

(2011) 07 SC CK 0035

In the Supreme Court Of India

Case No : Criminal Appeal No"s. 1327, 1369 and 1370 of 2008

Mustkeem @ Sirajudeen

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Arms Act, 1959 — Section 25, 4
Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) &mdash

Citation : (2011) 3 ACR 2925 : AIR 2011 SC 2769 : (2011) AIRSCW 4410 :
(2011) 3 Crimes 118 : (2011) 3 JCC 2117 : (2011) 7 JT 304 : (2011) 4 KCCR
434 SN : (2012) 1 MLJ 151 : (2011) 2 OLR 526 : (2011) 3 RCR(Criminal) 766 :
(2011) 7 SCALE 481 : (2011) 9 SCR 101 : (2011

Hon'ble Judges : Deepak Verma, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : R.K. Kapoor, Shweta Kapoor, Retu Sharma, Anis Ahmed Khan,
Monika Gusain, Hariom Yaduvanshi and R.K. Kapoor A.C, for the Appellant;
Imtiaz Ahmed, Naghma Imtiaz, Malind Kumar, Archana Pathak Dave and Milind
Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Verma, J.—This judgment and order shall govern disposal of Crl. A. No. 1369 of 2008 Nandu Singh @ Vikram Singh v. State of Rajasthan and Crl. A. No. 1370 of 2008 Arun Joseph v. State of Rajasthan as they arise out of the common judgment and order recorded by Division Bench of the High Court of Judicature for Rajasthan, Bench at Jaipur in D.B. Criminal Appeal No. 125/2005, 210/2005 and 1176/2005 decided on 03.12.2007, arising out of judgment and order of conviction recorded by Special Judge SC/ST (PA Cases) Jaipur in Sessions Case No. 02/2004 decided on 10.02.2005.

2. The trial court vide its judgment and order held the Appellants guilty for

commission of offence u/s 302/34 of the Indian Penal Code (in short 'IPC') and awarded life imprisonment with fine of Rs. 1000/- and in default of payment of fine further three months simple imprisonment and u/s 4/25 of the Arms Act one year R.I. and fine of Rs. 500/- and in default of payment of fine to further suffer one month imprisonment. The sentences were directed to run concurrently.

3. Feeling aggrieved by the said judgment, Appellants had preferred three appeals as mentioned hereinabove before the Division Bench of the High Court of Judicature for Rajasthan at Jaipur Bench. The High Court, after considering the matter from all angles also came to the conclusion that no interference was called for against the said judgment of the trial Court and dismissed the appeals. In all, there were five accused out of which one Abrar was declared absconder and Abdul Wahid was acquitted by the Trial Court. Thus these appeals by the three convicted accused.

4. We have, accordingly, heard learned Counsel Mr. R.K. Kapoor, Ms. Shweta Kapoor, Mrs. Mansi Dhiman for the Appellants and Mr. Milind Kumar, Mr. Imtiaz Ahmeda and Ms. Archana Pathak Dave for the Respondent State and perused the record.

5. Facts giving rise to the prosecution story, ultimately resulting in conviction of the Appellants, are as under:

On 24.07.2003 at 5.45 p.m. Diwakar Chaturvedi SHO Police Station Vidhan Sabha, Jaipur received telephonic information about murder of a person in Kathputli Colony. After recording the said information in Rojnamcha, SHO rushed to the spot with police squad and found a person lying dead in a pool of blood.

6. On inquiries being made P.W.3 - Ashok Kumar, present at the place of occurrence informed Diwakar that the name of the deceased was Ram Pal Yadav. He further informed that the murder of Ram Pal Yadav has been caused by Mustkeem, Nandu and one other person by inflicting injuries on his person with sword and knife. The third person was later identified as Arun Joseph. On receiving the said information SHO recorded the Parcha Bayan of P.W.3 - Ashok Kumar and registered a case u/s 302/120B of the IPC. Thus the investigation machinery was set into motion. Dead body was sent for autopsy, necessary memos were drawn, statements of witnesses were recorded, accused were arrested and on completion of investigation charge sheet was filed.

7. Charges u/s 302/149 IPC and Section 4/25 of the Arms Act were framed against the accused. They denied the charges and prayed for being tried. The prosecution in support of its case examined 19 witnesses. The statements of the Appellants u/s 313 of Code of Criminal Procedure were recorded, who claimed innocence and prayed for their acquittal.

8. As per the post mortem report Ex. P.34, deceased Ram Pal Yadav had received 38 ante mortem injuries and from the evidence of P.W.13 - Dr. Sumant Dutta, cause of death was stated to be due to hemorrhagic shock as a result of injuries

to chest, lungs and skull and on account of excessive bleeding. In the light of the Post Mortem Report and the evidence of P.W.13 - Dr. Sumant Dutta, it cannot be disputed nor has been disputed before us that deceased had met with homicidal death.

9. Now the question that arises for our consideration in this and the connected appeals is as to who were the perpetrators of the crime and whether the trial Court and High Court were justified in holding the Appellants guilty for commission of the said offences.

10. Before we proceed to do so it is necessary to point out that the solitary star witness of the prosecution P.W.3 - Ashok Kumar had turned hostile and was declared as such.

11. In fact, it is pertinent to mention here that the main material witnesses were declared hostile. The Trial Court observed in this context that P.W.1 Mohd. Ayub (recovery witness), P.W.3 Ashok Kumar and P.W.2 Prakash (both eyewitnesses) had retracted their statements made u/s 161 Code of Criminal Procedure during examination. Furthermore, it has also refused to attach much credence to the deposition of P.W.19 Yogesh Kumar, owing to the clear contradictions in his statement and aforesaid deposition regarding his presence at the scene of crime. Thus, in a nutshell, Trial Court had also found them unreliable and has not based the Appellants conviction on the basis of their statements. Similarly High Court has not taken their evidence into consideration. Thus, it is neither required nor is necessary to deal with their evidence. Trial Court had recorded a finding that the case is without any eye witness and is based on circumstantial evidence.

12. It is therefore necessary to discuss the evidence of P.W.8 - Smt. Supyar Kanwar, P.W.9 - Lali Devi and P.W.10 - Chittar so as to find out the element of truth in the same and to discern any motive behind the commission of the offence.

13. It is fully established that the prosecution case is based on circumstantial evidence. In this view of the matter, we have to see if the chain of circumstances was so complete so as to unerringly point the finger only at the Appellants as perpetrators of crime. Before delving into the legal analysis, however, we would like to examine the statements of P.W.8 and P.W.10 in brief.

14. As per the prosecution story, Appellants Mustkeem and Arun had met P.W.10 - Chittar a day before the occurrence, in whose house deceased Ram Pal Yadav, was residing as a tenant, for last 5 to 6 years and he deposed that Appellants Mustkeem and Arun had told him that, that day it would be the last visit of Ram Pal and he will not come to his house again. Similar is the evidence of P.W.9 - Lali Devi, wife of P.W.10. She has repeated the same version as had been deposed by P.W.10- Chittar.

15. P.W.8 - Smt. Supyar deposed that Mustkeem, Arun and Nandu used to visit Ram Pal Yadav regularly as all of them were dealing in illicit liquor trade. On

coming to know from Lali Devi that Arun, Mustkeem and Nandu were keen to eliminate Ram Pal Yadav, she had telephonically asked him to meet her at the earliest. When deceased Ram Pal Yadav met Smt. Supyar, she informed him about the intentions of the accused. She also told him that Arun and Mustkeem both had said that it would be the last visit of Ram Pal Yadav to her house as they were planning to eliminate him.

16. Thus, from an appraisal of the evidence of P.W.8, P.W.9 and P.W.10, the Trial Court and the Division Bench of the High Court ruled that prosecution has been able to establish that deceased Ram Pal Yadav and Appellants were all involved in illegal trade of liquor and a day prior to the date of incident, Arun and Mustkeem had expressed their intentions to eliminate Ram Pal to P.W.9 and P.W.10.

17. High Court while considering the Appellants' appeal found this factor as one of the incriminating circumstances to eventually hold the Appellants guilty for the aforesaid offence.

18. The other circumstance found against the Appellants by High Court was that, on the basis of the disclosure statements of the Appellants, weapons alleged to be used in the commission of offence and clothes stained with human blood were recovered. In its judgment, the High Court has discussed in extenso the effect of Section 27 of the Indian Evidence Act (hereinafter shall be referred to as 'Act') and subsequent discovery of the material objects thereafter.

19. On the basis of the report of the serologist, it has come on record that traces of AB blood group were found on the pants and baniyan of the deceased. The prosecution has also averred that Sword and clothes stained with human blood group AB were also recovered at the instance of Appellants, from the places shown by them and known only to them and none others. On account of aforesaid circumstances, the High Court was of the opinion that the chain of circumstances was complete and the completed chain of circumstances pointed the finger for commission of the said offence only by the Appellants.

20. As regards the motive (if any) behind the homicide, on review of the relevant deposition of the witnesses, we are of the opinion that one of the circumstances found against the present Appellants, that deceased and Appellants indulged in illegal trade of liquor and thus were having enmity with each other, is not based on any cogent and reliable evidence much less on the evidence of P.W.8, P.W.9 and P.W.10. This could not have been the motive of killing Ram Pal.

21. In fact, the omissions on the part of all three witnesses namely, P.W.8, P.W.9 and P.W. 10 to state certain material facts in the course of making their statements before the police, which they have categorically admitted in their depositions may even be considered as "contradictions" as per the Explanation to Section 162 of the Code of Criminal Procedure.

22. Their evidence, that they had intimated P.W.8 a day prior to the date of incident, that they would eliminate Ram Pal is also not trustworthy. On account of

several discrepancies appearing in their evidence, P.W.8 is absolutely an hearsay witness which is borne out from their evidence. Similarly the evidence of P.W.9 and P.W.10 does not establish the intention on the part of the accused to murder Ram Prasad. Since no enmity could be established on record between them there was nothing which warranted to eliminate Ram Pal.

23. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the Appellant unless the same was connected with the murder of deceased by the Appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance of the Mustkeem was not sufficient for test as the same had already disintegrated. At any rate, due to the reasons elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot ipso facto enable us to arrive at the conclusion that the latter were used for the murder.

24. In fact, the recovery of the weapons on disclosure of the Appellants itself becomes doubtful. The witness of Recovery Memo P.W.1 - Mohd. Ayub Khan was declared hostile and another witness P.W.10 - Chittar admitted that signatures were obtained on the memos and annexures at the Police Station itself. It is also pertinent to mention here that P.W.1 - Mohd. Ayub Khan was residing 4 Kms. away from the place of recovery and P.W.10 - Chittar was residing 8 Kms. away from the place of recovery and were also declared hostile. Prosecution failed to establish as to why none of the local persons were called to be the witnesses. The conduct of the prosecution appears to be extremely doubtful and renders the case as concocted, to falsely implicate the Appellants. Recovery Memos also reflect that there were overwriting on the same which has not been explained by P.W.16 - Diwakar Chaturvedi (Investigating Officer). He admitted that memos and annexures were prepared in his own handwriting but also admitted in his cross examination that the same were in a different handwriting. This lacuna should have been explained by the prosecution more so when the whole case rested only on circumstantial evidence. Thus looking to the matter from all angles we are of the considered opinion that it would not be safe and proper to hold the Appellants guilty for commission of offence.

25. It is too well settled in law that where the case rests squarely on circumstantial evidence the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be decided on the touchstone of law relating to circumstantial evidence, which has been well settled by law by this Court.

26. In a most celebrated case of this Court reported in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, *Sharad Birdhichand Sarda v. State of Maharashtra* in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial

evidence following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under:

- (i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
- (iii) The circumstances should be of a conclusive nature and tendency,
- (iv) They should exclude every possible hypothesis except the one to be proved, and
- (v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

27. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material objects and its use in the commission of the offence. What is admissible u/s 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

28. If the recovery memos were prepared at the Police Station itself then the same would lose its sanctity as held by this Court in Varun Chaudhary v. State of Rajasthan reported in AIR 2011 SCC 72.

29. The scope and ambit of Section 27 were also illuminatingly stated in AIR 1947 PC 67 Pudukuri Kotayya and Ors. v. Emperor reproduced here in below:

...it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

The same were thereafter restated in another judgment of this Court reported in *Anter Singh Vs. State of Rajasthan*,

30. The doctrine of circumstantial evidence was once again discussed and summarised in *Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra*, in the following terms:

10 ...It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstance from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

31. As regards scope of interference against concurrent findings of fact, powers under Article 136 of the Constitution can be exercised, in the manner described in para 14 of the aforesaid judgment reproduced here in below:

14. At this stage, we also deem it proper to observe that in exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court. *Bharat Vs. State of M.P.*,

32. After having discussed the entire evidence, we have no doubt in our mind that the same is vitiated by serious errors and if Appellant's conviction is upheld then it would amount to miscarriage of justice.

33. In the light of the aforesaid well settled principles of law by several authorities of this Court, we are of the opinion that the judgment and order of conviction as recorded by Trial Court and confirmed by High Court in Appellants appeals cannot be sustained in law. The same are, therefore, hereby set aside and quashed. Appeals are allowed. Appellants are acquitted of the charges levelled against them. The Appellants be set at liberty, if not required in any other criminal cases.