

HIGH COURT OF MADHYA PRADESH AT JABALPUR**CRA No. 1158/1994****Iqbal****Vs.****State of Madhya Pradesh****Present : Hon'ble Shri Justice S.K.Seth, Judge
Hon'ble Smt. Justice Anjuli Palo, Judge**

Shri Ajay Tamrakar, Advocate for the appellant.
Shri S.K.Rai, Government Advocate for the respondents/State.

Whether approved for reporting : **Yes / ~~No~~**

Law laid down :- Conviction can be based on circumstantial evidence including 'last seen together' theory.

Significant Paragraphs : - 17, 18

JUDGMENT
(21/09/2017)**Per : Smt. Anjuli Palo, J :-**

1. This appeal has been preferred by the appellant-accused challenging the judgment dated 16.09.1994, passed by VII Additional Sessions Judge, Jabalpur in S.T. No. 213/1991, whereby the appellant/accused has been convicted under Section 302 of Indian Penal Code and sentenced to life imprisonment and fine of Rs. 100/- with default stipulations.

2. It is not in dispute that the appellant-accused and the

deceased Nayeem resided in the same locality.

3. The case of the prosecution is that deceased Nayeem (11-12 years old) was the younger brother of Kausarjahan. A proposal from the appellant-accused to marry Kausarjahan was rejected by her father Nizamuddin (complainant), due to which the appellant-accused threatened them to kill her family members. Thereafter, Panchayat was called to advice and warn the appellant/accused. On 12.03.1994, Nayeem went missing. He did not return from his work place. On the next day his dead body was found on a hill. Someone had seen the deceased going towards the hill along with appellant-accused. After investigation, it was found that the appellant-accused had killed Nayeem for not allowing him to marrying Kausarjahan. Offence was registered against the appellant-accused under Section 302 of IPC. Charge-sheet was filed before the concerned Court. The case was committed to the Trial Court.

4. The Learned Trial Court framed charge under Section 302 of IPC against the appellant. Appellant-accused abjured guilt and stated that he has been falsely implicated in the case. No defence witness has been examined. After appreciation of the prosecution evidence, learned Trial Court found that the incident was not seen by any eye-witness. It was established that the proposal for marriage of appellant with the sister of

the deceased was refused by their father. The appellant-accused had abused and threatened to kill the deceased and his family members. Panchayat was called in this regard.

5. Learned Trial Court found that the deceased was lastly seen with the appellant-accused. The appellant-accused was unable to give any explanation as to what happened thereafter with the deceased. Anwar Khan (PW-5) and Rakesh (PW-18) had seen the appellant-accused with the deceased going towards the spot where body of the deceased was found. An *ustra* (razor-knife) used for killing the deceased was seized from the possession of the appellant. After relying upon the oral evidence of prosecution witness, which was corroborated by the medical evidence of Dr. D.K.Sakalle (PW-16), the Trial Court held the appellant guilty for committing murder of deceased Nayeem and convicted him under Section 302 of IPC as aforementioned.

6. Findings of the learned Trial Court has been challenged by the appellant-accused on the ground that findings of the Trial Court are based on presumptions and suspicion because his marriage proposal was refused by the father of the deceased. Learned Trial Court wrongly believed the prosecution evidence of Anwar Khan (PW-5). No eye witness has been produced by the prosecution. Further, the seizure of

ustra from the possession of the appellant-accused is not sufficient to connect him with the crime because no human blood was found on it. The appellant-accused has prayed to set aside the impugned judgment and acquit him from the charge for offence under Section 302 of IPC.

7. It is not in dispute that the proposal from the appellant-accused to marry Kausarjahan (sister of the deceased) was refused by her father Nizamuddin (PW-1). This fact was not challenged by learned counsel for the appellant in cross-examination of Nizamuddin (PW-1), his wife Akhtar Bi (PW-2) and Kasaurjahan (PW-3). The fact that due to refusal from the parents of Kasaurjahan, the appellant was annoyed and had threatened to kill them is also not rebutted. Halim (PW-4), elder brother of Kausarjahan (PW-3) has stated that one month prior to the incident, appellant-accused had obstructed his way and told him that if his marriage is not performed with Kausarjahan, he will do anything. This fact is not mentioned in his police statement (Exh.D-2). But this does not make his testimony doubtful. The statement of all prosecution witnesses established the motive of the appellant to kill the deceased Nayeem. All above facts involved the appellant-accused with the crime.

8. Nizamuddin (PW-1), his wife Akhtar Bi (PW-2),

Kasaurjahan (PW-3), Mubarak Shah (PW-6), Abdul Aziz (PW-7), China Kabbal (PW-8) and Wahid (PW-9) all corroborated the testimony of each other with regard to holding of panchayat for the appellant-accused and Nizamuddin as the appellant-accused had continuously threatened the family members of Nizamuddin for refusing his marriage proposal to Kausarjahan. It is also proved that Nizamuddin (PW-1) had intimated this fact to the respectable members of his community. The members of Panchayat also stated that neither the appellant attended the Panchayat nor did he take the advice.

9. Anwar Khan (PW-5) and Rakesh (PW-18) are the important witnesses with regard to 'last seen together' theory. They have unshakenly stated against the appellant that on the date of incident at about 6-7 pm, they saw Nayeem going with the appellant towards Fakirchand Akhada. On the next day his body was found behind the Fakirchand Akhada. Anwar Khan and Rakesh did not have any intent or enmity so as to falsely implicate the appellant-accused with the murder of the deceased. In the cross-examination, they strongly denied the suggestion of the defence counsel that they did not see Nayeem with the appellant. Only for the reason that the police recorded their statement after sometime, their testimony cannot be

disbelieved.

10. R.S.Choudhary (PW-17) went to the spot on 13.03.1991 and prepared the panchayatnama (Exh. P/3) of the body of the deceased Nayeem. He recorded *Dehati Nalishi* (Exh. P/7) on the spot in which the father of the deceased Nizamuddin informed the police the same incident about refusal of the marriage proposal of the appellant-accused for his daughter Kausarjahan due to which the appellant-accused had enmity with them.

11. Similarly, FIR (Exh. P/8) was registered against the appellant. The dead body of Nayeem was found on a hill behind Fakirchand Akhada which established that testimony of Anwar Khan (PW-5) and Rakesh (PW-18) is wholly reliable. Their testimony is also unchallenged and unrebutted. Therefore, the last seen theory is also established against the appellant-accused. The deceased Nayeem was lastly seen with the appellant-accused by the aforesaid two witnesses but the appellant-accused failed to provide any explanation in that regard.

12. The memorandum of the appellant was recorded by Yogendra Pal Singh, Investigation Officer (PW-10). An *ustra* (razor-knife) and clothes of the appellant were also seized by

the Investigation Officer in the presence of Komal (PW-11). He admitted his signature on the memorandum (Exh. P/1), seizure memo (Exh. P/2) but denied the proceeding hence, testimony of Yogendra Pal Singh (PW-10) is not supported by *panch* witness. We find that even then, the proceeding of Investigation Officer is found reliable. Nowadays, it is common tendency of the witnesses to not support the prosecution case due to fear of the accused or sometimes gained over by the accused.

13. In case of **Ramesh and Ors. v/s State of Haryana [2017 Cri.L.J.352]**, the Hon'ble Supreme Court has held that the trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations. The following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile :

- (i) Threat/intimidation
- (ii) Inducement by various means
- (iii) Use of muscle and money power by the accused
- (iv) Use of Stock witnesses
- (v) Protracted Trials

14. The police witness Yogendra Pal Singh (PW-10) has no enmity with the appellant-accused. He has honestly performed his duty.

15. Dr. D.K.Sakalle (PW-16) conducted the postmortem on the body of the deceased. He had made the following observations:

- (1) Incised wound on the left side of the chest parallel to the 9th rib of size 11x4x0.5 cms.
- (2) Incised wound on the left side of the chin of size 14x4x0.5 cms.
- (3) Incised wound of size 11x1.5x0.75 cms on the right side of the stomach 4 cm above the chin.
- (4) Incised wound on the right side of the chest parallel to 6th rib of size 4x1x0.5 cms.
- (5) Incised wound of size 4x2x1.5 cms on the back side of right arm.
- (6) Incised wound of size 14 cms. long and 3 cms. deep horizontally on the front side of the neck, 4 cms below the chin due to which the blood vessels were cut.

16. Dr. D.K.Sakalle (PW-16) opined that these were fresh injuries with bleeding caused by sharp edge knife. The deceased Nayeem died due to shock as a result of fatal injury over his neck. He clearly opined that such injury is sufficient to cause death and homicidal in nature. His testimony is not challenged by learned counsel for the appellant in cross-examination, which established that the appellant intentionally caused death of the deceased by causing several injuries over his body including vital part of his neck which proved fatal for

his life.

17. In case of **Vivek Kalra Vs. State of Rajasthan [(2014) 12 SCC 439]**, in similar circumstances, on last seen evidence and chain of circumstances fully established by prosecution, it is held that:

“The accused alone committed offences. Appellant came and took the deceased with him saying that they will come back after getting a cassette. But neither appellant nor deceased returned on the said evening. Dead body of A was found next morning. PW 28 confirmed that appellant came to his shop and took the cassette. Bloodstained dantli recovered from place of occurrence. Blacksmith, PW 13 confirmed that he had sold that particular dantli to appellant. Motive of revenge alleged. Held, although motive was not established sufficiently, but chain of circumstances established beyond reasonable doubt that it was the accused and accused alone who committed the offence.”

18. In view of the above discussion, we come to the conclusion that the following circumstances are properly established against the appellant-accused by the prosecution evidence:

- (i) He had annoyance and motive to kill the complainant Nizamuddin and his family members.
- (ii) Prior to the incident, the appellant-accused had on many occasions threatened to kill Nizamuddin and his family members. This fact was also brought to the notice of respectable members of their community and a Panchayat was also called in that regard.
- (iii) Deceased Nayeem was lastly seen with the appellant-accused by two independent witnesses.
- (iv) After the incident, an *ustra* with blood stains used for committing the murder of the deceased was recovered from the custody of the appellant.

19. Therefore, the learned Trial Court rightly found the appellant-accused guilty for committing the murder of Nayeem.

20. In case of **Badan Singh vs. State of MP [AIR 2004 SC 26]**, the Hon'ble Supreme Court has held that, High Court being the final Court of fact should critically scrutinize the evidence in some detail. It is duty of the Appellate Court to marshal and review the entire evidence on record.

21. We are satisfied that the view of the Court below is clearly reasonable. There is substantial and compelling reasons to rely upon the prosecution evidence. Accordingly, this appeal is dismissed.

22. The appellant is on bail. His bail bond is canceled and he is directed to surrender immediately before the Trial Court to undergo the remaining sentence, failing which the trial Court shall take appropriate action under intimation to the registry.

23. Copy of this judgment along with record be sent to the Trial Court for information and compliance.

(S.K.SETH)
JUDGE

(SMT. ANJULI PALO)
JUDGE