
(2006) 07 RAJ CK 0042
In the Rajasthan High Court
Case No : Criminal Appeal No. 303 of 2002

Irshad @ Risal

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 03-07-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 89
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 109, 120B, 302

Citation : (2006) 4 RLW 3013 : (2006) 3 WLC 761

Hon'ble Judges : Shiv Kumar Sharma, J; Chatra Ram Jat, J

Bench : Division Bench

Advocate : Reashm Bhargava, for the Appellant; R.P. Kuldddep, Public Prosecutor, for the Respondent

Judgement

Shiv Kumar Sharma, J.—Irshad @ Risal, the appellant herein, has impugned the judgment dated January 30, 2002 of the learned Additional Sessions Judge Kishangarh (Ajmer), whereby the appellant was convicted and sentenced u/s 302 IPC to suffer imprisonment for life and fine of Rs. 2,000/-, in default to further rigorous imprisonment for one year.

2. It is the prosecution case that the appellant personated himself as Rajendra Singh and came to the house of Rupendra Singh (since deceased). Rupendra Singh believed that Rajendra Singh was the brother of his wife Rajesh Kanwar and took him on scooter to the house of his cousin brother Prahlad Singh. Appellant pretended to go to Jammu but on the pretext of stomach pain he remained in the house of Prahlad Singh and thereafter went to Bus-stand. In the Bus-stand around 4.15 AM the appellant forced Rupendra Singh to go to Marble factory in search of his wrist watch. Rupendra Singh and the appellant together left the bus stand on scooter and after about three hours dead body of Rupendra Singh was found lying near the small bridge of R.K. Road. Prahlad Singh lodged written report on May 17, 1999 at Police Station Madanganj where case u/s 302, 120B and 109 IPC was registered against Rajendra Singh and investigation

commenced. The appellant and Rajesh Kanwar wife of the deceased were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge Kishangarh, who discharged Rajesh Kanwar of all the charges. The appellant who was charged u/s 302 IPC, denied the charge and claimed trial. The prosecution in support of its case examined as many as 26 witnesses. In the explanation u/s 313 Cr.P.C., the appellant claimed innocence. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellant as indicated herein above.

3. Learned Counsel for the appellant vehemently assailed the findings of learned trial Judge and made following submissions:

(i) The trial Court failed to consider that identification proceedings do not contain stipulation to the effect that persons having similar hair style were mixed. The Magistrate who conducted identification proceedings was not examined and the identification proceedings could not be taken into consideration. The identification proceedings were conducted on June 17, 1999 whereas the appellant was arrested on June 5, 1999 and he was not kept Baparda (with covered face). Prior to identification the appellant was taken to the place of recovery of knife and the place of alleged incident. The memos Ex. P. 23 and Ex. P. 3 did not bear this note that the face of the appellant was covered.

(ii) The alleged recovery of knife was farce and it could not be established that blood on recovered knife was of the deceased.

(iii) The appellant was not named in the FIR. The FIR was registered against Rajendra Singh and no justifiable reason is available on record for his inclusion at later stage.

4. Per contra, learned Public Prosecutor supported the impugned findings and urged that the appellant was rightly convicted and sentenced.

5. We have pondered over the submissions and with the assistance of learned Counsel scanned the record.

6. Factual situation emerges from the material on record may be summarized thus:

(i) The appellant was arrested on June 5, 1999 and was searched in the office of Circle Inspector situated in court compound. Arrest memo and search memos Ex. P. 18 and Ex. P. 19 were drawn.

(ii) On June 9, 1999 the appellant was taken to the site from where dead body was recovered and later on to the place from where recovery of knife was effected. Memos Ex. P. 16 and Ex. P. 17 were drawn.

(iii) On June 10, 1999 the appellant was taken to Surajpura (Jaipur) to recovery his own shirt and letters. Memos Ex. P. 23 and Ex. P. 24 were drawn.

(iv) None of the aforequoted memos contain stipulation that the appellant was kept and taken to the various places Baparda (with covered face)

(v) Setha Ram (PW. 26) who conducted investigation is not certain whether the appellant was kept with covered face or not.

(vi) Identification parade was conducted on June 17, 1999 and the Magistrate who conducted identification parade was not examined.

(vii) The place from where knife got recovered at the instance of the appellant on June 9, 1999 vide recovery memo Ex. P. 16, had already been searched on May 17, 1999 vide memo Ex. P. 3 but at that time knife was not found there.

(viii) Ex. P. 12 is the seizure memo of Diary which contains writings of appellant about Rajesh Kanwar (wife of the deceased).

(ix) Parma Ram (PW, 19) another Investigating Officer deposed that diary Ex. P. 12 was not sent to the Hand Writing Expert to establish that it contains the hand writing of the appellant.

(x) The place from where knife got recovered at the instance of the appellant was an open place where every body had access. Recovery got effected after 22 days of the incident.

(xi) On the basis of information of appellant u/s 27 Evidence Act which was recorded in Memo Ex. P. 27 on June 10, 1999 shirt and letters got recovered vide recovery memo Ex. P. 23 from Badi Surajpura Jaipur. Site plan Ex. P. 24 of place of recovery was drawn. Two motbirs of Ex. P. 23 and Ex. P. 24 were not examined.

(xii) There is nothing on record to establish that Hut/Land at Surajpura was owned and possessed by the appellant and it was in his exclusive possession. This fact has been admitted by Parma Ram I.O. (PW. 19) that the Hut/Land was open and accessible to all.

(xiii) A look at the FIR (Ex. P. 1) reveals that it was the deceased Rupendra who introduced his brother in law Rajendra Singh to the informant Prahlad Singh (PW. 1).

7. There is no eye witness of the incident and the appellant has been convicted on the basis of circumstantial evidence. It is now well settled by a catena of decisions of the Hon"ble Supreme Court that for proving the guilt of commission of offence u/s 302 IPC, the prosecution must lead evidence to connect all links in the chain so as to clearly point the guilt of the accused alone and nobody else. The Apex Court in Ramreddy v. State of A.P. JT 2005(4) SC 16 indicated as under:

It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other

than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however, grave may be, cannot be substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence....

IDENTIFICATION OF APPELLANT:

8. It is significant to note that the person who introduced himself as the brother of Rajesh Kanwar (wife of deceased Rupendra Singh) came for the first time to the house of the deceased and only Rajesh Kanwar could testify that the said person was not her brother. But instead of making her witness, the 10 implicated her as co-accused. Since there was no evidence against her, she was discharged by the learned trial Court. The prosecution examined Prahlad Singh (PW. 1), Gend Kanwar (PW. 7), Kan Singh (PW. 8), Nand Singh (PW. 9), Moman Singh (PW. 10) and Hukam Singh (PW.12) to establish that it was appellant who personated himself as Rajendra Singh, the brother-in-law of the deceased. These witnesses identified the appellant before the Magistrate who conducted identification parade but the Magistrate was not examined.

9. It is no doubt true that identification test do not constitute substantive evidence and such tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines but when a person's identity with an ascertained person is in issue, it may be proved not only by direct testimony or opinion evidence, but presumptively by similarity. It is the duty of the prosecution to establish that suspect during identification parade was mixed with so many persons and all necessary precautions were taken. The memorandum of identification proceedings drawn by the Magistrate acting u/s 164 Cr.P.C. could be proved by Magistrate and the accused was entitled to cross examine the Magistrate.

10. The memorandum of identification proceeding held by a Magistrate acting u/s 164 Cr.P.C. is not admissible without proof. Full Bench of Allahabad High Court in Sheo Raj Vs. State, indicated as under:

A memorandum of identification proceeding contains not only statements of the witnesses to the effect that such and such persons were the offenders but also many other facts, such as that the suspects were put up for identification mixed with so many persons that all precautions were taken, that the witnesses had no opportunity of communicating with one another during the identification, that the suspects were free to occupy any position in the parade, whether a witness pointed out the suspects in the first round or subsequently the demeanour of witness etc. These facts are not statements and a memorandum of them is not a memorandum to which Section 89 could, on any interpretation, apply and cannot be presumed to be genuine. If they have not been proved by the witnesses, who were present at the identification proceedings, they must be proved by the Magistrate.

11. Evidently in the instant case the chart of identification parade is not proved by the Magistrate who held the identification parade and full particulars of identification parade are not given by him, therefore such report is not evidence of the identification and conviction of the appellant on the basis of such report is illegal.

12. It also appears from the report that the appellant was arrested on June 5, 1999 and arrest memo Ex. P. 18 was drawn. He was taken to the site from where the dead body was recovered on June 9, 1999 again to the place from where recovery of knife was affected. A look at the memos Ex. P. 16 and Ex. P. 17 drawn by the IO goes to show that they do not contain stipulation that the appellant was taken to the various places Baparda (with covered face). Setha Ram IO (PW. 26), who conducted investigation do not say that the appellant while taken to the site and place of recovery was kept Baparda. There is nothing on record to show that precautions were taken to ensure that the witnesses had no opportunity to see the appellant before the identification parade. In *Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs. State of Mysore*, the Hon"ble Supreme Court found that there was no evidence adduced by the prosecution to show that precautions were taken to ensure that the witnesses did not see the accused and/or the witness had no opportunity to see the accused before the identification parade. On this ground it was held that reliance could not be placed on such identification parade.

RECOVERY OF KNIFE:

13. The knife allegedly used in commission of offence was recovered on June 9, 1999 vide recovery memo Ex. P. 16 on the basis of disclosure statement of the appellant. It is established from the evidence of the IO that the place from where knife was recovered was an open place, accessible to all. The said place was already searched on May 17, 1999 and memo Ex. P.3 was drawn and the recovery was effected after 20 days of the incident.

14. Their Lordships of the Supreme Court in *Trimbak Vs. The State of Madhya Pradesh*, indicated that when the field from which the ornaments were recovered was an open one and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of the articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles.

15. Division Bench of this Court in *Sunder Singh v. State of Rajasthan* 1976 Cri.L.R. 322 held that:

The recovery of blood stained kulhari from the Chhappar of the house of the accused in pursuance of the information given by the accused while he was in custody. This circumstance alone is not sufficient, in our opinion, to fasten the guilt on the shoulders of the accused appellant especially when the recovery was

made after about 10 days and that too from a place which is accessible to all and sundry.

16. In Chandra Bhan v. State of Rajasthan 1979 Cri.L.R. 52 : 1978 RLW 405 it was held as under:

So far as the evidence of recovery is concerned, less said, about it, is better. The direct evidence in this case has failed. The accused were arrested long after the incident and the articles were recovered" somewhere near about the scene of occurrence in an open field. On such evidence, no court can base conviction against the accused.

17. Again the Division Bench of this Court in Mohan v. State of Rajasthan 1985 RCC 406 indicated that where a weapon from open place got recovered after more than a month of occurrence, no reliance can be placed on such recovery.

18. The recovery of knife in the instant case has been affected under suspicious circumstance. When the IO searched the place on May 17, 1999 and drew memo Ex. P. 3 no weapon of offence was found. Strangely on June 9, 1999 when second search was made knife was found. This only shows that entire recovery of knife at the instance of appellant is a myth. In a similar situation Hon"ble Supreme Court in Ramesh Babulal Doshi Vs. State of Gujarat, observed as under:

Coming now to the circumstances No. (vi), namely, recovery of blood stained clothes and other articles from the fiat of the appellant in the morning of 9.9.1980 some of which were found to contain Group A blood which was also the group of the blood of the deceased - we are constrained to say that the evidence adduced by the prosecution in this regard was contrived to sustain the charges levelled against the appellant. Admittedly the flat of the appellant was searched in the night between 4.9.1980 and 5.9.1980 by the police after breaking open its lock. At that time except a pair of trousers, nothing incriminating was found by the police, much less seized. It is also the admitted case of the prosecution that after the flat was searched it was locked again and the keys were kept with none other than the brother-in-law of the appellant the reasons for which we are unable to fathom. Be that as it may, it is also and admitted fact that since then the appellant had not access to his flat till. It was searched on 9.9.1980. If in spite of these tell-tale circumstances a lot of articles-containing Group A blood was found inside that flat on 9.9.1980 it only shows that the entire story of search and recovery of the articles is a myth.

RECOVERY OF SHIRT AND LETTERS:

19. We also find that on the basis of information supplied by the appellant u/s 27 of Evidence Act recorded in Memo Ex. P. 27 on June 10, 1999 shirt and letters got recovered vide recovery memo Ex. P. 23 from Badi Surajpura Jaipur. Site plan Ex. P. 24 of place of recovery was also drawn. The prosecution however failed to examine the motbirs of the memos Ex. P. 23 and Ex. P. 24. There is nothing on record to establish that Hut/Land at Surajpura from where recovery was effected

was owned and exclusively possessed by the appellant. According to Parma Ram I.O. (PW. 19) the Hut/Land was open and accessible to all. Thus recovery of shirt and letters also does not connect the appellant with crime.

20. Having closely scanned the material on record, we are of the view that the circumstances collected by the prosecution do not form a chain of events for drawing the Inference that the appellant was guilty and no other person could commit the offence. The circumstances only create suspicion against the appellant which cannot be a substitute for a proof. Learned trial court did not properly consider the discrepancies noticed by us and committed illegality in convicting and sentencing the appellant.

21. For these reasons, we allow the appeal and set aside the finding of conviction and sentence rendered by learned trial Judge vide impugned judgment dated January 30, 2002. We acquit the appellant of the charge u/s 302 IPC. The appellant Irshad @ Risal, who is in jail, shall be set at liberty forthwith, if not required to be detained in confinement, in any other case.