

(1999) 02 J&K CK 0009
In the Jammu And Kashmir High Court
Case No : Criminal Ist Appeal No. 19 of 1994

Prem Chand and Another

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 25-02-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Jammu and Kashmir Evidence Act, 1977 — Section 27
Ranbir Penal Code, 1989 — Section 302, 34

Citation : (1999) CriLJ 3649

Hon'ble Judges : O.P. Sharma, J;A.M. Mir, J

Bench : Division Bench

Advocate : J.P. Sharma, for the Appellant; P.C. Sharma, G.A., for the Respondent

Final Decision : Allowed

Judgement

O.P. Sharma, J.—The appellants-Prem Chand and Manohar Lal stand convicted u/s 302 read with Section 34, R.P.C. for having

committed the murder of Balwant Singh and sentenced to undergo imprisonment for life and a fine of Rs. 1,000/- each.

2. The prosecution story as unfolded in evidence is that on the evening of March 27, 1988, the deceased had gone to the house of one Prahalad

Bhagat situated at Top-Serkhania to collect his camera from the accused-Prem Chand where the latter was working as Chowkidar, later he was

last seen alone in the company of the appellants around 9 p.m. on 27-3-1988. His dead body was found from the bushes near the same locality on

2-4-1988. The doctor, who conducted the postmortem of the body opined that no definite opinion regarding the cause of death could be given

because the body was highly decomposed. In response to the query made by the Investigating Police Officer, the doctor clarified on 23-4-1988

that the fracture of thyroid could be possible by a ligature strangulation resulting in death. This clarification, it appears provided a breakthrough

giving new direction to the investigation of the case. The Investigating Police Officer re-examined the witnesses whose statements had been

recorded in the course of investigation u/s 174 of the Code of Criminal Procedure. Their evidence revealed that the deceased was killed by the

appellants on the night of 27-3-1988 and both of them threw the dead body at the place where it was found. They allegedly disappeared from the

area soon after the commission of crime.

3. The prosecution case rests only on the circumstantial evidence. These circumstances are; (i) The deceased was last seen alive with the

appellants on 27-3-1988, (ii) Recovery of his camera from A-I, (iii) Recovery of muffler used for strangulation and (iv) The cause of death.

4. Mr. Singh appearing for the appellants argued that the evidence relied by the trial Court to hold the appellants guilty is not trustworthy because

the statements of these witnesses were recorded during investigation u/s 174 of the Code of Criminal Procedure in which they have not stated of

having seen the deceased with the appellants. This evidence according to him, was cooked up only after 23-4-1988, when doctor revised his

opinion about the cause of death by planting the witnesses. However, the same doctor, he argued, in his deposition in the Court has reiterated that

he could not find exact cause of death and had, therefore, used the word 'could' in EXPWCs-I which means "it may or may not be cause of

death.

5. Mr. Sharma learned Government Advocate however, argued that there is sufficient evidence to support the conviction recorded by the trial

Court because the evidence of the witnesses has remained unshaken in the cross-examination as none of them had any reason to depose against

the appellants.

6. In support of the first circumstance, prosecution relies on the statements of PWs-Yog Raj and Minder Singh. However, it is an admitted case of

the prosecution that they did not disclose this in the course of investigation u/s 174, Code of Criminal Procedure. It was only after Dr. C.S. Gupta

revised his opinion about the cause of death on 23-4-1988 that evidence about the deceased having been seen with the appellants on 27-3-1988

surfaced. It is also not disputed that statement of PW-Yog Raj was recorded more than -a month after the occurrence. Whether their evidence can

be relied to sustain the conviction, is a matter of appreciation of evidence.

7. The first witness about the fact that the deceased was last seen with appellants is PW-Yog Raj. According to him, he saw the deceased with the

appellants in the house of Prahalad Bhagat at about 8 p.m. on 27-3-1988. He had also seen the appellants crossing the boundary wall of the house

late at night while one of them was carrying something on his shoulder. Both according to him, returned soon thereafter without the object they

carried. The witness further says that the family members of the deceased enquired from him about the deceased next morning but he feigned

ignorance about all that he had witnessed. As he was sure about the involvement of the appellant, he left for his native village Kishtwar to avoid

harassment by the police and returned only a month after the occurrence. He was examined by the police only on 4-5-1988 more than a month

after the occurrence. His evidence has been accepted without considering the delay in recording his evidence. The failure of the witness to inform

the family members of the deceased about his having seen the deceased with the appellants when they contacted him a day after the occurrence

speaks volumes about his credibility. Moreover, the statement of PW-Gautam Singh brother of the deceased that the witness had disclosed all

about the occurrence on the next morning not only contradicts him but also makes his evidence highly doubtful because he (PW-Gautam Singh)

also did not inform anyone about it including his family members. While it is highly doubtful that he ever left for Kishtwar, his explanation that he left

because of the apprehension of being involved was sufficient to reject his testimony. If he ran away to avoid police harassment, who removed this

fear from him subsequently when he informed the police, is not disclosed. Moreover, it is strange that PWs-Vinod Singh and Gautam Singh both

real brothers of the deceased who visited the house of Prahalad Bhagat at 10 p.m. to enquire from the appellants about the deceased have given a

different version. It is not a normal human behaviour. He had no reason to feign ignorance about the disappearance of the deceased to his family

members when he was not under any threat from the appellants. He had also no reason to run away from the locality on the apprehension of being

involved and harassed when he had no association with the appellants. It is the emphatic and unchallenged statement of PW-Gautam Singh that

both the appellants denied that the deceased has come there. But according to Vinod Singh, appellant Prem Chand told them that the deceased

had left after meeting them. So neither of them can be believed because of the serious contradiction. So, there is no iota of evidence to support the

version of PW-Yog Raj.

8. The only other witness of this circumstance is PW-Jatinder Singh who while returning home had seen the appellants and the deceased together

in the house of Prahalad Bhagat at 9 p.m. on 27-3-1988 when he had approached them for a match stick to light a cigarette. According to this

witness, there was some altercation but this fact is denied by the Investigating Police Officer. However, even this witness maintained silence about

this fact until 24-4-1988. He did not disclose this when his statement was recorded in the course of investigation u/s 174, Cr.P.C. He is a witness

who was available in the village from 28-3-1988 to 23-4-1988 and yet did not volunteer the information. Why he did not do so, is not explained

by him or the prosecution. So his evidence suffers from the same vice as that of Yog Raj.

9. The next circumstance is recovery of camera from the appellant-Prem Chand. However, it is no evidence u/s 27 of the Evidence Act because

case of the prosecution is that appellant-Prem Chand had borrowed the camera from the deceased. This fact was also known to PWs-Vinod

Singh and Bharat Singh and the deceased is said to have gone to collect the same. So it is not a fact discovered u/s 27 of the Evidence Act.

Recovery of camera thus is not a circumstance against the appellant. In order to make a disclosure statement admissible u/s 27 of the Evidence

Act, the fact discovered must be known only to the accused and has also to be traced to the crime. It is in fact the information which must distinctly

relate to the facts which if discovered will connect the accused with the crime. The camera being already in possession of the appellants while it

could furnish a motive for killing, it is certainly not a fact discovered. Section 27 of the Evidence Act makes only so much of the information

admissible which is distinctly related to the facts which connect the accused with the crime as laid down in *Earabhadrapa v. State of Karnataka* :

AIR 1983 SC 446: (1983 Cri LJ 846) Which reads as under (at page 849 of Cri LJ):-

...Under Section 27 only so much of the information as distinctly relates to the facts really thereby discovered is admissible. The word 'fact' means

some concrete or material fact to which the information directly relates. As explained by Sir John Beaumont in App 65 : AIR 1947 PC 67 :-

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.

For the applicability of Section 27, therefore, two conditions are pre-requisite, namely (1) the information must be such as has caused discovery of

the fact; (2) the information must 'relate distinctly' to the fact discovered....

Since it is admitted case of the prosecution that camera of the deceased was borrowed by A-1 and the deceased went to collect it, therefore, it is

not a fact discovered u/s 27 of the Evidence Act. So the disclosure statement is not admissible and the evidence is totally irrelevant.

RECOVERY OF MUFFLER

10. On the basis of disclosure statement of A-2, muffler which according to the prosecution was used to strangle has been recovered.

However, as the cause of death is not definite, recovery of muffler at the instance of A-2 is irrelevant.

11. The only other circumstance is the cause of death. The case of the prosecution is that the appellants strangled the deceased with the use of

woollen muffler belonging to A-2. However, Dr. C.S. Gupta had first opined that cause of death could not be determined because the dead body

was in highly decomposed condition.

12. He was then asked to clarify whether fracture of thyroid cartilage could be the result of strangulation by ligature leading to death. In his reply

dated 23-4-1988, the witness stated that fracture of thyroid cartilage could be possible by ligature strangulation resulting into death. But in his

statement in the Court Doctor C.S. Gupta stated that : ""I have used the word ""could"" in EXPWCs which means it may or may not be the cause of

death."" So, the cause of death in this case remains in the realm of possibilities because he was not definite. In such a case, it was obligatory for the

prosecution to get the dead body examined by an anatomy expert as laid down in The State of Punjab Vs. Bhajan Singh and Others, which reads

as under (at page-284 of AIR):

...There is no eye-witness of the occurrence and the conviction of the accused is sought to be secured on the basis of circumstantial evidence. We,

however, find that the evidence which has been adduced in this case is far from satisfactory and that it suffers from a number of infirmities. In the

first instance, there is no evidence on record to show that the two dead bodies which are alleged to have been recovered in pursuance of the

disclosure statement of Bhajan Singh were those of Bachan Singh and Harbans Singh deceased. The evidence of Dr. Saluja is clear on the point

that the features of the persons on whose dead bodies the doctor performed post-mortem were unrecognisable. Question then arises as to whether

the death of the two persons whose dead bodies were recovered was homicidal. So far as this aspect is concerned we find that Dr. Saluja has

deposed that he found no marks of ligature on either of the two dead bodies. According further to the doctor, he could not find the cause of death

because the two dead bodies were in a decomposed state. In the face of the above evidence of the doctor, it is not possible to hold that the death

of the two persons whose bodies were recovered was homicidal.

The learned Sessions Judge in the course of his judgment has observed that the doctor who performed post-mortem examination was careless

inasmuch as he tried to send the two dead bodies to the Professor of Anatomy who might have been in a position to express opinion after

examining the hyoid bone and cervical vertebra as to whether the death of the two deceased persons was due to strangulation. Although it may be

that it would have been more appropriate on the part of the doctor to have sent the dead bodies to an anatomy expert, the fact that the doctor did

not do so, cannot be a ground for drawing an inference adverse to the accused. The accused cannot be made to suffer because of that omission of

the doctor. It would indeed be contrary to all accepted principles to give the benefit of that omission to the prosecution. The onus in a criminal trial

is open to the prosecution to prove the guilt of the accused. If there be any gap or lacuna in the prosecution evidence, the accused and not the

prosecution would be entitled to get the benefit of that.

Since Dr. C.S. Gupta was not sure about the cause of death, it was necessary to obtain opinion of the anatomy expert. This having not been

obtained, it cannot be held that the deceased died of strangulation. Since there is no evidence about the exact cause of death even if the

circumstance of last seen is held proved, it only creates a suspicion. However, even this circumstance has not been proved.

13. It is surprising that the trial Court while referring to the decision of the Apex Court in Gambhir Vs. State of Maharashtra, failed to notice the

following proposition of law (at page 1245 of Cri LJ):-

...The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three

tests : (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those

circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should

form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and

none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than

that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent

with his innocence....

This has been reiterated in Balwinder Singh alias Dalbir Singh Vs. State of Punjab, . But the learned trial Court failed to apply the aforesaid tests to

the facts of the case as not even single circumstance is established on the basis of which inference of guilt could not be drawn against the

appellants.

14. As the evidence furnished by the prosecution does not answer the requirement of the law, appellants have been wrongly convicted. In the view

we have taken, this appeal is allowed; the judgment impugned set aside and the accused are acquitted. The reference for confirmation of the

sentence is also rejected.