
(2015) 05 RAJ CK 0094

In the Rajasthan High Court

Case No : Criminal Appeal No. 974/2006 and Cr. Revision Pet. No. 1198 of 2006

Ram Kishore Harbhajan and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 374, 437A
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2015) 05 RAJ CK 0094

Hon'ble Judges : Kanwaljit Singh Ahluwalia, J; Nisha Gupta, J

Bench : Division Bench

Advocate : Mohar Pal Meena, for the Appellant; N.S. Dhakar, Public Prosecutor, Advocates for the Respondent

Final Decision : Allowed

Judgement

Nisha Gupta, J.—These DB Cr. Appeal and Revision Petition arise out of a common order passed by the trial court in same Sessions Case, hence both these cases are decided by this common judgment.

2. D.B. Cr. Appeal under Section 374 Cr.P.C., has been filed against the judgment dated 10.8.2006 passed by Additional Sessions Judge, Rajgarh Distt. Alwar in Sessions Case No. 3/2006 whereby the present appellant has been convicted and sentenced as under:--

"under Section 302 IPC: to undergo life imprisonment and to pay a fine of Rs. 5,000/-. In default of payment of fine to further undergo three year simple imprisonment.

under Section 201 IPC: to undergo three years imprisonment and to pay a fine of Rs. 500/-. In default of payment of fine to further undergo six months simple imprisonment."

3. The short facts of the case are that PW/7 Ramjilal lodged a written report (Ex.P/16) at Police Station Raini Distt. Alwar with the contention that his brother

Budha was murdered at his house in the night. In the morning his dead body was found on the road. He went inside his house and saw that his bed was broken and there was a trail of blood from house to the road. His wife and children were also not found there. He was having quarrel with Harbhajan and he also raised suspicion that Harbhajan murdered his brother Budha. On this written report, FIR No. 138/2005 (Ex.P/37) was registered and after investigation, charge sheet was filed against four persons for the offence under Sections 302 and 201 IPC. The case was committed and tried by Additional Sessions Judge, Rajgarh Distt. Alwar.

4. The charges were framed against the appellant for the offences under Sections 302 and 201 IPC which were denied by the accused person and they claimed to be tried.

5. To prove its case, prosecution examined PW/1 Chiranjilal, PW/2 Smt. Sarla, PW/3 Dharam Chand @ Kalya, PW/4 Mangilal, PW/5 Jagdish Prasad, PW/6 Parsadi, PW/7 Ramjilal, PW/8 Dr. Ramswaroop Meena, PW/9 Hakamdeen, PW/10 Bhagchand, PW/11 Khelanti, PW/12 Johari Lal, PW/13 Roop Chand, PW/14 Kailash Chand, PW/15 Brij Mohan, PW/16 Likhmichand Meena, PW/17 Jairam, PW/18 Babulal @ Babbu, PW/19 Hari Prasad, PW/20 Lal Singh, PW/21 Dr. R.D. Meena, PW/22 Suresh, PW/23 Kundan Lal, PW/24 Gajraj Singh, PW/25 Ramphool, PW/26 Kailash Singh, PW/27 Tejpal and PW/28 Hari Pal and produced documents Ex. P/1 to P/37.

6. Appellant was examined under Section 313 Cr.P.C. and in defence appellant had not examined any witness but produced documents Ex. D/1 to D/11. Vide the impugned judgment dated 10th August, 2006 the learned trial Court acquitted Leelaram and Lalidevi whereas present appellants Harbhajan @ Bhajni and Ramkishore were convicted and sentenced as above. During proceedings Ramkishore died, hence his appeal stands abated. Now the only appellant before the Court is Harbhajan @ Bhajani.

7. The contention of the counsel for the appellant is that the appellant has been implicated falsely. There is no legal evidence against the appellant to connect him with the crime. The case mainly rests on the evidence of PW/3 Dharam Chand and PW/18 Babulal @ Babbu and they have tried to implicate the appellant with the evidence of last seen that both the witnesses have seen the deceased with the appellant but both these witnesses are not trustworthy. The fact that the deceased was last seen with the appellant was not narrated in the written report (Ex.P/16) and statement of witnesses have been recorded after delay and otherwise the evidence of last seen is a weak type of evidence and without corroboration, conviction cannot be based upon the same, hence the appellant be acquitted.

Per contra, the contention of the learned Public Prosecutor is that PW/3 Dharam Chand @ Kaliya and PW/18 Babulal @ Babbu are reliable witnesses and other witnesses have also furnished motive for the crime that appellant was having

illicit relations with the wife of deceased, hence the court below has not committed any error in convicting the appellant and no interference is needed.

8. Heard the learned counsel for the parties and perused the paper book, the impugned judgment as well as paper book and original record of the case.

9. PW/7 Ramjilal lodged the written report and before the trial court, he testified the fact that Kalia went to the house of Budha to call him for ploughing the agricultural field but he was missing then he searched for Budha and his dead body was found on the road. He lodged written report (Ex.P/16). He also testified the fact that Lali wife of Budha was having relations with Harbhajan. PW/1 Chiranjilal, PW/5 Jagdish Prasad and PW/6 Parsadi also stated that Lali wife of Budha was having illicit relations with Harbhajan and they tried to put a motive to the incident but motive alone cannot be a ground to convict the appellant. There must be some cogent material to connect the appellant with the crime and same is badly missing in the present case.

10. The prosecution came with the story that Dharam Chand @ Kaliya (PW/3) went to the house of Budha at 9.00 P.M. and at that time, he saw Budha, Harbhajan, Leela and Ramkishore at the house of Budha and thereafter again when this witness went to the house of Budha at about 2.30 in the night, he saw the dead body of Budha. PW/3 Dharamchand @ Kaliya deposed before the trial court that on 8.10.2005 Budha came to his house to call him for ploughing the field. At that time he assured him that he would plough the field whenever he found time. At 9.00 PM, he went to the agricultural field of Budha. He parked the tractor there and thereafter went to the house of Budha and in the light of torch, he saw that Harbhajan, Leela and Ramkishore were there. Budha stated to him that person from another village visited him, hence first he should plough his own field. Thereafter witness went to plough his field and when again he came to the house of Budha at 2.30 in the night he called Budha by his name but none answered and when he entered the room he saw that bed was broken and rope was lying there stained with blood. The witness called persons of the vicinity. Bharatlal, Babbu, Mangilal, Poriya, Bharosi and Tondiya reached there. They went in the direction of trail of blood and found dead body of Budha 400-500 meter away from the house. He also testified the fact that Lali was having illicit relations with Harbhajan. In cross-examination, he stated that fact that he saw Harbhajan, Leela and Ramkishore at 9.00 PM was informed to villagers before he went to the police and he also narrated the same facts in his statements recorded under Section 161 Cr.P.C. but admittedly, no such narration was made in Ex.D/4 and in written report Ex.P/16. No fact was narrated that Dharam Chand @ Kaliya saw the appellant with deceased at the night of which Budha was found dead. He further improved his version and stated that PW/18 Babulal @ Babbu stated him that he saw accused persons running in the night at about 12.00 he also admits the fact that he is facing trial of giving beating to Harbhajan, hence enmity between the appellant and this witness is apparent and witness improved his version. He has not disclosed the fact to anybody that he saw the appellant

with Budha prior to his murder and cannot be termed to be a trustworthy witness.

11. PW/18 Babulal @ Babbu is another witness who came with the story that he saw Harbhajan, Leela and Kishore at about 12.00 PM when he was going to ease himself in forest. He deposed that he saw all the three persons in the light of torch and at about 3.00 PM he learnt about the murder of Budha and he also informed Kaliya that he saw three persons running at that time. In cross-examination also he stated that he informed all concerned that he saw Harbhajan, Leela and Kishore on that night. He resiled from his earlier version. He further specifically deposed that he informed Ramjilal (PW/7) about this fact before he lodged report (Ex.P/16) but this fact has not been narrated in written report (Ex.P/16) which clearly spells out that fact of last seen is a creation of Investigating Officer and statements of PW/3 Dharam Chand @ Kaliya and PW/18 Babulal @ Babbu do not inspire confidence.

12. PW/20 Lal Singh the Investigating Officer, he deposed that he seized a Loongi and cable at the instance of the appellant and PW/24 Gajraj Singh seized a Kameej of the appellant but as per FSL report (Ex.P/36) on cable and Kameej, the result of blood detection was found negative and on Loongi, blood was detected but no further opinion was given as regards to blood group. Hence F.S.L. report also is not an incriminating evidence against the appellant to connect him with the crime.

13. PW/8 Dr. Ramswaroop Meena and PW/21 Dr. R.D. Meena, members of medical board, conducted the post mortem and contention of PW/8 Dr. Ramswaroop is that he conducted the post mortem of Budha on 9.10.2005 and found the following injuries on his person:

"1. Incised wound 3 cm x 1 cm x across the cartilage of right Ear.

2. Bruise 10 cm x 8 cm on the Rt. Temporal region.

3. Depressed area 10 cm x 8 cm on the 3rd, 4th, 5th, 6th ribs area to right side chest.

4. Depressed area 9 cm x 6 cm on the 3rd, 4th, 5th, 6th ribs of cut aspect of left thoracic region.

5 (1). Bruise 1 1/2 cm x 1/2 cm anterior lateral aspect of upper 1/3 of Rt. Side of Neck.

5 (2). Bruise 3 cm x 2 cm on the cut with lateral aspect of x 1 1/2 cm below injury No. 5(1).

5 (3). Bruise 2 cm x 1 cm on the outer lateral aspect of upper 1/3 of left side of neck.

5. Pupils are dilated and fixed."

As per opinion of the Medical Board, the cause of death is shock and excessive hemorrhage due to head injury rupture of right lung, large carotid vessels and

spleen. All injuries were found ante mortem in nature which suggests that Budha died a homicidal death.

14. In the totality of the circumstances, the prosecution has utterly failed to prove the connection of the appellant with the crime. The only evidence which has been gathered against the appellant is of last seen which as pointed out earlier is a shaky one. Apart from it, evidence of last seen is not sufficient to record conviction of the appellant. Reliance has been placed on the judgment of Supreme Court in *State of Goa Vs. Sanjay Thakran and Another*, (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507, wherein the Supreme Court in paras 31, 32, 33 and 34 of the said judgment has held, as under:--

"31..... It is a settled rule of criminal jurisprudence that suspicion, however grave, cannot be substituted for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of circumstantial evidence. This Court has applied the above-mentioned general principle with reference to the principle of last seen together in *Bodhraj v. State of J* and as under : (SCC p.63, para 31)

"31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last 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 would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases..."

[See also : *State of U.P. v. Satish* (SCC para 22) and *Ramreddy Rajesh Khanna Reddy v. State of A.P.* (SCC para 27)].

32. In *Ramreddy Rajesh Khanna Reddy*, this Court further opined that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.

33. In *Jaswant Gir v. State of Punjab*, it was observed that (SCC p.441, para 5)

"5..... In the absence of any other links in the chain of circumstantial evidence, it is not possible to convict the appellant solely on the basis of the "last seen" evidence, even if the version of PW 14 in this regard is believed..."

34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were

found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case".

15. In the light of the above, we are of the considered opinion that the prosecution could not prove the offence against the appellant beyond reasonable doubt and the appellant deserves benefit of doubt.

Consequently, the appeal is allowed. The judgment under appeal dated 10.8.2006 passed by Additional Sessions Judge, Rajgarh Distt. Alwar in Sessions Case No. 3/2006 is set aside. The appellant is acquitted of the charges levelled against him. Appellant Harbhajan @ Bhajani is in jail, he be released forthwith, if not required in any other case.

Keeping in view, however, the provisions of Section 437A of the Code of Criminal Procedure, accused appellant Harbhajan @ Bhajani is directed to forthwith furnish a personal bond in the sum of Rs. 20,000/- each and a surety bond in the like amount, before the trial court, which shall be effective for a period of six months to the effect that in the event of filing of Special Leave Petition against this judgment or on grant of leave, the said appellant, on receipt of notice thereof, shall appear before the Supreme Court.

D.B. Cr. Revision Pet. No. 1198/2006.

As DB Cr. Appeal No. 974/2006 has been allowed, nothing survives in this revision petition and the same is accordingly dismissed.