

(2012) 05 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 136 of 2007

Kamal Bahadur

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 31-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 2 ShimLC 1121

Hon'ble Judges : Sanjay Karol, J;R.B. Misra, J

Bench : Division Bench

Advocate : Ritta Goswami, for the Appellant; R.K. Sharma, Senior Additional Advocate General with Mr. J.S. Guleria, Assistant Advocate General, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Karol, J.—For an offence, which is alleged to have been committed on 5th May, 2005, accused was put to trial. In terms of judgment dated 17th November, 2006, passed by learned Additional Sessions Judge, Solan, in Sessions Trial No. 31-NL/7 of 2006, titled as State of H.P. v. Kamal Bahadur, accused stands convicted and sentenced for the charged offence. It is the case of prosecution that accused Kamal Bahadur was residing at village Bendi in the house of Smt. Bimla Devi (PW-2). Deceased Kashmiro Devi also resided alone in her house in village Jabbal Bendi. Smt. Dhansara, wife of the accused and his children had left the accused and started living at Jammu (J&K). Smt. Dhansara called up Shri Surjit Singh (PW-7), a local shop-keeper of village Bendi and left a message for the accused to call her on Telephone No. 0191262065, which information was passed on to the accused. In village Bendi, Shri Roop Ram (PW-3) and the accused were working as labourers with Shri Ram Piare (PW-17). On 5th May, 2005, these labourers unloaded Saria (iron rods) from the truck and both consumed liquor together. Accused also purchased toffees from the shop of Shri Surjit Singh (PW-7). In the late evening accused went to the house of deceased

Kashmiro Devi where Kumari Anjana (PW-16) was also present. There accused offered toffees to the deceased and PW-16. Accused told PW-16 to ask her elder sister Kumari Ashu (PW-15) to provide him with food. PW-15 and PW-16 were related to the deceased and living close-by. Later on, when deceased Kashmiro Devi was alone in her house, by giving blows with a stone (Ex. P-7) and Chimta (Tongs). Soon thereafter PW-15, who was going towards the house of the deceased, saw the accused fleeing away, carrying bundle in his hand. While fleeing he also pushed PW-15. The incident was immediately brought to the notice of neighbour Shri Rattan Lal (PW-14) by Kumari Anjana and Kumari Ashu. They also informed their father Shri Ram Piare about the same. Shri Rattan Lal telephonically informed the police officials at Police Station Ram Shahar, where Sub Inspector Shri Som Nath (PW-21), after entering Rapt (Ex. PW9/A), rushed to the spot and got recorded statement Shri Rattan Lal (PW-14) u/s 154 of the Code of Criminal Procedure (Ex. PW13/B), on the basis of which FIR No. 32/2005 dated 6th May, 2005 (Ex. PW-13/A), u/s 302 of the Indian Penal Code was lodged at Police Station Ram Shahar. Police carried out investigation on the spot. Shri Joginder Singh (PW-6) took photographs (Ex. PW-6/1 to Ex. PW6/16). Spot map (Ex. PW-21/A) was prepared. After preparation of inquest report (Ex. PW-4/B), blood stained stone (Ex. P-7) and Chimta (Ex. P-8) were recovered by the police alongwith the sample of the blood stained soil and broken pieces of bangles belonging to the deceased. Dead body was sent for postmortem, which was conducted by Dr. Brind Kapil (PW-4) alongwith Dr. Bhupesh Gupta, who issued postmortem report (Ex. PW-4/C), which revealed that deceased had died due to cardiogenic shock, resulting into death. Accused was nowhere to be found. He was absconding and left his tenanted place without any information. During investigation, police contacted Shri Prem Bahadur (PW-12) at Jammu, the place where family of the accused was staying. Further, investigation revealed that on 6th May, 2005, accused had visited house of PW-20 alongwith his children and wife, but however, he suddenly left from there on 8th May, 2005. Later on his family returned in the evening but he did not come back. On 8th May, 2005, police officials from Police Station Ram Shahar visited the house of Shri Prem Bahadur and informed him about the factum of murder and complicity of the accused in the alleged crime. Soon thereafter Shri Prem Bahadur received a telephonic call from the accused enquiring about the welfare of his family. On 22nd May, 2004 accused returned to the house of Shri Prem Bahadur, who in turn called President of the Gram Panchayat, in whose presence accused admitted his guilt. Accordingly, Shri Prem Bahadur informed the officials of Police Station Ram Shahar and custody of the accused was handed over to them. Accused was arrested and during interrogation he made disclosure statement Ex. PW-19/A. This was so done on 25th May, 2005, and accused further got recovered his blood stained pants, shirt and Chappal from the Dhaank (cliff), the place where he had thrown the same after committing the crime and fleeing away from the spot. PW-16 also identified the clothes to be that of the accused since she had seen him wear the same at the time of commission of crime. Report of the Chemical Examiner (Ex. PX-I to Ex. PX-III) revealed that the seized

articles, including the weapon of offence, contained human blood and the hair found on the weapon of offence matched with the sample of the hair taken from the body of the deceased. With the completion of the investigation, which revealed complicity of the accused to the alleged crime, challan was presented in Court for trial.

2. Accused was charged for having committed an offence punishable u/s 302 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

3. In order to prove its case, prosecution examined as many as 21 witnesses and statement of accused u/s 313 of the Code of Criminal Procedure was also recorded.

4. Court below convicted the accused, for having committed murder of deceased Kashmiro Devi, u/s 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life and also pay fine of Rs. 10,000/- and in default thereof to further undergo rigorous imprisonment for a period of two years. Hence, the present appeal.

5. Ms Ritta Goswami, learned Counsel appearing for the accused, has attacked the judgment on the following grounds:

1. There was no motive for the accused to have murdered the deceased.

2. Last seen theory is too weak a circumstance to convict the accused.

3. There are contradictions in the testimonies of relevant witnesses, i.e. PWs 14, 15 and 16. Statements of these witnesses are parrot-like and as such need to be disbelieved.

4. Where two views are possible, the one favouring the accused ought to be taken.

6. Per contra, Mr. R.K. Sharma, learned Senior Additional Advocate General, duly assisted by Mr. J.S. Guleria, learned Assistant Advocate General, has supported the judgment of the trial Court by inviting our attention to the extra-judicial confession made by the accused in the presence of Shri Prem Bahadur (PW-20), which inspires confidence as also the conduct of the accused. The contradictions, according to the learned Counsel, are minor in nature and do not go to the root of the matter, rendering the prosecution version to be false or defence of the accused to be probable.

7. We have heard Shri R.K. Sharma, learned Senior Additional Advocate General, assisted by Shri J.S. Guleria, Assistant Advocate General, on behalf of the State as also Ms Ritta Goswami, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence placed on record by the prosecution. Having minutely examined the record, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is well reasoned and is based on complete and proper appreciation of evidence (documentary and

ocular) placed on record. There is neither any illegality/infirmity nor any perversity in the same.

8. Before we deal with the testimony of the relevant prosecution witnesses/we may only note that it is the admitted case of the accused, as is evident from the admissions made by him while answering the questions posed to him u/s 313 of the Code of Criminal Procedure, his wife and children had left him; he was staying alone at village Bendi in the accommodation hired by him from Smt. Bimla Devi (PW-2); his wife had telephonically called Shri Surjit Singh (PW-7) and left a telephone number with a request to inform him to call her back; both he and Shri Roop Ram (PW-3) were working with Shri Ram Paire (PW-17) and had unloaded the Saria from the truck on 5th May, 2005; in the evening of 5th May, 2005 he had asked PW-16 to tell PW-15 to serve him food; on 6th May, 2005 he visited the house of Shri Ram Bahadur (PW-20) at Jammu alongwith his wife and children; and that later on he was arrested by the police. Significantly, accused admits his presence on the spot of crime in the evening of 5th May, 2005. This is evident from his following statement:

I do not know. The witness Ram Paire deposed against me as he had to return my money of wages. I worked in the construction work of his house but he did not pay my wages and when I asked for my payment he threatened me with dire consequences. On the evening of 5.5.2005 when I was not provided food by Kumari Ashu D/o Ram Paire I immediately left that village.

9. Apex Court in *State of Punjab Vs. Hari Singh and Others*, and *Brajendrasingh Vs. State of Madhya Pradesh*, has held that statement of accused u/s 313 of the Code of Criminal Procedure simpliciter normally cannot be a basis for conviction of the accused, but where such statement is in line with the case of prosecution, then certainly the heavy onus of proof on prosecution stands reduced to some extent.

10. Thus, compass of factual matrix stands narrowed down and testimonies of the prosecution witnesses need to be examined in the aforesaid factual background.

11. From the testimony of Dr. Brind Kapil (PW-4) as also post-mortem report (Ex. PW-4/C), duly proved by him, it is quite apparent that deceased sustained injuries on her head, which led to cardiogenic shock and death. Following injuries were found on her body, in addition to injuries on her nasal bone and hands:

1. Laceration of about 4 inches on the occipital region with fracture of the underlying bone alongwith brain exposed from there. 2 inches laterally to left ear obliquely placed.

2. Laceration vertically placed 2 inches with fracture of the underlying bone on the left temporal region.

3. Laceration 3 inches over the right temporal region. Fracture of underlying bone.

4. Laceration 4 inches on the occipital with fracture of underlying bone.

The doctor clearly opined that injuries on the nasal bone and the hands could be caused with the weapons of offence, i.e. stone (Ex. P-7) and Chimta (Ex. P-8). Significantly, it clearly stands denied by the doctor that aforesaid injuries could be sustained on account of fall.

12. Independently, we find that the admission made by the accused on any count stood established on record. The fact that Smt. Bimla Devi (PW-2) had let out her room to the accused in village Bendi, where he was residing alone, stands proved through her testimony.

13. That on the fateful day, accused and Shri Roop Ram had unloaded Saria of Shri Ram Piare stands established through the testimonies of both Shri Ram Piare and Shri Roop Ram. Also, significantly it stands established through the testimony of Shri Roop Ram that both he and accused had consumed liquor after finishing the said work. According to the prosecution, this was in the late hours of the evening.

14. That wife of the accused had called up Shri Surjit Singh (PW-7) on telephone and left a message for the accused also stands proved through his testimony. He has also, in his un rebutted testimony, deposed that accused had purchased toffees from his shop.

15. We need not, in detail, go into the evidence with regard to the recovery of weapon of offence (Ex. P-7); the clothes of the deceased and other incriminating circumstances, duly proved by the prosecution through the testimony of police officials as also independent witnesses Shri Man Singh (PW-1), Smt. Bimla Devi (PW-2), Shri Roop Ram (PW-3), Shri Baldev Thakur (PW-5), Shri Surjit Singh (PW-7), Shri Rattan Lal (PW-14), Kumari Ashu (PW-15), Kumari Anjana (PW-16), Shri Ram Piare (PW-17), Shri Rattan Chand (PW-19), and Shri Prem Bahadur (PW-20) as there is not much challenge to the same.

16. The fact that accused had actually left village Bendi in the night of 5th May, 2005 for Jammu and the fact that police officials visited there on 8th May, 2005 and met Shri Prem Bahadur (PW-20) in relation to the offence in question and that Shri Prem Bahadur had informed the police officials at Police Station Ram Shahar and got the accused recovered from Jammu on 22nd May, 2005 stand duly established through the un rebutted testimony of Shri Prem Bahadur (PW-20) and the Investigating Officer Shri Som Nath (PW-21). We do not find any contradictions in their statements in this regard. These witnesses have clearly deposed that accused had confessed, in their presence, of having committed the crime and hidden his clothes. We may not go into this particular fact as we otherwise find that prosecution case to the effect that accused had suddenly absconded from the spot and left the tenanted premises in village Bendi without disclosing the place of his destination stands established on record. His conduct, according to us, is one of the link in the chain of circumstances which undisputedly and unambiguously points a finger towards his guilt.

17. Prosecution has been able to show from the FSL report that blood found on the clothes of the accused as also deceased matched with the blood group (AB) of the accused. Prosecution has also been able to show that hair found on the weapon of offence matched with the sample of hair of the deceased.

18. Defence of the accused that no money was paid to the accused by Shri Ram Piare and as such he left the place stands falsified from the unrebutted testimony of Shri Ram Piare (PW-17), who in no uncertain terms has deposed that the money stood paid to the accused. This suggestion of non-payment of dues by Shri Ram Piare to the labourers employed by him has not been put to Shri Roop Ram, who undisputedly worked together with the accused. Hence, defence taken by the accused cannot be said to be probable at all. PW-17 has also corroborated the prosecution version to the effect that accused had abandoned his house and absconded from there for an unknown destination.

19. It is settled position of law that failure to cross examine a witness on some material part of his evidence may be treated as an acceptance of truth of that part of the evidence. If a witness is not cross examined on a particular material fact, the Court, unless there are inherent improbabilities affecting the credibility of the witness, would presume and accept the account given by witnesses to be true. If the accused fails to cross examine the witness on the material aspect for which he stands charged, consequence would follow that he believed that his testimony is not disputed. It is not a mere technical rule of evidence but a rule of essential justice. [Sarwan Singh Vs. State of Punjab, ; A.N. Venkatesh and Another Vs. State of Karnataka, Mishrilal and Others Vs. State of M.P. and Others, ; and Utpal Das and Another Vs. State of West Bengal,

20. Also the Constitution Bench of the Apex Court in Kartar Singh Vs. State of Punjab, has held that:

278....It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:

- (1) to destroy or weaken the evidentiary value of the witness of his adversary;
- (2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
- (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;

and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.

21. Subsequently in State of Uttar Pradesh Vs. Nahar Singh (Dead) and Others, the Apex Court reiterated that:

14. The oft quoted observation of Lord Herschell, L.C. in Browne v. Dunn, (1893)

6 The Reports 67, clearly elucidates the principle underlying those provisions. It reads thus:

I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

(Emphasis supplied)

22. Coming to the testimonies of Shri Rattan Lal (PW-14) and Kumari Ashu (PW-15), yes we find that there are some variations and minor contradictions, but however, considering the overall circumstances, it cannot be said that they are major and in any manner render the prosecution case to be fatal.

23. Shri Rattan Lal (PW-14) has deposed that on the fateful day, both Kumari Ashu and Kumari Anjana came to his house at about 10 p.m. and informed him that accused had killed the deceased. He immediately went to the spot and found the deceased lying on the floor with blood splattered all over. By that time, accused had run away from the spot. He telephonically informed the police. Now, significantly, there is no suggestion by the accused that this witness has falsely deposed in Court. We also find that there is no contradiction, which was pointed out by the accused to the witness, in his statement (Ex. PW-13/B) recorded by the police.

24. Coming to the testimony of Kumari Ashu (PW-15), we find that she has fully established the prosecution case and deposed that accused came to their house where her younger sister (Kumari Anjana) was present and asked her to provide food. Kumari Anjana went to the house of Shri Rattan Lal and when she returned she found deceased Kashmiro Devi not to be present there. She and her sister were asked by their grandmother to look for Kashmiro Devi in her house. Accordingly, she searched for the deceased but could not find her. After some time, she heard sound of "Waha-Waha" coming from the house of the deceased. She went towards the said house by burning Mashaal (torch of wood) and also called for the deceased. She heard a loud sound coming from inside the house of the deceased. Soon she saw that the accused came out of the said house and after pushing her ran away from the spot carrying a bundle in his hand. She went

to the house of Shri Rattan Lal and told him that accused had left the house of the deceased in a hurry. Both, she and her sister, went inside the house of the deceased and saw the deceased lying dead on the floor and blood oozing from her head. Now, significantly, this witness has not been cross-examined on these material aspects by the accused. Her statement goes un rebutted. Only suggestion put to the witness is that possibly she could not identify the accused as there was less light. Significantly, it has not been suggested to PW-15 that she had not seen the accused carrying a bundle with himself or that he had not pushed her. Noticeably accused himself admits his presence in the house and there was no other male member in the house present at that time.

25. Coming to the testimony of Kumari Anjana (PW-16), we find that to a large extent she has corroborated the version deposed by PW-15. However, there are some contradictions. This witness states that Mashaal had switched off by the time PW-15 reached the house of the deceased. This witness also states that she was not present at the time when accused pushed PW-15. She states that she visited the house of her uncle first and then went to the house of the deceased. These contradictions, in our considered view, are neither relevant nor material for the reason that accused himself admits presence of both the sisters in the house of the deceased at the relevant time. Also, there is no suggestion of denial about their presence on the spot. No doubt, PW-16 states that she was informed by PW-15 about her being pushed by the accused. On first brush, it appears that there are some contradictions in this regard but the careful scrutiny of testimony of PW-15 only reveals that it is not so. She specifically does not state that her sister, i.e. PW-16, was present on the spot at the time when accused had pushed her.

26. Another contradiction pointed out is that according to Shri Rattan Lal both the sisters came to his house and informed him about the death of the deceased. In Court PW-15 does not state this fact and she only states that she went to the house of Shri Rattan Lal. PW-16 supports this version of hers. The contradiction, in our considered view, is not material at all. Whether one sister went to inform witness Shri Rattan Lal about the incident or both of them went is immaterial. On material facts, we find that there is no contradiction.

27. Hence, the circumstance of last seen, i.e. the accused seen in the company of the deceased and also the accused fleeing away from the spot in a huff, stands fully established. Apex Court in S.K. Yusuf v. State of West Bengal, 754, has held that "the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible". It has also relied upon its earlier decision rendered in Mohd. Azad @ Samin Vs. State of West Bengal, .

28. From the material placed on record it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for.

There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

29. It is true that prosecution has not been able to prove the fact that accused harboured any animosity or that there was no motive for the accused to have killed the deceased, but then it is not the requirement of law that in every case, even where circumstances otherwise stood established, this circumstance is necessarily required to be proved. In the instant case, it has come on record that accused had consumed alcohol and had thereafter visited the house of the deceased for taking food. After all accused had not taken his meals. According to him it was not given. In an anger he left the place. The girls heard loud sound coming from the house of the deceased; he was seen fleeing away from the spot; weapon of offence was found on the spot; blood stained clothes of the accused were also recovered on the basis of disclosure statement made by him; sample of blood found on the incriminating articles matched with the blood sample of the accused; the accused had fled away from the spot; and he was apprehended after some time in a different and distant place. All these circumstances are sufficient enough to further establish animosity or motive. In *Amitava Banerjee @ Amit @ Bappa Banerjee Vs. State of West Bengal*, apex Court has held that absence of motive for commission of offence would not make the case fatal. All that is required to be done is that the Court has to be more careful and circumspect in scrutinizing evidence to ensure that suspicion does not take the place of proof while finding the accused guilty.

For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. Hence, the appeal is dismissed.