

(2008) 03 UK CK 0039

In the Uttarakhand High Court

Case No : Criminal Appeal No. 1597 of 2001

Smt. Sarojani Devi and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 17-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 201, 207, 313, 374

Penal Code, 1860 (IPC) — Section 201, 302, 304, 314, 34

Uttar Pradesh Reorganisation Act, 2000 — Section 35

Citation : (2008) NCC 619 : (2008) 8 UC 1115

Hon'ble Judges : Prafulla C. Pant, J; Dharam Veer, J

Bench : Division Bench

Advocate : U.P.S. Negi, for the Appellant; Amit Bhatt, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 374 of Code of Criminal Procedure, 1973 (hereinafter referred as Code of Criminal Procedure), is directed against the judgment and order dated 15-02-1991, passed by learned Sessions Judge, Pauri Garhwal, in Sessions Trial No. 13 of 1989, whereby the accused/Appellants Sarojani Devi and Madhwanand, are convicted u/s 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred as I.P.C.), for commission of murder of one Km. Kiran and u/s 304 Part II read with Section 34 I.P.C. (as well as u/s 314/34 I.P.C.) for causing death of Smt. Manju and u/s 201 read with Section 34 I.P.C. for causing disappearance of their bodies from the place of incident. Each one of the convicts is sentenced to imprisonment for life u/s 302 read with Section 34 I.P.C. to rigorous imprisonment for a period of ten years u/s 304 Part II read with Section 34 I.P.C. and rigorous imprisonment for a period of three years u/s 201 read with Section 34 I.P.C.

2. Heard learned Counsel for the parties and perused the lower court record.

3. Prosecution story, in brief is that accused/Appellant Madhwanand and Sarojani Devi are husband and wife, who were working as Ward Boy and Ward Ayah

respectively in District Government Hospital, Pauri. The used to live in the Government quarter, allotted to them in the campus of the hospital. Smt. Manju (one of the deceased), wife of Dharmendra Singh (P.W.15), had a pregnancy of five months. On 20-08-1988, she accompanied with her sister Km. Kiran (another deceased) went to the quarter of the accused/Appellants for the purposes of termination of pregnancy of Smt. Manju. According to the prosecution, accused/Appellants are not qualified to conduct the termination of five months pregnancy and yet they illegally tried to abort the foetus and consequently, in the process Smt. Manju died. Thereafter to conceal their crime, they throttled Km. Kiran (sister of Manju) and committed her murder. It is alleged by the prosecution that thereafter the two accused/Appellants threw the dead bodies in the night, down the road passing in front of their quarter. Complainant Narendra Singh Gussain (P.W.8) brother of the deceased, lodged First Information Report on 21-08-1988 with police station Pauri, stating that on 20-08-1988, when he came back to his house from his office at 6.00 p.m. he was told by his mother that Manju and Kiran, who had gone to hospital for some treatment had not returned back. On this, complainant made search for the two in both the hospitals (male and female) but he could not find his sisters on that day. On the next day in the morning, when he went in search of his sisters, he was told by minor daughter of accused/Appellants that Kiran along with another girl had come to their house on previous day but she (minor daughter of the accused /Appellants) had gone thereafter to her village. Thereafter complainant Narendra Singh Gussain, who was accompanied by his maternal uncle Jagdeep Singh Rawat (P.W.16) and uncle Puran Singh, enquired from accused/Appellant Sarojani Devi about the missing girls, who did not disclose about the whereabouts of the girls. Finally, the complainant along with his aforesaid two relatives found that in front of the staff quarters of the hospital there was crowd. When they asked about what had happened, it was told that dead bodies of two girls are lying down the road. Complainant found that the dead bodies were of his sisters. Suspecting commission of murder of the two, he lodged First Information Report (Ext. A-9) at 10:30 a.m. with the police station Pauri on the basis of which, check report (Ext. A-14) was prepared and necessary entry in the general diary at serial No. 16 was made, copy of which is Ext. A-15. Crime No. 42 of 1988, was registered u/s 302 I.P.C. against accused/Appellant Sarojani. The crime was investigated by Chetan Swaroop (P.W.17), Incharge Inspector of the Police, Station Pauri, who went to the spot and got prepared inquest report (Ext. A-3) of dead body of Smt. Manju and inquest report (Ext. A-4) of the dead body Km. Kiran. The police further got prepared sketch (Ext. A-20 and Ext. A-21) of the dead bodies. The dead bodies were sent for post mortem on the same day i.e. 21-08-1988. Autopsy was conducted on both the dead bodies by Dr. P.C. Fularia (P.W.1) and his two associates namely Dr. C.P. Dimri and Dr. R.K. Saxena, After post mortem examination the team of doctors prepared autopsy reports, Ext. A-1 relating to the post mortem examination of dead body of Smt. Manju and Ext. A-2 relating to post mortem examination of dead body of Kiran. The cause of death of Manju could not be ascertained by team of doctors but as to

death of Kiran, three doctors opined that she had died due to asphyxia as a result of strangulation. Investigating Officer interrogated the witnesses and prepared site plans (Ext. A-25 and Ext. A-26). After arrest of accused/Appellants, Sarojani Devi and Madhwanand, the police requested Shri Gaya Prasad, Sub-Divisional Magistrate (P.W.13) to record the confessional statement of the accused, who recorded the confessional statement of the accused/Appellants Madhwanand and Sarojani Devi (Ext. A-11 and Ext. A-12). The police during investigation found handkerchief (Ext. 1) of Kiran (deceased) from the house of the accused/Appellants and also recovered rope (Ext. 2) by which she was strangled. An identification was conducted of the recovered handkerchief by Shri H.S. Chaturvedi, another Sub-Divisional Magistrate (P.W.14). During investigation, the police recovered two scissors, two artery forceps, one used drip set, one sealed drip set, one sealed packet of copper T., two bottles of liquid paraffin, two used injections of phials of T.T., two injections of cintosin etc. along with aforementioned handkerchief in the presence of Dr. Rajiv Hatwal and pharmacist K.S. Rawat (P.W.3) and prepared memorandum Ext. A-6. After completion of the investigation, charge sheet (Ext. A-27) was filed by the Investigating Officer against both the accused Sarojani Devi and Madhwanand for their trial in respect of offences punishable under Sections 302 and 201 I.P.C.

4. Chief Judicial Magistrate, on receipt of charge sheet after giving necessary copies of the accused, as required u/s 207 Code of Criminal Procedure committed the case to the court of Sessions, for trial. Learned Sessions Judge after hearing parties framed charge of offences punishable u/s 302 read with Section 34 I.P.C. for commission of murder of Smt. Manju and Smt. Kiran and one punishable u/s 201 read with Section 34 I.P.C. to which the accused/Appellants pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W.1 Dr. P.C. Fuloria, who conducted post mortem examination along with other two doctors, P.W.2 Sushil Chandra, witness of the inquest report, P.W.3 Kirath Singh Rawat, Pharmacist in whose presence injections and drip sets etc. recovered from the house of the Appellants, P.W. 4 Madan Lal Baluni, another Pharmacist, who has produced the attendance register of the hospital staff, P.W.5 Laxmi Devi (hostile witness), P.W.6 Km. Hemanti (minor daughter of the accused/Appellants hostile witness), P.W.7 Dr. A. Saxena, who has told that accused/Appellants Sarojani took oral leave at about 5:00 p.m. from him from the hospital, P.W. 8 complainant Narendra Singh Gussain, brother of both the deceased, P.W.9 Lokmani Jakhmola, Photographer, P.W. 10 Sudhir Singh Gussain, who identified handkerchief of Kiran, recovered from the house of the accused/Appellants, P.W.11 Digvijay Singh Chauhan, witness of recovery of rope, P.W. 12 Virendra Singh (party hostile), P.W.13 Gaya Prasad (Extra Magistrate, who recorded "extrajudicial confession", P.W.14 H.S. Chaturvedi, Sub-Divisional Magistrate, who conducted identification proceedings of recovered handkerchief, P.W.15 Dharmendra Singh, husband of the deceased Manju, P.W.16 Jagdeep Singh Rawat, maternal uncle of the deceased and P.W.17 Inspector Chetan Swaroop (Investigating Officer). Oral and documentary evidence was put to the accused u/

s 313 Code of Criminal Procedure to which they alleged to be false. In defence, they got examined D.W.1 Jagmohan Singh. After hearing the parties, the trial court found both the accused guilty of charge of offences punishable u/s 302 read with 34 I.P.C. (for commission of murder of Kiran) and one punishable u/s 304 Part II, read with Section 34 I.P.C. (along with offence u/s 314/34 I.P.C.) for causing death of Smt. Manju and also relating to offence u/s 201 read with Section 34 I.P.C. for causing disappearance of dead bodies from the place of incident. After hearing on sentence, each of the convicts was sentenced to undergo imprisonment for life u/s 302 read with 34 I.P.C. rigorous imprisonment for a period of ten years u/s 304 read with Section 34 I.P.C. and rigorous imprisonment for a period of three years u/s 201 read with Section 34 I.P.C. Both the accused/Appellants preferred appeal against judgment and order dated 15-02-1991, passed by learned Sessions Judge, Pauri Garhwal in Sessions Trial No. 13 of 1989, on 19-2-1991, before Allahabad High Court where it was admitted on 20-02-1991. This appeal is received by transfer u/s 35 of U.P. Reorganisation Act, 2000, for its disposal.

5. Before further discussions, we think it just and proper to mention regarding what has been found in the post mortem examination report, which was conducted by team of doctors Dr. C.P. Dimri, Dr. R.K. Saxena and Dr. P.C. Fuloria. Ext. A-1 is the post mortem examination report, proved by P.W.1 Dr. P.C. Fuloria, which relates to dead body of Smt. Manju. As per the report, the lady was 24 years old. The dead body was 1 and 14 day old. No ante mortem injuries were found on her dead body. The team of doctors could not ascertain the cause of death. However, viscera was preserved. On internal examination of generating organs, the doctors found that on opening uterus, male foetus 24 cm in length, weight 380 grams with 5 hairs on scalp present, vernix, caseosa, present on the body. As to the condition of vagina, it is mentioned that vaginal orifice was found dilated. Blood present in the vagina. Rugose present in vaginal mucus. On opening uterus it is found containing intact membranes, amniotic fluid present.

6. As far as post mortem examination of deceased Kiran (aged 22 years) is concerned, the same is recorded by the aforesaid team of doctors in Ext. A-2, which is also proved by P.W.1 Dr. P.C. Fuloria. Said report discloses following ante mortem injuries on the body of Kiran at the time of post mortem examination:

1. Ligature mark is situated below the thyroid cartilage horizontal and in circles, the neck completely reddish brown in colour dry and hard. Margins of ligature mark are abraded at various places. Size 2.5 ? 28 cm. On dissection subcutaneous areolar tissue under ligature mark is ecchymosed. Few fibres of neck muscles under the ligature mark are ecchymosed.
2. Abrasion on the middle part of forehead 5cm above the bridge of nose 0.1cm ? 0.3cm, reddish brown in colour.
3. Linear oblique abrasion on right cheek 6cm ? 0.2cm reddish brown in colour, 2cm below the outer angle of right eye.

4. Abrasion on upper lip right side 1cm ? 0.8cm, 1 cm below nose.

On internal examination, the team of Medical Officers found that tongue of the deceased was swollen. Pleura, larynx, lungs, Gaul bladder and spleen were found congested. Medical Officer opined that cause of death of Km. Kiran was asphyxia as a result of strangulation.

7. It is case of circumstantial evidence and this Court has to see what are the circumstances and whether chain of circumstances is proved, showing only one probability that the accused/Appellants committed the offence for which they are convicted by the trial court. On examination of record, this Court found following circumstances proved on record:

1) It is not disputed that both the accused/Appellants Sarojani and her husband Madhwanand were Ward Ayah and Ward Boy, respectively in District Hospital Pauri on 20th of August, 1988, as the same is not only proved from the statements of the witnesses P.W.3 Kirat Singh Rawat, Pharmacist, P.W.4 Madan Lal Baluni, Pharmacist and P.W.7 Dr. A. Saxena but also from the replies given by the accused/Appellants u/s 313 Code of Criminal Procedure where they admitted having posted in District Hospital Pauri on aforesaid posts.

2) It is also proved on record not only from the statements of witness P.W.3 Kirat Singh Rawat, Pharmacist, but also from the replies of the statements given by the accused u/s 313 Code of Criminal Procedure that the accused used to live in the staff quarters in the campus of District Hospital, Pauri.

3) From the statement of P.W.3 Kirat Singh Rawat, Pharmacist and P.W.17 Inspector Chetan Swaroop read with memorandum Ext. A-6 it is proved that during investigation from the quarter of the accused/Appellants two scissors, two sealed autriphorseps, one drip set used, one drip set new, copper tea applicator, liquid Parafin, two bottles partly used, two injections T.T., one gloves and powder used in delivery, two injections of cintosin, three needles and one handkerchief of Kiran (deceased), were recovered.

4) P.W.15 Dharmendra Singh, husband of the deceased Manju, has proved that before his marriage with Manju, he was in love with her. He got married to her in June, 1988. Since Manju got pregnancy through him before marriage and due to fear of being lowered down in public opinion, he gave consent to his wife to abort the foetus, as delivery could have taken place much before nine months of the marriage.

5) It is also proved from the statement of P.W. 8 Narendra Singh Gussain, brother of the deceased that his sisters had gone on 20-08-1988, towards District Hospital as told by his mother and when they did not return, he went for search of them but they could not be traced.

6) P.W.8 complainant Narendra Singh Gussain, has further proved that on 21-08-1988, when he again went for search of his sisters Manju and Kiran with P.W. 16 Jagdeep Singh Rawat, near the hospital he saw the crowd and on enquiry

they came to know that two dead bodies are lying there. He identified the dead bodies of his sisters. Dead bodies were photographed on the request of police by a photographer P.W.9 Lokmani Jakhmola.

7) Both P.W.8 Narendra Singh Gussain and P.W. 16 Jagdeep Singh Rawat, while searching for Manju and Kiran on 21-08-1988, met accused/Appellants minor daughter, who told that Kiran had come along with another girl in their house on previous day.

8) Post Mortem Examination reports (Ext. A-1 and Ext. A-2) conducted by team of doctors, proved by P.W.1 Dr. P.C. Fuloria, shows that though the cause of death of Smt. Manju could not be ascertained but foetus was found in her uterus and as to Kiran she was found to have died by asphyxia as a result of strangulation.

9) Statement of P.W. 10 Sudhir Singh Gussain and P.W. 14 H.S. Chaturvedi, Sub-Divisional Magistrate, who conducted identification of the property proves that the handkerchief (which was recovered from quarter of accused/Appellants as mentioned in Ext. A-6) was found belonging to Kiran (deceased).

10) P.W.7 Dr. A. Saxena, has stated that on 20-08-1988, accused/Appellant Sarojani Devi, who came for duty at 5:00 p.m. took oral leave from him. His statement is corroborated by endorsement made in the attendance register, copy of which is Ext. A-8.

11) P.W. 11 Digvijay Singh Chauhan, has proved that on 23-08-1988, on pointing out of accused/Appellant Madhwanand, a rope (Ext. 26) was recovered by the police and memorandum Ext. A-10 was prepared. P.W. 17 Inspector Chetan Swaroop, Investigating Officer, corroborated that the rope (Ext. 26), used in the crime was recovered on pointing out of the accused in respect of which memorandum (Ext.A-10) was prepared.

12) According to medical jurisprudence in the cases of criminal abortion, vagina gets dilated with signs of bloody discharge. The said symptoms were also found by P.W.1 P.C. Fuloria, which are mentioned in his post mortem examination report (Ext. A-1).

8. From the above circumstances, which are proved on record, we are satisfied that chain of circumstances against the accused/Appellants is complete to establish the prosecution story that Smt. Manju, who had five months pregnancy, accompanied with her sister Kiran, went to get the foetus aborted to the quarter of accused/Appellants Sarojani and Madhwanand, where death of Manju was caused by an act done by them with intent to cause miscarriage and thereafter they committed murder of Kiran probably due to the fear that she could report to the police and thereafter they threw dead bodies sometime in the night across the road passing in front of their quarters near the trees/bushes to conceal the crime committed by them.

9. Shri U.P.S. Negi, learned Counsel for the accused/Appellants argued that there

are several quarters in the campus of the hospital and as such, it cannot be said that who had committed murder and thrown the dead bodies. We are unable to accept the argument of learned Counsel for the Appellants for not only the drips and injections were found from the house of the accused/Appellants, which are used in delivery and terminating the pregnancy but also handkerchief of Kiran was found there. Not only this, as discussed above, P.W.8 complainant Narendra Singh Gussain and P.W. 16 Jagdeep Singh Rawat has stated before the court that on 21-08-1988 i.e. the next day before they could reach the dead bodies, daughter of accused/Appellants on enquiry confirmed that Kiran along with one girl had come to her parents house. Though P.W.6 Km. Hemanti, minor daughter of the accused/Appellants has not supported the prosecution story and was declared hostile, but it can very easily gathered that since her evidence would get her parents convicted, as such, she could not dare to adduce evidence against them.

10. P.W. 13 Gaya Prasad, Executive Magistrate, has stated that he recorded "extra judicial confession" of both the accused/Appellants, which are proved as Ext. A-11, made by accused Madhawanand, Ext. A-12 made by accused Sarojani Devi. However, on cross examination, this witness has admitted that statement was recorded at police station. Compliance of provision, required u/s 164 Code of Criminal Procedure is also not made by the Magistrate before recording the statement. Whether such statement made to the Magistrate can be accepted as extrajudicial confession or not was discussed in Rishi and Anr. v. State of Bihar AIR 1955 Patna 425 in which it was held that such statement cannot be used as extra judicial confession either. The trial court has not relied on the extrajudicial confession. We are of the view that since the statements Ext. A-11 and Ext. A-12, were recorded at police station when the accused were in the custody of police, as such, the trial court rightly did not rely on said submission. We agree with the trial court that even after ignoring "extra judicial confession" made by the accused/Appellants, from the circumstantial evidence discussed above, the prosecution has been successful in proving the charge of offences punishable u/s 302 read with 34 I.P.C. (in commission of murder of Km. Kiran) and u/s 314 I.P.C. for causing death of Manju by an act with intent to cause miscarriage and u/s 201 read with Section 34 I.P.C. i.e. causing disappearance of the dead bodies from the place of incident where the murder was committed and by throwing them across the road near the trees.

11. On behalf of the defence, story is set up that accused/Appellants had gone in the evening on 20-08-1988 to see one of their relatives in the hospital in connection to which D.W. 1 Jagmohan Singh was produced to prove registration of the out-door patient on that day. But said defence story does not appear to be reliable as no relative or member of patients' family is produced to corroborate this fact. The contention of learned Counsel for the Appellants that the offence punishable u/s 201 I.P.C. is not acceptable that the dead bodies were not caused to be disappeared rather they were thrown down on the road. In our opinion "disappearance" does not necessarily mean that the dead bodies are concealed

by digging a pit and burying them or not to make them identifiable. If an accused makes the evidence disappear in such manner that the accused/Appellant may escape from the punishment that also amounts to causing disappearance of evidence even if the dead bodies are thrown in a public place or river or on the road.

12. Learned Counsel for the accused/Appellants drew attention of this Court to principle of law laid down in *Devinder Singh and Ors. v. State of Himachal Pradesh* 2004 Supreme Court Cases (Cri) 185 and argued that since it is not pointed out by the witnesses what was the identification mark on the handkerchief recovered from the house of the Appellants, as such, the identification evidence cannot be relied. In our opinion had the accused in their reply u/s 313 Code of Criminal Procedure claimed that the handkerchief shown to have been recovered from their house, belonged to them, or to some one else, it could have been said that want of identification mark on the handkerchief does not constitute circumstance indicating at accused and the identification evidence is doubtful but that is not the case. Reliance on behalf of accused/Appellants is also placed to the cases of *Bodhraj and Ors. v. State of Jammu and Kashmir* (2002) 8 Supreme Court Cases 45, *Ishwar Singh v. State* AIR 1976 Supreme Court 2423 and *Kartarey and Ors. v. State of U.P.* AIR 1976 Supreme Court 76 and it is argued that it must be established that the weapon recovered at the pointing out of the accused/Appellant was used in the crime. We have gone through the aforesaid judgments. The facts of the cases referred are different to the facts and circumstances of this case. Here no weapon has been used for commission of murder of Kiran. The rope, which is said to have been recovered at the pointing out of accused/Appellant Madhwanand, mentioned in the memorandum (Ext. A-10) if read with the statement of P.W. 17 Inspector Chetan Swaroop, establishes that the rope (Ext. 26) used in commission of murder of Kiran was thrown by him at the place from where it was recovered.

13. Lastly, the reference on behalf of the accused/Appellants was made to the principle of law laid down in *State of Goa v. Sanjay Thakran and Anr.* (2007) 3 Supreme Court Cases 755 and *Sharad v. State of Maharashtra* AIR 1984 Supreme Court 1622 and it is contended that suspicion how-so-ever strong is not substitute for proof and as such in the cases of circumstantial evidence the conviction should not be recorded merely on the basis of suspicion. We agree with the principle of law laid down by the Apex Court but in the present case having gone through the evidence on record, we are of the firm view that it is established from beyond reasonable doubt from the circumstantial evidence, discussed above that it is only and only accused/Appellants Madhwanand and Sarojani, who with common intention firstly caused death of Manju by an act done with intent to cause miscarriage (punishable u/s 314 I.P.C.) and after her death due to fear of being apprehended as Kiran (sister of Manju) was present there, they committed murder (punishable u/s 302 I.P.C.) of Kiran by strangulation. It is also established on record thereafter they threw two dead bodies sometime in the night intervening 20-21st August 1988, in an attempt to

escape the punishment of the offence committed by them and thereby committed yet another offence punishable u/s 201 read with Section 34 I.P.C.

14. For the reasons as discussed above, this appeal is liable to be dismissed with the partial modification that instead of sentence awarded u/s 304 I.P.C. accused/Appellants are liable to undergo sentence u/s 314 I.P.C. read with Section 34 I.P.C. for causing death of Manju. It is pertinent to mention here that trial court has already convicted the accused/Appellants u/s 314 read with Section 34 I.P.C. As far as conviction and sentence awarded by the trial court u/s 302 read with Section 34 I.P.C. and one punishable u/s 201 I.P.C. read with Section 34 I.P.C. are concerned the same does not need any interference by this Court. Therefore, the appeal is dismissed to the extent conviction and sentences recorded by the trial court against the accused/Appellants in respect of offences punishable u/s 302 read with Section 34 I.P.C. (for commission of murder of Kiran) and the one punishable u/s 201 read with Section 34 I.P.C. However, instead of conviction and sentence u/s 304 read with Section 34 I.P.C. (for causing death of Smt. Manju), each one of the accused/Appellants convicted u/s 314 read with Section 34 I.P.C. and sentenced to undergo rigorous imprisonment for a period of five years. With this modification, the appeal stands dismissed. All the sentences shall run concurrently. Accused/Appellants are on bail. Their bail is cancelled. Lower court record be sent back to the trial court (Sessions Judge, Pauri) to make the accused/Appellants serve out the sentences, awarded against them.