

(2010) 11 CHH CK 0031
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 612 of 1993

Sheshu Alias Narendra Alias Sheshnarayan	APPELLANT
Vs	
State of M.P. (Now C.G.)	RESPONDENT

Date of Decision : 16-11-2010

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 34, 394

Citation : (2011) 1 CGLJ 531

Hon'ble Judges : Rajeev Gupta, C.J.; Sunil Kumar Sinha, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—These appeals are directed against the judgment dated 21.6.93 passed in Sessions Trial No. 362/91 by the Second Additional Sessions Judge, Durg.

2. By the impugned judgment, the Appellants have been convicted u/s 302/34 IPC and sentenced to undergo imprisonment for life. They have been further convicted u/s 394/34 IPC and sentenced to undergo R.I. for 5 years, with a direction to run the sentences concurrently.

3. The facts, briefly stated, are as under:

Deceased- Basant Kumar was son of Lalchand (PW-2). They were running business of giving VCR, Television and Cassette on rent. On 2.10.89 at about 10.00 a.m., the Appellants came to their house and took VCR & Television for film-show in their village. The deceased and their servant-Ayub (PW-3) went to the village of the Appellants on the scooter of the deceased. Deceased left Ayub along with VCR set in the house, where the film-show begun. Thereafter the deceased went from that house saying that he is going to petrol-pump for taking petrol in the scooter and will come again after sometime. The Appellants also accompanied the deceased on his scooter saying that they will get down near the

petrol-pump. Thereafter the deceased was not seen alive and his dead body was found at an open place at about 7-7.30 a.m. on 3.10.89. Rajkumar, a village boy, saw the dead body and lodged the missing intimation. By that time a missing report was also lodged. The Investigating Officer reached to the place of occurrence, gave notice to the Panchas and prepared inquest (Ex.-P/4) on the body of the deceased. There were many injuries on the body. The post-mortem examination was conducted by Dr. K.P. Chandrakar (PW-22). The postmortem report is Ex.-P/25. He noticed 15 external injuries, including multiple fractures on the body of the deceased and opined that the cause of death was excessive haemorrhage and shock as a result of multiple injuries and fracture of skull bone. The death was homicidal in nature. On 5.10.89, the scooter of the deceased, bearing registration No. MOR 1845, was found in abandoned condition and was seized vide seizure memo Ex.-P/10.

Appellant- Narayan was taken into custody during the course of investigation on 9.10.89 and his memorandum statement u/s 27 of the Evidence Act (Ex.-P/15) was recorded and two keys of the scooter, one small purse and some other articles were recovered at his instance vide seizure memo Ex.-P/17. The keys and the purse were put for identification on 20.12.89 and were identified to be that of the deceased by Lalchand (PW-2). The identification memo is Ex.-P/2. The identification was conducted by Executive Magistrate, A.R. Dhruw (PW-23).

The case of the prosecution is that on 2.10.89 at about 12-1.00 p.m., the Appellants accompanied the deceased from village Purai on his scooter; they committed his murder on the way; and they also took his scooter, purse and keys of the scooter with them. There was no eye-witness to the incident and the case of the prosecution was based on circumstantial evidence. The learned Sessions Judge held that the deceased was lastly seen in the company of the Appellants and the above articles belonging to the deceased were seized at the instance of Appellant- Narayan, therefore, the Appellants were liable for punishment under the aforementioned Sections of IPC.

4. Mr. Ravi Kumar Bhagat, learned Counsel appearing on behalf of Appellant- Narayan, argued that there was long time gap between the deceased seen alive in the company of the Appellants and his dead body found, therefore, the circumstance of last seen together would not be incriminating. He also argued that it was not established that Appellant- Narayan had given any statement to the police and the articles, allegedly belonging to the deceased, were seized at his instance.

5. On the other hand, Mr. Akhil Mishra, learned Dy. Govt. Advocate appearing on behalf of the State, opposed these arguments and supported the judgment passed by the Sessions Court.

6. We have heard the learned Counsel for the parties at length and have also perused the records of the sessions case.

7. Admittedly, there is no direct evidence in this matter and the case of the

prosecution is based on circumstantial evidence. Following are the circumstances, on which, the learned Sessions Judge has convicted the Appellants for commission of the above offences:

- (i) The deceased was lastly seen alive in the company of the Appellants at about 12-1.00 p.m. on 2.10.89;
- (ii) The keys of the scooter & purse belonging to the deceased were seized on the memorandum (Ex.-P/I 5) of Appellant- Narayan &
- (iii) The said articles were identified by Lalchand (PW-2) to be that of the deceased.

8. In *Dhananjay Chatterjee v. State of W.B.* (1994) 2 SCC 22, the Supreme Court held "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

9. About the last seen theory, in many cases, the Supreme Court held that the last seen theory comes into play where the time gap between the point of time when the accused and 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 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 accused and deceased were last seen together, it would be hazardous to come to a conclusion of a guilt in those cases.

10. Now we shall individually examine each circumstance.

11. The learned Sessions Judge has held that the articles belonging to the deceased were seized at the instance of Appellant- Narayan when he gave his discovery statement Ex.-P/I 5. The above finding is erroneous. The 2 witnesses of the discovery statement are Girdhari Lal (PW-14) and Prashant Singh (PW-15). Girdhari Lal (PW-14) deposed that he cannot identify the accused persons. He cannot identify accused- Narayan. However, one boy named as Narayan had given statement that he had kept the keys of the scooter and bag containing Rs. 10/- and he admitted to give it to the police. If the identity of the person giving memorandum statement is not established by the witnesses of the

memorandum, it cannot be said that the alleged memorandum was proved to be given by that person. On the evidence of Girdhari Lal (PW-14), it was not established that Appellant- Narayan gave any such disclosure statement to the police before him because he could not identify him in the Court. Prashant Singh (PW-15) was Sarpanch of village Purai. He very categorically deposed that Appellant- Narayan had not made any disclosure before him. He also added that accused-Sheshnarayan had also not made any disclosure before him. After reading the contents of memorandum recorded u/s 27 of the Evidence Act (Ex.-P/ I 5), he deposed that this statement was never recorded before him and the police took his signature while making some seizure memos. However he admitted that full-pant, shirt, purse-containing a nose-pin and one small packet of tobacco, were seized by the police in front of the house of Appellant- Narayan. The seizure memo Ex.-P/I 7 bears his signature. It is therefore clear that he has also not supported the discovery said to be made by Appellant- Narayan and had simply said that the above articles were seized in front of the house of Narayan. On due appreciation of the evidence of these witnesses, it cannot be said that it was established beyond all reasonable doubts that the seizure of above articles were made on the discovery made by Appellant- Narayan u/s 27 of the Evidence Act.

12. So far as identification of the above articles are concerned, that would be hardly incriminating against the Appellants because we have already held that the said article were not seized at the instance of Appellant- Narayan, as alleged by the prosecution. Moreover, we find that according to the prosecution, the bag allegedly seized at the instance of the Appellant was having a photograph of the deceased, therefore, there was no necessity of its identification and further that the identification memo contains that the identification proceedings were drawn in the front yard of the police station. Therefore, this circumstances will also not be incriminating against the Appellants.

13. Now we shall consider the last seen circumstance. In the present case, the deceased was lastly seen in the company of the Appellants on 2.10.89 at about 12-1.00 p.m. and thereafter his dead body was seen by Rajkumar at about 7-7.30 a.m. on 3.10.89. Therefore, there was a long time gap between the point of time when the Appellants and the deceased were seen last alive and when the deceased was found dead, and a possibility of any person other than the Appellants being the author of crime cannot be said to be impossible. In the above situation, in the absence of any other positive evidence to conclude that the Appellants and the deceased were last seen together, it would be difficult to come to a conclusion of guilt in this matter.

14. For the foregoing reasons, the conviction and sentences awarded to the Appellants Under Sections 302/34 & 394/34 IPC cannot be sustained.

15. Accordingly, the appeals are allowed. The conviction and sentences awarded to the Appellants Under Sections 302/34 & 394/34 IPC are set-aside. The Appellants are acquitted of the charges framed against them. The Appellants are

on bail. Their bail bonds are cancelled and sureties stand discharged.