said to be an eye-witness of rape or murder. The positive version against the accused is P.W. 1 and P.W. 2, who have stated that the accused came to their place and induced victim Babita to go with him. One more witness namely Rajvir P.W. 3 has stated that he had seen victim with the accused-appellant when he went for easing himself in the orchard at 11:00 p.m. on the fateful night. He saw the accused-appellant fleeing from orchard. Rajvir was the person, who last saw the accused with the deceased-victim at about 11:00 in the night.

22. In the present case on basis of complaint at the most what can be inferred is that the conduct of the accused was suspicious, so as to substantiate suspicious is missing, the reason being one that if the accused was last seen with the deceased at about 7:00 p.m. it is nobody's case that he was seen even in the morning or immediately after incident took place. As according to Doctor the death took place at about 2:30 at night. It is a principle of criminal jurisprudence that suspicion however strong cannot take place of legal proof.

23. In this case, the case of prosecution suffers from number of serious infirmities from the beginning till the end, which goes to the root of the matter. The only fact, which is brought on record is corroborated testimony of witnesses regarding last seen together of accused with the deceased, but there is no material on record to show that the deceased and the accused-appellant were infact together till the end and the till the offence was committed.

24. In this case the prosecution has not examined any single witness to show that the deceased and accused were spotted at the place in the grove not only that prosecution has not examined a single witness, who can testify that he/she had seen the accused after 12:00 a.m. night. There are certain missing links except last seen together.

25. The learned trial Judge came to the conclusion that as per the testimony of P.W. 1, 2, 3 and 4, they saw the victim Babita with the accused. He has gone on possibilities and it is submitted by learned counsel for the appellant that this case being a case of circumstantial evidence, the trial Judge has committed a gross error in basing the conviction on the basis of last seen together and on the ground that the accused wanted satisfaction of his lust. It is a case of sexual perversity for many reasons. This is main ground on which the learned trial Judge has based his conviction relying on testimony of P.W. 1, P.W. 2 and D.W. 1.

26. In this case, the investigation itself is faulty. No fingerprints were found from the body of the deceased. There is nothing to show that the accused was the

person, who alone was the perpetrator of the crime, so as to implicate him and convict him. Injuries and strangulation have been found, but the probabilities go to show that the prosecution has not been able to prove that the circumstantial is proved to the hilt.

27. The principles enunciated by the Apex Court for case hinging on circumstantial evidence and the same culled out from the facts and what should be the approach of the Court, where accused has been convicted by the learned trial Judge for commission of the offence under section 302 coupled with sec. 201 and 376 IPC are absent as no proof that the accused tried to hide the incriminating material. It is nobody's case that provisions of Section 201 of I.P.C. that the accused did not cause any disappearance of evidence of the offence. The ingredients for proving that it was culpable homicide amounting to murder under Section 299 read with Section 300 I.P.C. are also not proved as the ingredients are absolutely absent rather not a single ingredient is proved by the prosecution. The third charge is commission of offence under Section 376 I.P.C. the ingredient of Section 375 I.P.C. have not been proved as not even prima facie medical exam of the accused was done. This is not only a case of faulty investigation but shoddy investigation. And therefore also in absence of proving the facts, we are unable to accept the submission of learned counsel for respondent that judgement relied in Madan Gopal Kakkad (Supra) will not aid the prosecution case as in this case whether there was penetration or not is not proved rather as held above ingredients of 375 is also absent and in this case it is not case of prosecution that there was any extra judicial confession and therefore the judgemnet of Madan Gopal Kakkad (Supra) will not applied rather the decisions mentioned bove will not permit us to sustain the judgment of trial court.

28. In this case, as per the factual matrix, which would go to show that the case of the prosecution rests on circumstantial evidence, the circumstance from which an inference of guilt is sought to be drawn, has to be cogently and firmly established. They must be of definite tendency which would point to the guilt of the accused and accused alone, the circumstances which would be taken cumulatively must and must form a chain unbroken and no escapism from the conclusion that the crime was committed by the accused and accused alone. This principle has been annunciated way back by the Apex Court in the case of Padala Veera Reddy v. State of M.P. Reported in JT 1989 (4) SC 223.

29. In this case there is no discovery with his one main breach in the chain of circumstances. No incriminating circumstance except last seen together is there against the accused. No medical evidence as far as alleged commission of rape is also proved. Motive plays an important role in a matter, which hinges circumstantial evidence, hence the accused could not be held guilty. The medical evidence does not support the prosecution story. The findings of fact of the learned Trial Judge are also not based on circumstantial evidence but on surmises and conjectures. We are unable to persuade us into subscribe to the decision of the Trial Court convicting the accused.

30. It is very clear that no pathology report is there. There are lot of variations in oral testimonies of the witnesses. The Muneem who is alleged to be staying in the Orchard field has not been examined. The death was around the dawn and no one has seen the accused with deceased after 11:00 p.m.

31. In the facts and circumstances of the case and the evidence led by the parties renders the origin and genesis of the occurrence doubtful. The accused-appellant is entitled the benefit of doubt.

32. In this case can it be said that the circumstances conclusively proved or it based on hypothesis only. The hypothesis when decided on the touchstone on the principles enunciated in a very early judgement of Apex Court in Sharad (Supra) has held that when there are two possibilities one of commission of crime and the other of emotions are reasonably possible the accused is entitled to benefit of doubt. In this case when the facts which are proved itself has caused doubt as narrated hereinabove punishing the accused would be substantial miscarriage of justice and therefore also the accused would be entitled to benefit of doubt. In this case the various links in the chain laid by the prosecution have to proved broken by appellant. The circumstances did not point to the guilt of accused with definiteness the proximity to the time of death and the accused being there also causes doubt. The principles enunciated way back in Hanumant Vs. State of Madhya Pradesh reported in AIR 1952 SC 343 will also help the accused and the principles enunciated therein are applied to the facts of this case. We may with emphasis even rely on the observations made by Apex Court in the case of Shankar Lal G Dixit Vs. State of Maharashtra reported in (1981) 2 SCC 35 similar view has been taken and we have applied the legal principles in the facts of this case without the recital of them in these judgments.

33. When there are no medical evidence connecting the accused, who have had sexual intercourse with the minor girl, his sperm nor his medical examination was performed, this one main missing link. As far as the death is concerned, there are no evidence which connect him with the death. The chain is not complete and the chain last seen together having raped then murder, none of these factors conclusively proved the guilt and the circumstances also are final can it be, because of faulty investigation, the answer is manifold and the judgement of the Trial Court does not speak any of the aforesaid circumstances. The punchsheel of the proof based on circumstantial evidence is absurd. Mode of proof is also lacking just because the learned Judge felt that appellant wanted to complete his lust as his wife had left him. Can such circumstances render the commission of rape of 8 years girl and then murdered, the cardinal principle of criminal jurisprudence says no.

34. On the basis of aforesaid discussion in our considered opinion and also applying the rule of caution, conviction of the accused-appellant cannot be sustained and is liable to be set-aside and in the circumstances of the case, the accused-appellant deserves to be acquitted.

35. Accordingly, appeal is allowed. The impugned judgement and order dated 1.8.1997 passed by Sessions Judge, Farrukhabad in Sessions Trial No. 243 of 1996 is hereby set aside and the appellant is acquitted of the charges levelled against him and his conviction and sentence is hereby quashed and set aside. The appellant is in jail, he shall be released forthwith. The judgement and order of this Court be transmitted to the Trial Court within 15 days for its expeditious implementation. The concerned court shall report compliance within one month thereafter.