

HIGH COURT OF MADHYA PRADESH AT JABALPUR
DIVISION BENCH

Criminal Appeal No. 1552/2005

APPELLANT : **Kishan Singh @ Krishnapal Singh, S/o Daddu Singh @ Bansh Bahadur Singh**

Vs.

RESPONDENT : **State of Madhya Pradesh**

For the appellant : Shri Surendra Singh,
learned Sr. Counsel with
Shri A.K. Dubey, Advocate.

For the respondent/State : S/Shri Ajay Shukla and
Anubhav Jain, Govt. Advocates.

Criminal Appeal No. 1569/2005

APPELLANT : **Manish @ Bablu, S/o Mahadev Sharma**

Vs.

RESPONDENT : **State of Madhya Pradesh**

For the appellant : Shri Jai Shukla, Advocate.

For the respondent/State : S/Shri Ajay Shukla and
Anubhav Jain, Govt. Advocates.

Criminal Appeal No.1605/2005

APPELLANT : **Vikas @ Pinku, S/o Hiranyanath Upadhyay**

Vs.

RESPONDENT : **State of Madhya Pradesh**

For the appellant : Shri Prakash Upadhyay,
Advocate.

For the respondent/State : S/Shri Ajay Shukla and
Anubhav Jain, Govt. Advocates.

PRESENT : **Hon'ble Shri Justice R.S. Jha**
 Hon'ble Smt. Justice Nandita Dubey

Whether approved for reporting : **Yes**

Law laid down

Significant paragraph numbers :16,17,22,23,27,28,32,
33.

Arguments heard on : 15.11.2017

Judgment delivered on : 20.11.2017

J U D G M E N T

As per Nandita Dubey, J.:

Criminal appeal Nos. 1552/2005, 1569/2005
and 1605/2005 arise out of the same incident and,
therefore, heard and decided concomitantly.

2. These three appeals arise out of judgment
dated 29.07.2005 passed by Fourth Additional
Sessions Judge (Fast Track), Sidhi in S.T. No.164/2004,
whereby the appellant Kishan Singh @ Krishnapal
Singh has been found guilty of an offence punishable
under Section 302 read with Section 120-B of the
Indian Penal Code and has been sentenced to life
imprisonment with fine of Rs. 500/- in default rigorous
imprisonment for one month and appellants Manish @
Bablu and Vikas @ Pinku have been found guilty of an
offence punishable under Sections 302 read with

Section 120-B and 201 of the Indian Penal Code and have been sentenced to life imprisonment with fine of Rs. 500/- and rigorous imprisonment for 7 years and fine of Rs.200/- respectively and in default further rigorous imprisonment for one month for each offence.

3. Prosecution case, in short, is that the appellants committed the murder of Promod Singh @ Dadu, by drowning him in Gopal Das Dam and thereafter with the intention of disposing the body, hid it in a paddy field.

4. According to prosecution, on 05.09.2004, at about 3.00 A.M., P.W.-3 Mahesh Prasad Gupta lodged a report to the effect that he had been robbed of his pickup truck. During the investigation, appellants Manish and Vikas were taken into custody on suspicion. On interrogation, accused/appellants Manish and Vikas disclosed about the commission of murder of Promod Singh by drowning him in Gopal Das Dam with the help of appellant Kishan and expressed their willingness to show the place where they had committed the murder of Pramod Singh. According to the prosecution, appellants Manish and Vikas were

going in NE car to dispose of the body, but on account of the fact that there was no fuel in the car, they hid the body of the deceased in a paddy field near the Sidhi-Rewa main road.

5. On the basis of memorandum (Ex. P-9 & Ex. P-10) of appellants Manish and Vikas, body of the deceased was recovered from open paddy field, next to the Sidhi-Rewa road. Dehati Merg (Ex.P-40) and panchnama was recorded and spot map (Ex.P-12) was made. Body of the deceased was sent to mortuary. The police party thereafter proceeded to Gopal Das Dam, from where they recovered a piece of shirt pocket and a white button (Ex.P-13) and thereafter proceeded to the house of appellant Kishan, from where a shirt with missing pocket was seized.

6. Body of the deceased was sent for postmortem. The postmortem report indicates that the body was in an advanced stage of decomposition. Dr. K.S. Nigam (P.W.-4), who conducted the postmortem has opined that death was homicidal in nature and occurred due to asphyxia but could not determine the actual cause for asphyxia due to the

decomposed stage.

7. The accused/appellants were put to trial. The prosecution examined as many as 15 witnesses. The statement of the accused persons under Section 313 of the Cr.P.C. were recorded. The defence examined 3 witnesses in support of their case.

8. The learned trial Court found the appellants guilty of committing the offence as aforesaid, on the basis of statement/evidence of P.W.-1 Dr. Chandra Kant Mishra, P.W.-4 Dr. K.S. Nigam and on the basis of documentary evidence Ex.P-1 and Ex.P-2 postmortem report and on this basis held that death of deceased Promod was homicidal. The trial Court has reached to a conclusion that the death of deceased was the result of "dry drowning" relying on page 164 of 20th edition of Medical Jurisprudence and Toxicology by Dr. Modi. The trial Court further relying on the evidence of P.W.-6 Snehlata Singh and P.W.-8 Jitendra Singh held that the accused/appellants were the persons, last seen with the deceased. The trial Court on the basis of aforesaid evidence found the chain of circumstances to be complete and held that the prosecution has proved the

guilt of the appellants beyond reasonable doubt and convicted them as aforesaid.

9. Shri Surendra Singh, learned senior counsel appearing for appellant Kishan and Shri Prakash Upadhyay and Shri Jai Shukla, learned counsel respectively appearing for the appellants Vikas and Manish have raised the following submissions in support of the appeals :-

(i) There is no proof of homicidal death. Medical evidence negate the death by drowning.

(ii) There were no eye witnesses of the events. Circumstantial link was not proved beyond doubt.

(iii) Recovery of Shirt pocket and button from Gopal Das Dam would not lead to the conclusion that it was appellant Kishan, who had committed the murder.

(iv) The memorandum and seizure were fabricated.

10. Shri Ajay Shukla and Shri Anubhav Jain, learned Govt. Advocates appearing for the respondent/State have supported the judgment. It

was contended that finding and conclusion arrived at by the Court below was based on cogent evidence and the circumstantial evidence brought on record by the prosecution were sufficient to convict the accused persons.

11. Having heard the learned counsel for the parties at length and on meticulous perusal of record, it is clear that there is no direct evidence to establish that the appellants murdered the deceased Pramod by drowning him in Gopal Das Dam and the evidence regarding the murder is purely circumstantial.

12. First of all, we may deal with the argument advanced on behalf of the appellants that the cause of death is not evident from the postmortem report and there is no proof that death was homicidal. According to learned Senior Counsel, once the cause of death is not proved, the appellants would be entitled to an order of acquittal.

13. Postmortem report is exhibited as Ex.P-2 and the relevant part thereof reads as under :-

“Naked body wearing underwear lying flat with extended arms and legs with partial flexion at knee joint, in stage of advanced decomposition of body. Vesicles present all over the body. Skin peeled off specially face, abdomen, neck, back. Maggot's present over both eyeballs and rectal area. Rigor mortis passed off. Foul smelling present. Both eyes open and protruded. Mouth open, tongue lied between the teeth. Tip of tongue protruded, crushed between tooth and tip of tongue cyanosed. Both pupils dilated and fixed. Whole body was swollen. Face cyanosed. Nails cyanosed. Conjunctiva congested. Abdomen was distended. Neck cyanosed. Scrotum and penis was oedematus.”

“On knees following injuries were present :

1. Abrasion on the front of right knee 2 x 1 inch in size, dry blood clot and oedema was present (Ante mortem in nature).

2. Abrasion present over front of left knee, 3x1 inch in size, dry blood clot present.”

Postmortem lividity present over chest and upper part of abdomen.

No water was present over both middle ear cavity.”

Opinion of the doctor.

“In our opinion, deceased died of asphyxia. Actual cause of Asphyxia could not detected due to advance decomposition of the body. Police may investigate the cause. Viscera's, cloth's and trachea preserved. Time lapsed was between 24 to 36 hours. Homicidal in nature.”

14. The doctor was examined as P.W.-4. The doctor has opined that the death could be due to asphyxia, but did not say as to how he reached to that conclusion in absence of any marks/injury on the body. The doctor has categorically deposed that no water was present over both middle ear cavity of the deceased and the death has not occurred due to drowning. The FSL report brought on record is also inconclusive as regard to the death by drowning. Moreover, there is no evidence or eye witnesses to the effect that deceased was taken to the Gopal Das Dam and murdered by drowning. It is also evident from the evidence of P.W.-1 Dr. C.K. Mishra, Sr. Scientist and P.W.-11 Ramendra Singh that the body of deceased was found lying face down in an open paddy field, next

to the main road, visible to all. Body was found lying flat with extended arms and legs with partial flex on at knee joint. The photographs (Ex.P-17 to P-25) clearly show that the deceased was wearing only underpants which were drawn half down to his knees. One hand of the body was extended in air as if trying to break the fall. As per the evidence that has come on record that deceased and appellants were under the influence of alcohol and intoxicated. There were abrasions on both the knees and according to P.W.-4 K.S. Nigam, the same could have been the result of accidental fall. Under these circumstances, looking to the position of the body recovered, the possibility that the deceased fell face down while sitting in the field to ease himself and accidentally suffocated himself cannot be ruled out.

15. The trial Court on the basis of Modi's Medical Jurisprudence had arrived on the conclusion that it was a case of "dry drowning". However, the trial Court has totally ignored the fact that Modi's Medical Jurisprudence also says that even an adult can accidentally suffocate himself under the influence of

alcohol or epileptic by falling face down (page 580, 23rd edition). From a perusal of Ex.P-36, it is evident that for determining the cause of death or to form an opinion that the death was caused by drowning, it was essential to perform "diatom test", however the same was not asked for by the police or the team of doctors, who conducted the postmortem. From the evidence on record, it is clear that there is no other evidence or proof to prove that it was a case of homicidal death.

16. Similar issue as to whether the death is homicidal, came up for consideration in the case **State of Punjab Vs. Bhajan Singh AIR 1975 SC 258**, where the Supreme Court after considering the testimony of the doctor has held :-

"Question then arises as to whether the death of the two persons whose dead bodies were recovered was homicidal. So far as this aspect is concerned, we find that Dr. Saluja has deposed that he found no marks of ligature on either of the two dead bodies. According further to the doctor, he could not find the cause of death because the two dead bodies were in a de-composed state. In the face of the above evidence of the doctor, it is not possible to hold that the death of the two persons, whose bodies were recovered,

was homicidal.

17. In Madho Singh Vs. State of Rajasthan (2010) 15 SCC 588, the Supreme Court has held :-

“The primary, if not solitary basis of the conviction of the appellants is on the theory of last seen as the deceased left his house with the appellants at about 11.00p.m. on the 1st May, 1999. In order to convict the appellants for an offence under [section 302](#) the first and foremost aspect to be proved by the prosecution is the homicidal death. The evidence on record produced by the prosecution falls short of the proof of homicidal death of Om Singh. According to PW11 Dr. Lakhan Lal, his face had been crushed. According to testimony of PW15 Dr. Disaniya, the injuries received by the deceased could be sustained in the accident. Besides these two witnesses, there is no evidence to prove that it was a case of homicidal death.”

18. Apart from the aforesaid, the alleged NE car said to have been used in the incident has not been subjected to chemical examination so as to determine whether the body of the deceased was infact carried into it, nor investigated as regard the ownership of the car. Moreover, recovery of shirt pocket and button from Gopal Das Dam in absence of any other

corroborative evidence will have no direct bearing on the death of deceased and would not lead to the conclusion that it was appellant Kishan, who committed the murder.

19. As per P.W-1 Dr. C.K Mishra and P.W.-4 Dr. K.S. Nigam, the body of the deceased was in an advanced stage of decomposition as described in the preceding paragraphs. According to Modi's Jurisprudence, page 342, the duration of rigor mortis is 24 to 48 hours in winter and 18 to 36 hours in summer. The maggots are normally formed after an average of 39 hours of the death. In the instant case, from the condition of the body as described above, it is evident that the death of the deceased has occurred much prior to the time as alleged by the prosecution.

20. It is settled law that inferences drawn by the Court have to be on the basis of established case and not on conjectures. The prosecution came out with a specific case that deceased Promod was murdered by drowning him in Gopal Das Dam, however, the same is not established from the medical evidence that has come on record. Hence, the

inferences drawn by the trial Court that deceased Pramod Singh was murdered by drowning in Gopal Das Dam and thereafter his body was carried in the NE car and disposed of in the paddy field is perverse and cannot be sustained.

21. The prosecution has relied on the testimony of P.W.-6 Snehlata and P.W.-8 Jitendra Singh to prove that the appellants were last seen together with the deceased. It is settled law that the circumstances of last seen together cannot by itself form the basis of holding the accused guilty of the offence.

22. The principles of circumstantial evidence is reiterated in **Nizam and another Vs. State of Rajasthan (2016) 1 SCC 550**, the Supreme Court has held :-

8. Case of the prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain

of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his innocence.

23. In **State of Uttar Pradesh Vs. Shyam Behari and another (2009) 15 SCC 548**, referring to the case of **Gambhir Vs State of Maharashtra (1982) 2 SCC 351**, the Supreme Court has held:-

“The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (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 probabilities the crime was committed by the accused and none else. 4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any order hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the

accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, AIR 1982 SC, 1157)

24. In the instant case, the trial Court has relied on the testimony of P.W.-6 Smt. Snehlata Singh and P.W.-8 Jitendra Singh. According to these witnesses, the deceased was seen with the appellants between 6 P.M. to 11 P.M. on 04.09.2004 roaming around in NE car at different places. According to P.W.-6 Snehlata, the deceased went out with the appellants in their NE car on 04.09.2004 at 6.00 P.M to visit one Vivek at Rewa. According to P.W.-6, she and her father were informed about the death of Pramod on 05.09.2004 by one Inspector Baghel, but despite knowing about the murder of her brother, she did not disclose the fact of her brother going with the appellant to the police. It is only after 20-25 days of the incident, when for the first time she made a statement to this effect. According to P.W.-5 Harikeshav Singh and P.W.-6 Snehlata, the deceased and the appellants were good friends.

25. P.W.-8 Jitendra Singh claimed to have seen the appellants and deceased together at 11 P.M. at a

liquor shop near the bus stand. The statement of P.W.-8 Jitendra Singh is also doubtful for the fact that he claimed to have seen the dead body at 9.00 P.M. on 5.09.2004, whereas, according to prosecution the memorandum of appellants (Ex.P-9 & P-10) regarding the place where body of deceased was hidden was taken at 9.10 P.M. and the body was recovered at around 10.00 P.M. (Ex.P-11). This witness admits his presence at the spot from where the dead body was recovered but surprisingly did not disclose the fact of having seen the deceased with appellants on the previous night, i.e., on 04.09.2004 at 11.00 P.M. as claimed by him.

26. From the evidence on record, it is clear that there is unexplained delay in recording the statement of P.W.-6 Snehlata and P.W.-8 Jitendra and on their part in disclosing the fact of last seen to the police. The delay in recording of statement and the conduct of these witnesses in not disclosing the fact to police or to anyone else for the matter renders their story doubtful and unreliable.

27. In **Harbeer Singh Vs. Sheeshpal and others (2016) 16 SCC 418** the Supreme Court has held:

*17. However, Ganesh Bhavan Patel Vs. State Of Maharashtra, (1978) 4 SCC 371, is an authority for the proposition that delay in recording of statements of the prosecution witnesses under [Section 161 Cr.P.C.](#), although those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, would cast a doubt upon the prosecution case. [See also *Balakrushna Swain Vs. State Of Orissa, (1971) 3 SCC 192; Maruti Rama Naik Vs. State of Maharashtra, (2003) 10 SCC 670 and Jagjit Singh Vs. State of Punjab, (2005) 3 SCC 68*]. Thus, we see no reason to interfere with the observations of the High Court on the point of delay and its corresponding impact on the prosecution case.*

28. In **Madho Singh Vs. State of Rajasthan (2010) 15 SCC 588**, the Supreme Court has held:

8. In the absence of proof of homicidal death the appellants cannot be convicted merely on the theory of last seen - 'they having gone with the deceased in the manner noticed hereinbefore. The appellants' conviction cannot be maintained merely on

suspicion, however strong it may be, or on their conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that all the three were good friends for over a decade.

29. In the case of circumstantial evidence, not only the various links in the chain of evidence should be clearly established but the complete chain must be such as to rule out the likelihood of innocence of the accused. In the present case, even if the evidence of appellants having been seen last seen together with deceased is accepted, it would at best amount to be evidence of last seen together with the deceased, but in absence any other satisfactory link connecting the appellants to the crime and pointing to the guilt of the appellants, the only circumstance of last seen together cannot be made basis of the conviction.

30. Apart from the aforesaid, it is clear from the record that there are major discrepancies and contradictions, embellishment in the prosecution story. There is major contradictions in the evidence of P.W.-1 Dr. C.K. Mishra and P.W.-11 Ramendra Singh. According to P.W.-1 Dr. C.K. Mishra, he got the

information to inspect the spot at 12 O'Clock in the mid night of 5.09.2004 and conducted the inspection on 6.09.2004 (Ex.P-1) at 8.00 A.M. He found the body lying face down in open field next to road, in the condition as described in the preceding paragraphs. Whereas, according to P.W.-11 Ramendra Singh, the body was removed from the spot after taking photographs on 5.09.2004 and kept in mortuary at 12 O'Clock in the night and sent for postmortem at 8.00 A.M. in the morning of 06.09.2004. This fact is also corroborated by P.W.-4 Dr. K.S. Nigam, who conducted the postmortem at 8.00 A.M. on 06.09.2004.

31. Apart from the aforesaid, the time entered on the memorandum does not found corroboration from the statement of other witnesses. The prosecution claimed to have recorded the memorandum at 9.00 and 9.10 P.M. and recovered the body at 10.00 P.M. However, P.W.-9 Krishnapratap Singh, witness of memorandum has stated that memorandum was recorded at 7.15 P.M. and thereafter the body of deceased was recovered at 7.30 P.M. These vital contradictions in the evidence of

prosecution witnesses makes the entire prosecution story doubtful and given strength to the claim of appellants that the memorandum and seizure documents were made up and fabricated.

32. In Kali Ram Vs. State of Himachal Pradesh AIR 1973 SC 2773, the Supreme Court has observed as under:

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

33. In Sharad Birdhichand Sarda Vs. State of Maharashtra AIR 1984 SC 1622, the Supreme Court has held as under:

"The facts so established should be consistent only with the hypothesis of the guilt of the accused. There should not be explainable on any other hypothesis except that the accused is guilty. The

circumstances should be of a conclusive nature and tendency. 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.

Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."

34. In view of the medical evidence on record, the death of deceased Pramod Singh could not be termed as homicidal and in absence of the proof of homicidal death, the appellants cannot be convicted merely on the theory of last seen. In view of the aforesaid circumstances, there is nothing on record to conclusively establish that the appellants were the author of the crime. The circumstances on the record do not rule out every other hypothesis except the guilt

of the appellants and in our view, the prosecution has filed to establish the guilt of the appellants beyond reasonable doubt. Under the circumstances, the appellants are entitled to the benefit of doubt.

35. In view of the above, it is clear that the prosecution has failed to prove the case against the appellants beyond reasonable doubt. Thus, the appeals succeed and are hereby allowed. The conviction and sentence imposed on the appellants is set aside. The appellants, who are on bail shall be discharged of their bail bonds.

36. A copy of this judgment be also kept in the record of Cr.A. Nos. 1569/2005 and 1605/2005.

(R.S.Jha)
JUDGE
20/11/2017

(Nandita Dubey)
JUDGE
20/11/2017