
(2015) 09 SHI CK 0086
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 494 of 2008

State of Himachal Pradesh

APPELLANT

Vs

Gaurav Sharma and Others

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 417, 418, 423
Penal Code, 1860 (IPC) — Section 201, 302, 323, 34, 364

Citation : (2015) 3 ShimLC 1579 : (2015) 3 ShimLC 1448

Hon'ble Judges : Sanjay Karol, J; Piar Singh Rana, J

Bench : Division Bench

Advocate : Ashok Chaudhary, V.S. Chauhan, Additional Advocates General and J.S. Guleria, Assistant Advocate General, for the Appellant; Jagdish Vats, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Sanjay Karol, J—State has appealed against the judgment dated 24.4.2008 of the Additional Sessions Judge, Sirmaur District at Nahan, Himachal Pradesh, passed in Sessions Trial No. 13-N/7 of 2006, titled as State of Himachal Pradesh v. Gaurav Sharma & others, challenging the acquittal of respondents Gaurav Sharma, Abhishek Sharma and Pardeep Kumar, hereinafter referred to as the accused) of the offences, punishable under the provisions of Sections 302, 364, 323, 201/34 of the Indian Penal Code.

2. It is the case of prosecution that on 9.3.2006, Shri Laik Ram (PW-24), the then Tehsildar Rajgarh, gave information to the police of a dead body lying at a place known as Salech Kainchi. SI Shyam Lal (PW-13) alongwith HC Kuldeep Kumar (PW-25) and Constable Bhupender Singh (PW-17) went to the spot. Dead body was lying approximately 60 metres below the road in the Khad. Shri Shyam Singh (PW-1), who happened to be present on the spot, informed the police that previous evening, deceased had visited his Dhaba. Accordingly, statement of Shri Shyam Singh (Ex. PW-1/A) was reduced into writing and through Constable

Bhupender Singh sent to Police Station, Rajgarh, on the basis of which, FIR No. 17/06, dated 9.3.2006, for commission of offences, under the provisions of Sections 302, 384, 364, 323, 201, 34 of the Indian Penal Code, was registered. HC Kuldeep Kumar (PW-25) took the dead body to the hospital for postmortem, which was conducted by Dr. R.K. Gupta (PW-26) on 10.3.2006. Shri Sanjeev Kumar (PW-28) identified the dead body to be that of his brother (Rajesh Kumar). Accordingly, dead body was handed over for cremation. On 9.3.2006 itself, SI Chain Ram (PW-33) took over the investigation and arrested accused Gaurav Sharma on 10.3.2006. First Test Identification Report was conducted on 18.3.2006.

3. During investigation, accused Gaurav Sharma, disclosed that he alongwith the other accused persons had scuffled with the deceased and then thrown him below a Dhaank. Accordingly, accused Abhishek and Pardeep Kumar were also arrested. They made disclosure statements Ex. PW-1/B (accused Gaurav Sharma) and Ex. PW-13/B & Ex. PW-13/C (accused Pardeep Kumar), which led to identification of the spot, where they had consumed food, liquor, had altercation with the deceased; and thrown him below the "Dhaank" (cliff). Pursuant to disclosure statements, accused got recovered incriminating articles.

4. Investigation revealed that on 8.3.2006, in the presence of Shri Sanjeev Kumar (PW-28), all the accused had visited the house of the deceased. Thereafter, they together went in a Van. During the day they visited the Dhabas of Shri Shyam Singh (PW-1), Shri Kanwar Singh (PW-4) and Shri Durga Singh (PW-7), where they consumed food and alcohol. Accused not only refused to pay money but threatened and intimidated the owners of the Dhabas. In fact, they kidnapped Shri Shyam Singh and his servant Shri Attar Singh (PW-3); gave them beatings and threw the mobile phone of Shri Shyam Singh. Thereafter, they threw the deceased from the "Dhaank" and resultant injuries led to his death.

5. With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

6. Accused were charged for having committed offences punishable under the provisions of Sections 364, 302, 323, 392, read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

7. In order to establish its case, prosecution examined as many as 33 witnesses and statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which they took the following defence:

Accused Gaurav Sharma

"I am innocent and I have been falsely implicated. I never drove vehicle No. HP-14-7517 nor I know driving of car etc. I was picked up on the night of 9th March, 2006 and was given beatings by the police. I was shown to PWs Shayam Singh, Kanwar Singh, Attar Singh in the police Station by the SHO. The witnesses

informed the SHO that I was not the person who visited the Dhaba but the police forced the witnesses to identify me before the Magistrate. I told the Magistrate also that I was shown by the police to the witnesses. As I was tortured by the police to admit for identification. So under the pressure of the police I made the statement. I put my signatures on various memos as I was forced by the police to do so. I was never taken to any place for any such identification. One Prem Bahadur was plying the said vehicle under my father. I had no connection with the vehicle."

Accused Abhishek

"I am innocent. I do not know the deceased. I have no connection with the other accused. After arrest I was tortured by the police and my signatures on various memos were obtained under pressure. I did not commit the offence and false case has been planted on me."

Accused Pardeep Kumar

"I am innocent after my arrest I was given beating and my one vein of left hand started bleeding and my clothes and shows were smeared with blood and I was treated in the Rajgarh Hospital. The police obtained my signatures on various memos under pressure. I did not commit the offence and false case has been planted on me."

8. Based on the testimonies of the witnesses and the material on record, trial Court acquitted all the accused of the charged offences. Hence, the present appeal by the State.

9. It be observed that accused Abhishek has since died. Hence, appeal qua him already stands abated.

10. We have heard Mr. Ashok Chaudhary, Mr. V.S. Chauhan, learned Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General, on behalf of the State as also Mr. Jagdish Vats, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

11. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

12. In *Prandas Vs. The State*, AIR 1954 SC 36 , Constitution Bench of the apex

Court, has held as under:

"(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in - "Sheo Swarup and Others vs. The King-EmperorAIR 1934 227 (Privy Council) , in these words:

"Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

13. It is not in dispute that there is no eye witness to occurrence of the incident. Prosecution case rests purely on circumstantial evidence. In Para-17 of the judgment, trial Court has culled out 15 circumstances.

14. Cumulatively put, prosecution refers to three circumstances: (i) deceased left his house in the company of the accused and was also lastly seen with them; (ii) disclosure statements made by the accused, which led to recovery of incriminating articles; and (iii) recovery of dead body.

15. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the

circumstantial evidence. [See: Pudhu Raja and Another Vs. State, rep. by Inspector of Police, (2012) 4 JCC 2751 : (2012) 9 JT 252 : (2012) 9 SCALE 177 : (2012) 11 SCC 196 ; Madhu Vs. State of Kerala, AIR 2012 SC 664 : (2012) CriLJ 1230 : (2012) 1 Crimes 148 : (2012) 1 JCC 620 : (2012) 1 JT 181 : (2012) 1 SCALE 226 : (2012) 2 SCC 399 : (2012) AIRSCW 782 : (2012) 1 Supreme 342 ; Dilip Singh Moti Singh Vs. State of Gujarat, (2002) 8 JT 497 , Mulakh Raj, etc. Vs. Satish Kumar and others, AIR 1992 SC 1175 : (1992) CriLJ 1529 : (1992) 2 Crimes 130 : (1992) 2 JT 554 : (1992) 1 SCALE 804 : (1992) 3 SCC 43 : (1992) 2 SCR 484 ; and Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88 .].

16. Also, apex Court in Padala Veera Reddy Vs. State of Andhra Pradesh and others, AIR 1990 SC 79 : (1989) 4 JT 223 : (1989) 2 SCALE 906 : (1989) 2 SCC 706 Supp : (1990) 1 UJ 137 , Court held that when a case rests upon circumstantial evidence, following tests must be satisfied:

"(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; and

(4) 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 and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(Also see: Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, AIR 2006 SC 1656 : (2006) 4 JT 16 : (2006) 3 SCALE 452 : (2006) 10 SCC 172 : (2006) AIRSCW 1602 : (2006) 3 Supreme 175 ; Balwinder Singh Vs. State of Punjab, AIR 1996 SC 607 : AIR 1995 SC 607 : (1996) CriLJ 883 : (1995) 8 JT 81 : (1995) 6 SCALE 261 : (1995) 4 SCC 259 Supp : (1995) 5 SCR 10 Supp ; and Harishchandra Ladaku Thange Vs. State of Maharashtra, AIR 2007 SC 2957 : (2007) 10 JT 496 : (2007) 10 SCALE 464 : (2007) 11 SCC 436 : (2007) 9 SCR 562 : (2007) AIRSCW 6247 : (2007) AIRSCW 5394 : (2007) 6 Supreme 232).

17. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

18. The apex Court in State of U.P. Vs. Ashok Kumar Srivastava, AIR 1992 SC 840 : (1992) 1 Crimes 576 : (1992) 1 JT 340 : (1992) 1 SCALE 149 : (1992) 2

SCC 86 : (1992) 1 SCR 37 , while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilty of the accused.

19. In the instant case, no motive has been ascribed to the accused for killing the deceased. Since 8.3.2006, deceased was found missing from his house and yet no report was lodged by anyone. It is also a matter of record that except for one, all the independent witnesses have not supported the prosecution. They were declared hostile and despite their extensive cross-examination, nothing fruitful could be elicited from their testimonies.

20. Factum of recovery and identification of dead body is not seriously disputed before us. In any event, it stands established through the testimonies of Constable Bhupender Singh, HC Kuldeep Kumar, Shri Sanjeev Kumar, SI Shayam Lal and SI Chain Ram.

21. Dr. R.K. Gupta (PW-26), who conducted the post-mortem, found following injuries on the dead body:

"1. There was lacerated wound 5 cm x 1 cm, vertically placed in the occipital region in the center. Wound was ante mortem and bone deep. There was fracture of the underlying bone.

2. Ante mortem abrasion 5 cm. X 4 cm. on the frontal bone just above the right eyebrow.

3. Ante mortem abrasions 5 cm. X 4 cm. on the frontal bone just above the left eyebrow.

4. There were multiple abrasions over the chest and back, both arms and forearms, abdomen (front and back), both legs and thighs. They were of different size varying from 1 cm. X 1 cm to 8 cm X 3 cm. They were vertically, horizontally and obliquely placed and were ante mortem in nature."

22. As per the post-mortem report (Ex. PW-16/A) and version of the doctor, deceased, who had consumed alcohol, died as a result of head injuries, which could also be sustained by fall. Thus, it stands established that at the time of occurrence of death, deceased was under the influence of alcohol.

23. To establish that an altercation took place between accused Gaurav Sharma, Shri Shayam Singh (PW-1) and the deceased, prosecution seeks reliance upon the testimony of Dr. Yashwant Singh (PW-27), who examined accused Gaurav Sharma and Dr. Vikash Fotedar (PW-30), who examined Shri Shayam Singh. Now, Shayam Singh does not state that he received the injuries on account of any alleged scuffle, which took place, either with the deceased or the accused. He took a defence that during interrogation, police gave him beatings. Dr. Yashwant Singh admits injuries found on the body of accused Gaurav Sharma

could have been inflicted by blows.

24. On the circumstance of last seen, we find Shri Sanjeev Kumar to have deposed that on 8.3.2006, in the morning, accused came to his house and the deceased left in their company. It is only on 10.3.2006 that he learnt about the death of his brother and identified the dead body. We do not find his version to be inspiring in confidence, for there are embellishments, exaggerations and improvements.

25. His version of having travelled alongwith the accused and the deceased is not so recorded in his previous statement, with which he was confronted. Similarly, his version of having visited the school to drop his children is not so recorded therein. Crucially, he admits that despite his brother not returning home on 8.3.2006, he never lodged any report with the police or reported the matter to anyone. Why so? he does not state. After all, he could have made enquiries from the accused, which is not his case. He also does not state whether his brother was to go with the accused. He admits his "Bhabi" Smt. Lata to have been present in the house at the relevant time. Significantly, she has not been examined in Court.

26. It be also observed that statement of this witness was recorded by the police only on 21.5.2006. Why so? remains unexplained. Now, if the statement was recorded on 21.5.2006, then on what basis did the police arrest the accused.

27. In continuation of this circumstance, prosecution wants the Court to believe that the accused went to the Dhabas of Shri Shayam Singh, Shri Kanwar Singh and Shri Durga Singh. Now, incidentally all the witnesses, who noticed the accused and the deceased together, where allegedly they together consumed food and alcohol or abducted Shri Shayam Singh and Shri Attar Singh have not supported the prosecution case at all.

28. Testimonies of Shri Shayam Singh, Shri Kanwar Singh, and Shri Durga Singh are evidently clear on this aspect. The witnesses, in one voice, have deposed that neither could they identify the accused to be the person who allegedly consumed food at their Dhabas nor were they witnesses to any fight/quarrel.

29. Thus, the circumstance of last seen cannot be said to have been proved by the prosecution.

30. It be only observed that police did not register the FIR on the information furnished by the Tehsildar, who first saw the dead body. Why so? has not been explained. Prosecution version of Shri Shayam Singh (PW-1), being present at the time of recovery of dead body and getting his statement (Ex. PW-1/A) recorded, is absolutely uninspiring in confidence. Shri Shayam Singh denies having made any such statement to the police. That apart, he had no reason to be present at the place where the dead body was found, for the spot was not in his neighbourhood. He hails from village Khathani, whereas dead body was recovered from a place known as Salech Kainchi. Also, it has not come on record

as to how Shri Sanjeev Kumar learnt about the death of his brother, for SI Shayam Lal (PW-31) does not state that after making enquiries, he reached the house of the deceased.

31. SI Chain Ram arrested accused Gaurav Sharma, on the statement of Shri Shayam Singh (PW-1), which stands denied by the witness. That apart, Test Identification Parade conducted by Shri Hoshiar Singh Verma (PW-32) would in no manner advance the case of the prosecution. Even if the accused were got identified, still there is nothing incriminating or inculpatory against them. Police was already aware of the place from where the dead body was recovered and confessional statements so made to the Police Officer are inadmissible in law.

32. Insofar as role ascribed to accused Pardeep Singh is concerned, it be only observed that the factum of disclosure statement leading to recovery of incriminating articles, stands denied both by Shri Ram Lal (PW-13) and Shri Kulbhushan Sood. Same is the case of alleged disclosure statement made by accused Abhishek, in the presence of HC Arjun Singh and Shri Madan Thakur, who denied having witnessed any disclosure statement, leading to recovery of the incriminating articles. Recovered articles being clothes and apparels are also not linked either to the assailants or to the victim.

33. Even link evidence, i.e. reports of the experts (Ex. PY & PZ), do not establish the blood group found on the clothes of the deceased to be that of the assailants or on the clothes of the assailants to be that of the deceased.

34. Through the testimony of Chowkidar Shri Neeta Ram (PW-8), prosecution wants the Court to believe that after abducting Shayam Singh and Attar Singh, alongwith the deceased, accused went in a vehicle, which was to pass through the Forest Check Post. Shri Neeta Ram saw the vehicle and since the barrier was closed, accused turned it and drove away. However, such fact cannot be said to have been proved on record, for Shri Neeta Ram only states that telephonically, he received information from Shri Kanwar Singh of one Utility Vehicle No. HP-14-7517 coming towards Giripul side. The occupants of the vehicle had given beatings to Shri Shayam Singh and taken away his mobile phone. But then the witness states that he could not identify or see the persons, sitting in the vehicle. He could not note the number of the vehicle. He does not state that the vehicle was of "Utility" make. He admits that it was pitch dark at that time.

35. On the question of recovery of mobile phone of Shri Shayam Singh, allegedly taken away by the accused, we find that independent witness Shri Mukesh Sharma (PW-16) has not supported the prosecution case.

36. Thus, from the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offences, they stood charged for. The circumstances cannot be said to have been proven by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. the

guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating guilt of the accused and no other hypothesis other than the same.

37. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that on 8.3.2006, the accused persons, in furtherance of their common intention, abducted Shri Attar Singh and Shri Shayam Singh and during night time at a place known as Salech Kainchi, caused murder of the deceased; caused simple hurt to Shri Attar Singh and Shri Shayam Singh; and also committed robbery of mobile phone, belonging to Shri Shayam Singh.

38. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

39. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Md. Ankoos and Others Vs. The Public Prosecutor, High Court of A.P.*, AIR 2010 SC 566 : (2010) CLT 222 : (2010) CriLJ 861 : (2009) 14 JT 6 : (2009) 13 SCALE 584 : (2010) 1 SCC 94 : (2009) 15 SCR 616 : (2009) 10 UJ 4781 , it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.