
(1992) 02 RAJ CK 0053

In the Rajasthan High Court

Case No : Criminal (Jail) Appeal No. 144 of 1987

Kanhaiya Lal

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 10-02-1992

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 302, 391, 394

Citation : (1992) 1 RLW 75 : (1991) 2 WLC 713 : (1992) 1 WLN 120

Hon'ble Judges : Milap Chandra Jain, J; B.R. Arora, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.R. Arora, J.—This appeal is directed against the judgment dated March 26, 1987, passed by the Sessions Judge, Udaipur, by which the learned Sessions Judge convicted and sentenced the accused-appellant for the offences under Sections 302 and 394 I.P.C.

2. The appellant was tried by the learned Sessions Judge, Udaipur, for the offences under Sections 302 and 394 I.P.C. The case of the prosecution, as unfolded in the First Information Report, which was lodged at Police Station, Patasiya on April 23, 1985, by Poona, is to the effect that Smt. Moi - the wife of the informant Poona, a day before yesterday, showed her intention to go to her parental house situated in village Lakhawas, upon which the informant asked her to go by the first bus. In the night, at about 10.00/11.00 p.m., he went to his field in order to keep a watch on the crop and when he came back to the house yesterday at about 10.00 a.m., his wife was not found at the house. He thought that she might have gone to her parental house. Today, in the evening", some herdmen informed him that in the jungle of Nabhi Dharam Mahadeo, a deadbody of a woman is lying there, whose legs are cut and one leg is lying near the deadbody. He, alongwith the other villagers, went there and saw the deadbody of the lady and on seeing the deadbody, it was revealed that the deceased was his

wife Smt. Moti. It was further stated that before her death, she was wearing one silver Kadiya (Thick silver bangle) in each of her legs, which were found missing. The name of the accused was not given in this F.I.R., which was, later on, named during the investigation as the appellant Kanhaiya Lal, and the police, after necessary investigation, presented the challan against the accused-appellant. The accused was tried by the learned Sessions Judge, Udaipur. The prosecution, in support of its case, examined thirteen witnesses. The accused did not produce any evidence. The learned Sessions Judge, after trial, convicted the accused under Sections 302 and 394 I.P.C. and sentenced him to undergo imprisonment for life and a fine of Rs. 50/- and in default of payment of fine further to undergo one month's rigorous imprisonment, u/s 302 I.P.C. and was sentenced to undergo seven years' rigorous imprisonment and a fine of Rs. 50/- and in default of payment of fine further to undergo one month's rigorous imprisonment for the offence u/s 394 I.P.C. It is against these convictions, and sentences, passed by the learned Sessions Judge, Udaipur, that the appellant has preferred this appeal.

3. We have heard learned Counsel for the appellant as well as the learned Public Prosecutor and perused the judgment, passed by the Court below, as well as the record of the case.

4. There is no eye witness of the occurrence. The prosecution; in support of its case, examined four witnesses, who had last seen the accused "with the deceased Smt. Moti. This evidence consists of the evidence of P.W. 2 Kuda - father-in-law of deceased Moti, P.W. 3 Dewa - brother-in-law (Dewar) of the deceased, P.W. 5 Poona-the husband of the deceased Smt. Moti and P.W. 10 Smt. Naani Bai - sister-in-law (Devrani) of the deceased. The prosecution sought corroboration from the testimony of P.W. 6 Hemant Kumar Tehsildar, who conducted the identification parade of Kadiyas, recovered from the possession of the accused and P.W. 4 Dr. Ramakant, who conducted the post-mortem on the deadbody of deceased Smt. Moti, as well as the evidence of the recoveries of the Kadiyas and axe made at the instance of the accused. The case of the prosecution is further corroborated by the evidence of Motbir witnesses, which consists of P.W. 1 Mehrab Khan; P.W. 8 Mustafa Khan and P.W. 9 Laxmi Kant. Then there remains the evidence of four police witnesses, which consists of P.W. 7 Basant Singh Constable, who took the sealed articles from the Malkhana of Police Station, Patasiya, to State Forensic Science Laboratory, Jaipur, P.W-11 is Fateh Singh, the Station House Officer, who started investigation, but later on, the investigation was taken by P.W. 13 Shri Nathu Lal Maurya - Deputy Superintendent of Police, who conducted the remaining investigation. P.W. 12 Mana Lal is the Head Constable, who was the Incharge of the Malkhana at Police Station, Patasiya, and who has stated that the sealed articles remained with him duly sealed and intact. He has, also, stated that he took the Kadiya for identification before P.W. 6 Hemant Kumar Tehsildar and thereafter brought the same back and got them sealed. The learned trial Court, while convicting the accused-appellant, believed the testimony of the prosecution witnesses, who had last seen the accused-appellant with the deceased Smt. Moti. He, also, placed

reliance over the recoveries of the Kadiyans and axe, made at the instance of the accused.

5. We will now first consider the evidence, produced by the prosecution regarding the last seen of the accused with the deceased Smt. Moti, it is not the case of the prosecution that the accused was last seen with the deceased Smt. Moti at the place where the deadbody was found or near about it. Even nobody has seen the accused with the deceased out-side the house of P.W. 5 Pooha. P.W. 2 Kuda - father of the informant - has only stated that Smt. Moti was the wife of Poona and the house of Poona is situated at a distance of about 100 feet from his house. On Sunday, accused Kanhaiya Lal was sitting with Smt. Moti and the informant was, also, in the house. Accused Kanhaiya Lal was talking with Smt. Moti and when he enquired from accused Kanhaiya Lal what he was talking about then the accused, "Maama (maternal-uncle), we are talking for some time." He, thereafter, did not enquire any-thing from the accused and went to the field at about 8.00/9.00 p.m. Next day, Smt. Moti was not found at her house, the house was closed and, he therefore, thought that Smt. Moti might have gone to her parental house/Accused Kanhaiya Lal was present there and was loitering near the compound. On enquiry where Smt. Moti had gone, the accused replied that he did not know anything : he sat with her for sometime and thereafter he went away. In cross-examination, he has admitted that this accused Kanhaiya Lal used to come to the house of Poona off and on. He has admitted that in the police statement the fact of his staying in the Khaliyan in the night does not find mention though he informed the police to that effect. He has, also, admitted that the accused was Dharam Bhai of the deceased Smt. Moti.

6. P.W. 3 Deva has stated that for the last one year, accused Kanhaiya Lal and Smt. Moti were living like brother and sister. In the evening of Sunday, he had seen the accused sitting with Smt. Moti at the house of Poona and the accused was talking with Smt. Moti. He did not talk to Kanhaiya Lal (accused) but only saw the accused talking with Smt. Moti up till 9.00/10.00 p.m. in the night. In the morning, Smt. Moti was not seen and on enquiry, made from Poona, he thought that Smt. Moti. might have gone to her parent's house, In the cross-examination, he has admitted that Smt. Moti was not a lady of bad character and the accused used to come at Poona's residence off and on. He has admitted in the cross-examination that the doors of the house were closed and nobody could have identified or seen who was sitting inside the house and, therefore, he is not in a position to say who was sitting inside the house and he identified only by hearing the voice. The statement of this witness shows that he has not seen the accused inside the house of Poona and only heard his voice and on the basis, he is saying that the accused was sitting inside the house of Poona.

7. P.W. 5 Poona - the husband of the deceased Smt. Moti - has stated that at about 1.00/1.3 years before, in the night at about 8.00 p.m., he and his wife Smt. Moti were in the house and taking their meals. At that time, accused Kanhaiya Lal came there and he and the accused smoks together and as he had

to go to his field, he went to the field and the accused remained sitting in the house and the accused and Smt. Moti were talking. Next day, he returned from the field at about 8.00/9.00 a.m. and at that time, the accused was sitting in a hotel, the door of his house was closed, but it was not locked. His wife Smt. Moti was not found inside the house and when she was not found there, he thought that she might have gone to her parent's house as there was a talk to this effect a day before. About two days after, some herdmen informed him that deadbody of the lady was lying in the Nallah in the jungle of Nabhi Dharam Mahadeo and hearing so, he alongwith 4-5 persons, went there, saw the deadbody and found that the neck of the deceased was cut and both the legs were, also, found cut and one bag was lying near the deadbody, which belongs to his wife Smt. Moti, in which there were some clothes of his wife. His wife used to wear silver Kadiyans in the legs, which were, also, taken by some one by cutting her legs. He, also, identified these articles conducted and, also, in the Court. This witness, in the F.I.R. has stated that the accused was sitting at his residence when he had left in the night for his field. He has only stated in the F.I.R. that he had allowed his wife to go to her parents' house in the morning and he left the house at about 10.00/11.00 p.m., while in his statement before the Court, he has given the time for going to his field at about 8.00/9.00 p.m. As the story about the last seen by this witness does not find place in the F.I.R., which was the first version given by the witnesses, it appears that this evidence of last seen appears to be an after-thought and has been created in order to implicate the accused with the crime, otherwise, if the accused would have been there in his house when he left the house then in the F.I.R., his name should have been found mention. Even in the F.I.R., the name of the accused has not been given. All the witnesses have stated that the accused was seen by them only upto 9.00/10.00 p.m. and this witness left the house at about 10.00/11.00 p.m. and this story of last seen of the accused at the residence of Poona and as such the evidence of these witnesses regarding the last seen of the accused with the deceased Smt. Moti cannot be relied upon.

8. Lastly, P.W. 10 Smt. Nani Bai - sister-in-law (Devrani) of the deceased Smt. Moti, has been produced. Her statement is, also, to the effect that about 16 years before, on Sunday, in the night, she saw the accused alongwith Smt. Moti at about 9.00/10.00 p.m. in the house of Poona. In the cross-examination, she has admitted that she had not seen the accused but only hear the voice of the accused and on the basis of hearing voice, she identified him. She has, also, admitted that he used to come to Smt. Moti off and on as he was the Dharam-Bhai of the deceased. This witness has not seen the accused and has merely stated that on the basis of hearing the voice, was of the view that it was the accused.

9. All the evidence, produced by the prosecution regarding the last seen of the accused with Smt. Moti, thus, does not inspire confidence. The story of last seen appears to be an after-thought and has been introduced by the prosecution at a later stage. In the initial stage, at the time of lodging the F.I.R., this story of last

seen was not put forward by the prosecution. Moreover, the accused was not seen by any of the witnesses near the place where the dead body of Smt. Moti was lying. Nobody had seen the accused and deceased Smt. Moti coming out of the house and proceeding towards the place of the occurrence. The evidence only relates to the last seen of the accused at the residence of deceased Smt. Moti and, therefore, this evidence of last seen even if it is believed, does not connect the accused with the crime. This circumstantial evidence of last seen does not complete the chain of the circumstances and does not link the accused with the crime. Certain links are missing and this evidence of last seen cannot unequivocally point out the guilt of the accused and is not in a position to exclude other hypothesis constituting his innocence. Thus, this evidence of last seen cannot be read against the accused-appellant.

10. Now there remains the only evidence regarding recoveries of Kadiya and blood-stained axe at the instance of the accused. These articles were recovered, as per the prosecution case, at the instance of the accused in pursuance to Ex.P.4 and Ex.P.5 -the informations supplied by the accused. According to this information, it has nowhere been stated in the information, given u/s 27 of the Indian Evidence Act, that the accused had kept these articles there. What has been stated in these two informations is that the axe, with which the murder of Smt. Moti was committed, is lying in his house in the quilt on his roof (Dagla). He has nowhere stated that he kept this axe there and will get that recovered. Similar is the case with respect to the information Ex. P. 4, given u/s 27 of the Indian Evidence Act, regarding the recovery of Kadiyans. In this information, the accused has stated that those Kadiyans are lying in the white cloth in a bag which is hanging on the hanger (Khunti) fixed in his house. In this information, he has not stated that he kept these Kadiyans in the packet wrapped in the white cloth in his house and therefore, the recoveries made at the instance of this accused, cannot be said to be the discoveries made at the instance of the accused. It cannot be said that these were at the instance of the accused-appellant, who gave informations which led to the discoveries and he was the person who concealed them there. This evidence of recoveries, therefore, cannot be read against the accused and to make such circumstances incriminating, it must be shown that the appellant himself had concealed the blood-stained axe or these Kadiyans there. This evidence, therefore, cannot be read against the accused.

11. In the case of *Pohalya Motya Valvi Vs. State of Maharashtra*, the Apex Court, while considering the admissibility of the information u/s 27 of the Indian Evidence Act, observed as under:

The recovery of blood-stained spade became incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of concealment, namely, that the appellant who gives information leading to its discovery was the person who concealed it.

12. In this view of the matter no conviction can be based on the basis of the testimony of the so-called prosecution witnesses regarding the last seen of the accused with the deceased and the recoveries made at the instance of the accused-appellant, and the accused cannot be convicted on the basis of these two circumstances, which do not conclusively prove the case against the accused-appellant beyond reasonable manner of doubt. The circumstances, pointed-out by the prosecution, do not complete the chain to fasten the guilt against the accused. Several links are missing and the accused cannot be held guilty on the basis of these two circumstances only.

13. Now, coming to the convicting of the accused appellant u/s 394 I.P.C., when we have not believed the recoveries of the Kadiyans and the axe at the instance of the accused and have given the benefit of doubt to the accused as in our opinion they were not the discoveries in pursuance of the informations given by the appellant, therefore, the ingredients of the offence u/s 391 I.P.C. are, also, not made out. For proving the offence u/s 394 I.P.C, the prosecution has to prove that the accused committed or deemed to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. The prosecution has failed to prove the presence of these ingredients against the accused in this case. In this view of the matter, the prosecution has failed to prove the case against the accused for the offence u/s 394, I.P.C., also.

14. Consequently, we allow this appeal, set-aside the judgment dated March 26, 1987, passed by the learned Sessions Judge, Udaipur, convicting and sentencing the accused-appellant under Sections 302 and 394 I.P.C. and acquit the accused-appellant of all the charges levelled against him. The accused is in jail and he may be released forthwith, if not wanted in any other case.