
(2008) 08 MP CK 0016
In the Madhya Pradesh High Court

Sadhan Nayak @ Deepak

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 394, 397

Citation : (2009) ILR (MP) 234 : (2009) 4 MPHT 18

Hon'ble Judges : Sushma Shrivastava, J;Arun Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sushma Shrivastava, J.—Appellant has preferred this appeal challenging his conviction and order of sentence passed by IXth Additional Sessions Judge, Bhopal in S.T. No. 228/98, decided on 27-10-99.

2. Appellant has been convicted under Sections 394/397, 302 of IPC and sentenced to Rigorous Imprisonment for seven years with fine of Rs. 500/-, in default Rigorous Imprisonment for three months, and to imprisonment for life with fine of Rs. 500/-, in default Rigorous Imprisonment for three months, for the respective offences by the impugned judgment. The sentences were to run concurrently.

3. According to prosecution, on 13-5-98 about 9 O'clock in the morning, complainant Sarla Rao left for her office leaving her servant named Vijay at her House No. 542, Arvind Bihar, Bag Sevaniya, Bhopal. When she came back about 7 o'clock in the evening, she did not find her servant Vijay, then she opened the door of her house by duplicate key. On going inside the house, she found that her things were lying scattered, her suitcase, a black bag. VCR, blood pressure instrument, her gold chain, diamond set alarm watch and cash rupees four thousand etc. were missing. The FIR of the incident was lodged by her at Police Station Bag Sevaniya on the same day at 20.45 p.m., on the basis of which an offence was registered under Sections 454, 380 of IPC and was investigated.

Police came to the spot and searched for her servant Vijay. whose dead body was found in an almirah of pooja room in the upper storey of the house. Dehali merg was recorded by the Police at the instance of complainant Sarla Rao and merg inquest report was prepared. The dead body of Vijay was sent for post-mortem examination. On post-mortem examination, ligature marks around the neck of deceased and other injuries caused by sharp object were found. In the opinion of autopsy surgeon, his death occurred due to asphyxia as a result of ligature strangulation.

4. During investigation, it was revealed that deceased Vijay was last seen with appellant Sadhan Nayak @ Deepak on 13-5-98 at about 12 o'clock in the noon at the house of complainant Sarla Rao and the appellant had left for Calcutta by Indore-Bilaspur Hxpress same evening. On suspicion, Jabalpur Police was informed and appellant was apprehended next morning at Jabalpur Railway Station from I lowrah Coach of Indore-Bilaspur Express and the looted property and a knife was seized from his possession. A string used in the commission of offence and the looted cash was also seized at the instance of the appellant. The cash amount worth rupees two thousand and fifteen hundred was seized from Dilip Jana and Ram Prasad Rathore respectively on the information of the appellant. The seized articles were put to test identification parade. After due investigation, appellant was prosecuted u/s 454, 380,397,302 of IPC and was put to trial.

5. Appellant denied the charges framed against him under Sections 394/397, 302 of IPC and pleaded innocence. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case found the appellant guilty under Sections 394/397, 302 of IPC, convicted and sentenced him as aforesaid by the impugned judgment, which has been challenged in this appeal.

6. Learned Counsel for the appellant submitted that the appellant was erroneously convicted without any cogent and clinching evidence and no circumstances pointing out the guilt of the appellant were established from the evidence on record. Learned Counsel for the State, on the other hand, supported the impugned judgment.

7. We have perused the impugned judgment and the entire evidence on record.

8. The conviction of the appellant rests upon the circumstantial evidence. The Trial Court relied upon the following circumstances to draw the conclusion of the guilt against the appellant:

(i) the seized articles were robbed from the house of complainant Sarla Rao on the dale of occurrence;

(ii) during commission of the robbery, hurt was caused to deceased Vijay resulting into his homicidal death;

(iii) deceased was last seen in the company of the appellant at the house of complainant Sarla Rao prior to the occurrence;

(iv) appellant was seen with stolen/robbed articles, which were recovered and seized from him.

9. Learned Counsel for the appellant, however, submitted that none of the aforesaid circumstances were established from the evidence on record and the chain of circumstances was not complete so as to fasten the guilt upon the appellant.

10. The law relating to the conviction on the basis of circumstantial evidence is well settled and has been reiterated by the Apex Court in the case of *Kusuma Ankama Rao v. State of A.R* reported in 2008 AIR SCW 4669 (Para 12), as under:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(2) 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;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) 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.

11. In the light of aforesaid legal principles, we proceed to examine the evidence on record. It is clearly borne out from the evidence of complainant Sarla Rao (P.W. 1), her driver Gulab Singh Parmar (P.W. 4) coupled with the evidence of Imal Bai (P.W. 6), ASI R.R. Gautam (P.W. 8) and the medical evidence of Dr. D.S. Badkur (P.W. 2) that house burglary at the place of complainant Sarla Rao (P.W. 1) and the murder of her domestic servant Vijay aged about fourteen years was committed in her house on 13-5-98 when she was away in her office. Complainant Sarla Rao (P.W. 1) deposed in her evidence that on 13-5-98 when she came back from her office at 6 o'clock in the evening and pressed the call bell, her servant Vijay did not open the door. Then she opened it by duplicate key and found that her things were scattered and many things like watch, blood pressure instrument, VCR, gold chain, bangles and diamond topse etc. were missing and her servant Vijay was not there. She then asked her driver to search for the servant Vijay in the house and sent for his mother, but Vijay could not be found. She went to Police Station and lodged the FIR (Exh. P-I) at Police Station, Bag Sevaniya. When the police came on the spot and searched for Vijay, his dead body was found in an almirah in the room of the first floor of her house.

12. Gulab Singh Parmar (P.W. 4), the driver of complainant Sarla Rao, also

corroborated the aforesaid facts that when madam Rao came back from the office in the evening by the car driven by him, her servant Vijay did not respond despite repeated call-bells; the door was then opened by her by a duplicate key, but Vijay was not found inside. Gulab Singh Parmar (P.W. 4) also searched for the servant, but he could not find him and he came to know that theft was committed in the house, the report of which was lodged with the Police, and thereafter the dead body of Vijay was found in the house. Imal Bai (P.W. 6), the mother of deceased Vijay also deposed in her evidence that her son used to work at the place of complainant Sarla Rao and she had seen him alive at 12 o'clock, but in the evening about 6 o'clock the driver came to her and inquired about Vijay and the key of the house. She also deposed that on search, the dead body of her son Vijay was found in the upper storey of the house of complainant Sarla Rao.

13. ASI R.R. Gautam (P.W. 8) also stated in his evidence that on 13-5-98 Sarla Rao had lodged the FIR (Exh. P-1) and after recording the same, he reached the place of occurrence and on search, saw the dead body of servant Vijay lying in the pooja room of complainant's house. According to Sub-Inspector G.L. Ahirwal (P.W. 9), on receiving information that the dead body of servant Vijay was found in the house of complainant Sarla Rao, he reached there and found that the dead body of servant Vijay was lying in the shelf of complainant's pooja room, having ligature marks in the neck and injuries in the stomach. He then recorded Dehati merg (Exh. P-2) at the instance of complainant Sarla Rao and prepared merg inquest report (Exh. P-9) and sent the dead body for post-mortem examination.

14. Dr. D.S. Badkur (P.W. 2) performed the autopsy on the dead body of deceased Vijay and found a ligature mark of 5-6 cm broad present transversely all around the neck covering hyoid bone, thyroid bone and cartilage, which was slightly depressed and obliquely transverse, the base of mark showing slightly depressed and elevated ridges. There was also an incised wound 3 x 1 cm transverse x skin deep in right iliac fossa, tapering medially and an abrasion 1.5 x 2 cm transverse on medial border of lower 1/3rd and upper 2/3rd of right forearm and a contusion of 3 cm diameter on right frontal eminence were also found. In the opinion of Dr. D.S. Badkur (P.W. 2), injuries were fresh and ante-mortem in nature and death was due to asphyxia as a result of ligature strangulation.

15. The evidence discussed above remained virtually unshattered and unrebutted despite extensive cross-examination. The evidence of Dr. D.S. Badkur (P.W. 2) clearly revealed that Vijay met a homicidal death due to asphyxia as a result of strangulation and injuries were also caused to him by sharp weapon.

16. It was thus clearly established from the evidence mentioned above that when complainant Sarla Rao (P.W. 1) was in her office on 13-5-98, her domestic servant Vijay Kumar was murdered at her house and her valuables and other properties were robbed.

17. We also find the evidence of Balvant Rai (P.W. 5) on record that he had seen the appellant going towards the house of Sarla Rao on the date of occurrence at about 12 o'clock in the noon and after sometime he had seen the appellant standing with a black bag, a suitcase and some packet wrapped in red coloured cloth on the road outside the house of madam Rao. He had also seen the appellant with her servant Vijay Kumar at her house and he had also noticed the appellant starting a small vehicle of madam Rao. Balvant Rai (P.W. 5) also deposed that on the same day when madam Rao came back, she gave repeated calls to her servant Vijay, but he was not found and afterwards it was discovered that Vijay had died.

18. Balvant Rai (P.W. 5) was cross-examined at length, but he remained firm and his evidence could not be dislodged in any manner. Learned Counsel for the appellant submitted that Balvant Rai (P.W. 5) was a child witness, who could be easily tutored; but the evidence of a child witness cannot be outright rejected on such a ground if it is found to be reliable. As held by the Apex Court in the case of Panchhi and others Vs. State of UP, , it is not the law that if a witness is child, his evidence should be rejected even if it is found reliable, though the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is an easy prey to tutoring.

19. In the instant case, Balvant Rai (P.W. 5) is not a small child, but a boy of eleven years of age, who has sufficient maturity of understanding, as is also evidence from the note appended by Trial Court before recording of his evidence. Upon close and careful scrutiny of the evidence of Balvant Rai (P.W. 5), his evidence is found to be cogent and credible and he does not appear to be a tutored witness. His evidence clearly indicated that deceased Vijay was last seen in the company of the appellant at the house of Sarla Rao on the date of occurrence and the appellant was also found going towards the house of Sarla Rao and thereafter seen with black bag, a suitcase and other things, which is a strong and clinching incriminating circumstance established against the appellant.

20. It is also evident from the testimony of Dilip Kumar Jana (P.W. 3) that on 13-5-98 appellant had gone to him with a handbag, a suitcase and also gave him two thousand rupees on his asking and P.W. 3 escorted the appellant to the Railway Station, Hhopal, where he purchased a ticket for the appellant for Howrah and appellant had also boarded Indore-Bilaspur Hxpress for Howrah before him.

21. Although, Dilip Kumar Jana (P.W. 3) was declared hostile and cross-examined by the prosecution and the aforesaid facts were revealed in his cross-examination, but the facts elicited in his evidence remained uncontroverled in cross-examination by the appellant. Needless to emphasize that the testimony of a hostile witness cannot be simply brushed aside. As observed by the Apex Court in the case of Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, , the evidence of a hostile witness cannot be treated as effaced or washed off from the record altogether and the dependable part of evidence of such a witness can be

accepted.

22. It is also borne out from the testimony of ASI Sukanl Kumar Hcnerjee (P.W. 14) coupled with evidence of O.P. Tiwari (P.W. 20), Rajendra Shukla (P.W. 15) and Kishorilal Rajat (P.W. 16) that upon receiving a telephone information by Jabalpur Police from Addl. S.P. Bhopal, appellant was apprehended from I Iowrah coach of Indore-Bilaspur I Express on the morning of 14-5-98 and a large number of items including VCR, B.P. instrument, gold chain, bangles, diamond topse and other things stolen from the place of Sarla Rao were found in the handbag and suitcase carried by the appellant, which were seized from him vide seizure memo (Exh. P-19). The seized articles were also identified by Sarla Rao (P.W. 1) at the identification parade held on 18-5-98 before Smt. Usha Chaturvedi (P.W. 13), Parshad, Municipal Corpn. vide identification memo (Exh. P-4).

23. The various documents like seizure memo (Exh. P-19) and the identification memo (Hxh. P-4), FIR (Exh. P-1) lodged by complainant Sarin Rao (P.W. 1) and the additional list of stolen articles (Fhx. P-5) submitted by her, proved by the prosecution, also lend substantial corroboration to the fact that appellant was found in possession of the various items stolen and robbed from the place of Smt. Sarla Rao (P.W. 1) on 13-5-98, which were seized from him next morning after the incident of robbery and murder committed at the house of complainant Sarla Rao a day earlier. There are no reasons to doubt the recovery of aforesaid articles from the appellant at Jabalpur Railway Station on 14-5-98, which remained duly corroborated by the evidence of independent witnesses like Rajendra Shukla (P.W. 15) and Kishorilal Rajat (P.W. 16). There are also no reasons to doubt or discard the other evidence discussed above.

24. It was thus clearly established from the evidence of aforesaid witnesses that appellant was napped at Jabalpur Railway Station early in the morning on 14-5-98 when he was travelling in the Howrah coach of Indore-Bilaspur Hxpress and was found in possession of various items stolen from the place of Smt. Sarla Rao (P.W. 1), which were also identified by her at the identification parade held on 18-5-98 at U.S. College before Smt. Usha Chaturvcdi (P.W. 13).

25. Thus, we find that a series of circumstances connecting the appellant with the commission of crime were firmly and cogently established from the evidence on record. To recapitulate, on the day of occurrence on 13-5-98 at 12 o'clock in the noon, appellant was seen going towards the house of complainant Sarla Rao and her domestic servant Vijay (deceased) was also last seen in the company of the appellant in the noon lime and thereafter appellant was seen with a suitcase and handbag standing on the road outside the house of the complainant; on the same day he went to Dilip Kumar Jana (P.W. 3) with a suitcase and a handbag in his hand, gave him two thousand rupees on credit and thereafter he boarded the Howrah coach of Indore-Bilaspur Hxpress before him. On the same day, Le., 13-5-98 the incident of theft/robbery and murder of servant Vijay was discovered at the place of complainant Sarla Rao; the next morning appellant was napped at

Jabalpur Railway Station in the I lowrah coach of Indore-Bilaspur Hxpress with a suitcase and handbag and a large number of items stolen from the place of Smt. Sarla Rao (P.W. 1) were recovered from him at Jabalpur Railway Station.

26. The aforesaid circumstances well established from the evidence on record coupled with other evidence available on record unerringly point out to the guilt of the appellant and are totally incompatible with his innocence. These circumstances formed a complete chain and were sufficient to conclude that it was the appellant and none else, who committed robbery and murder of Vijay at the place of complainant Sarla Rao on 13-5-98.

27. In view of the aforesaid discussion, we are of the considered opinion, that the conviction of the appellant recorded by the Trial Court u/s 394/397 and 302 of IPC and the sentences awarded to him do not warrant any interference in appeal.

28. Thus, we find no merit in this appeal. Appeal fails and is dismissed.