

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

**SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA**

CRIMINAL APPEAL No.515 OF 2011

BETWEEN :-

**ASHUTOSH KAITHWAS, S/O
SUBHASH KAITHWAS, AGED
ABOUT 20 YEARS, R/O POWER
HOUSE COLONY, E-1/1027,
NEPANAGAR, DISTRICT
BURHANPUR (MADHYA
PRADESH)**

....APPELLANT

(BY SHRI RAKESH JAIN, ADVOCATE)

AND

**THE STATE OF MADHYA
PRADESH, THROUGH STATION
HOUSE OFFICER DISTRICT
JABALPUR (MADHYA PRADESH)**

....RESPONDENT

(BY SHRI YOGESH DHANDE, GOVERNMENT ADVOCATE)

Reserved on : 03/11/2022

Delivered on : 10/11/2022

J U D G M E N T

Per: Sujoy Paul, J.

This appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (In short "Cr.P.C") assails the judgment dated 21.02.2011 passed in Sessions Trial No.670/2009 whereby the appellant was held guilty for committing offence under Section 302 of IPC and directed to undergo sentence of life imprisonment with fine of Rs.1,000/- with default stipulation.

2. The brief facts are that appellant and deceased Jagdamba Prasad Saket were students and were residing in room No.19 of Industrial Training Institute (ITI), Madhotal, Jabalpur. The deceased left the hostel on 12.08.2009 and went to his native place namely; Singrauli. In the meantime, Hostel Superintendent Shri L.M. Agnihotri (PW-1) issued an order to change the room of both the said students. The appellant was directed to shift room No.16 whereas deceased was directed to remain in room No.19.

3. As per the prosecution story, deceased Jagdamba Prasad came back from Singrauli to his room No.19 on 24.08.2009 at around 6:00 A.M. When Jagdamba Prasad opened his locker, he found that his mark-sheet is missing. He promptly informed the other students and Superintendent Shri L.M. Agnihotri about non-availability of said mark-sheet. In turn, Shri Agnihotri came to the hostel and in the presence of other students apprised the appellant that if missing mark-sheet of Jagdamba Prasad is available with him, he may return it back to him. Thereafter, Agnihotri went back to his residence.

4. On 24.08.2009 at around 6:30 P.M., another student Zakir Hussain (PW-6) had seen that appellant and Jagdamba Prasad have left the hostel. On the same day, both of them reached the house of another student Gulab Singh (PW-3) at around 7:30 P.M. After spending time at Gulab's residence for 15-20 minutes,

both of them left the place together by saying that they are going to see Ganesha idols.

5. The prosecution story further shows that appellant came back to the hostel on 25.08.2009 at around 1:00 A.M. covered with mud. He entered the hostel room and closed the door from inside. The other students enquired from him about Jagdamba Prasad but he did not inform whereabouts of Jagdamba Prasad. His shoes and clothes were full of mud. Ashutosh took bath in the night itself. At around 1:15 A.M. Ashutosh Agnihotri and Polus James (PW-2) approached hostel Superintendent L.M. Agnihotri (PW-1) and informed him that Ashutosh and Jagdamba left the hostel in the evening together but Ashutosh Kaithwas (appellant) alone came back in a dirty condition and is taking bath. Appellant is not informing anything about Jagdamba Prasad. Indeed, he is saying that he did not leave the hostel with Jagdamba Prasad.

6. M.L. Agnihotri, in turn, lodged the '*Gum Insan*' report of Jagdamba Prasad in Police Station Madhotal, Jabalpur. On 27.08.2009, the police enquired whereabouts of Jagdamba from appellant. As per the case of the prosecution, in the presence of Rampal Saket (PW-6) and Rajpal Saket (PW-8) on 27.08.2009 at around 20:30 O' Clock, appellant informed that he has murdered Jagdamba Prasad by assaulting him by means of a knife and stone. The dead body is kept in an agricultural field. His memorandum Ex. P/15 was prepared and on the same date at around 22:00 O' Clock along with witnesses Rampal and Rajpal, Kamlesh Yadav and Santosh, the dead body was recovered from an agricultural field near the Patan Bypass, National Highway No. 7. The identification and recovery Panchnama Ex. P/2 was prepared. At the instance of appellant, a stone of almost 5 Kg. weight and knife of 9 inch long were recovered. A seizure memo Ex. P/16 was prepared. A site map Ex. P/7 was prepared. A cycle of appellant was seized.

The earth/soil in appellant's shoes, paddle of cycle were taken through Ex. P/6 and P/8.

7. The dead body of Jagdamba Prasad was identified by his father Rajpal and brother-in-law Rampal. There was an injury near right eye of the deceased. The body was decomposed and on the face of it, it appeared that Jagdamba Prasad was murdered.

8. In turn, the postmortem of Jagdamba Prasad was conducted. As per the postmortem report EX. P/12, the death is homicidal in nature. A query was raised whether stab wound available on the person of deceased could have been caused by the knife so recovered. The doctor in his report Ex. P/13 opined that injury on the body of deceased could have been caused by the said knife.

9. After the investigation, the challan was filed and in turn, matter was committed to the Sessions Court. The appellant did not admit his guilt and prayed for a full-fledged trial. The Court below framed five questions for its determination. After recording evidence and hearing the parties, the Court below came to hold that prosecution could not establish that appellant is guilty for committing offence under Sections 365 and 201 of the IPC. However, appellant was held guilty for committing offence under Section 302 of the IPC.

Submission of Appellant:-

10. Shri Rakesh Kumar Jain, learned counsel for the appellant submits that as many as 10 witnesses entered the witness box on behalf of the prosecution. Prosecution took assistance of 20 documents to prove its case.

11. Learned counsel for the appellant submits that there is no eye-witness to the incident. The case of prosecution is based on last seen evidence, recovery of dead body, weapon and stones etc. and also on other circumstances.

12. Gulab Singh (PW-3) is the last seen witness of the prosecution. By taking this Court to the statement of Gulab Singh, Shri Jain, learned counsel for the appellant submits that he had allegedly seen the appellant and Jagdamba leaving the Hostel at around 6:30 p.m. However, in the cross-examination, he could not depose whether Jagdamba went elsewhere with other friends. It is urged that this statement is not sufficient to treat the present appellant as 'last seen' with the deceased.

13. The next attack is on the statement of Zakir Hussain (PW-6). As per this statement, he was sleeping in Room No.16 of the Hostel. Ashutosh came to his room at around 1:30 p.m. in the night and knocked his door. When Zakir Hussain (PW-6) inquired where was he for the whole night, Ashutosh informed that he was sleeping in Room No.4 with Rajesh. The clothes of appellant were wet. Appellant informed that he fell down in mud because of which his clothes are wet full of mud. Zakir Hussain (PW-6) raised his eyebrows and inquired where he found mud between Room No.4 and 16. The appellant did not furnish any reply to the said question. This witness then took the help of other students and by that time the appellant had already taken a bath. This witness and other students informed Shri L.M. Agnihotri (Hostel Superintendent) and peon Kamlesh Yadav about the said incident. During whole night, all students and staff were enquiring from appellant about whereabouts of Jagdamba Prasad but he did not inform the same.

14. Shri Jain submits that as per the prosecution story, the appellant had allegedly stolen the mark-sheet of the deceased. However, the said mark-sheet was neither recovered nor produced before the Court. Thus, no motive could be established against the present appellant. The FIR was lodged on 26.08.2009 at around 6.05 P.M. There is no explanation for the delay in lodging the FIR.

15. The next statement is of Polus James (PW-2). This witness deposed about missing mark-sheet of Jagdamba from his locker. Shri Jain, at the cost of repetition, urged that mark-sheet was never recovered and produced. Thus, said allegation is of no help to the prosecution. The statement of this witness is in the line of the statement of Zakir Hussain (PW-6).

16. Shri Jain further submits that Ex.P/20 is the FSL report wherein a finding is given that earth/soil recovered from Ex. A, C, D and E are similar soils. It is argued that it is not the blood of deceased which is found to be either on the weapon or on the clothes of the present appellant. Similarity of soil cannot be a reason or circumstance to hold the appellant as guilty.

17. The recovery is questioned by contending that Rampal (PW-7) is brother-in-law of the deceased. He was declared as hostile. In this view of the matter, recovery is doubtful and cannot be a reason to hold the appellant as guilty.

Submission of Government Counsel :-

18. Shri Yogesh Dhande, learned Government Advocate supported the impugned judgment by contending that the Court below has considered the evidence in its entirety. The Court below rightly appreciated the evidence. Gulab Singh (PW-3) is the last seen witness. The statement of L.M. Agnihotri (PW-1), Polus James (PW-2) and Zakir Hussain (PW-6) are in the same line which cannot be doubted.

19. Learned Government Advocate submits that the appellant was held guilty on the basis of last seen evidence, recovery and other circumstances. By taking this court to the relevant paragraphs of the judgment, it is submitted that appreciation of evidence by court below is on permissible parameters. The 'Dehati merg intimation' was recorded on 27.08.2009. The recovery of dead body is supported by independent witnesses as well as by the Investigating Officer.

20. Shri Dhande relied on **(2019) 2 SCC 311 Viran Gyanlal Rajput Vs. State of Maharashtra** and submits that recovery of knife, stone and dead body at the instance of appellant directly shows his guilt in the matter. The mud / earth recovered from appellant's shoes, paddle of cycle which matched with the mud available on the dead body and other articles as per FSL report is highly incriminating. The next reliance is on **2019 (20) SCC 321 Harinder Singh Alias Hira V. State of Punjab** it is urged that the recovery of dead body at the instance of appellant / accused establishes a circumstances and if it is seen that other evidence like last seen etc. whole chain was complete.

21. Parties confined their arguments to the extent indicated above.

22. We have bestowed our anxious consideration on rival contentions and perused the record.

Findings :-

23. In view of aforesaid factual matrix of the case, indisputably the case of the prosecution is based on circumstantial evidence. Learned counsel for the parties rightly stated that the appellant was held guilty on the basis of last seen evidence, recovery of dead body and weapon at the instance of appellant and other incriminating circumstances. It is also not in dispute that appellant and deceased Jagdamba Prasad were residing in Room No. 19 of Industrial Training Institute (ITI) Hostel, Madhotal, Jabalpur. The appellant, pursuant to instructions of the ITI administration, shifted to Room No.16. All the students of ITI and staff members have unequivocally deposed about the said factual backdrop and their depositions are in the same line.

24. Shri L.M. Agnihotri (Hostel Superintendent) (PW-1), Polus James (PW-2), Gulab Singh (PW-3) and Kamlesh Yadav (PW-4) (all students) deposed in the same line that the appellant and deceased were residing in Room No. 19. The

deceased after returning from his house found that his mark-sheet is missing because of which he made a complain to L.M. Agnihotri (PW-1). Shri Agnihotri (PW-1), in turn, called all the students and requested that mark-sheet of deceased be returned to him. This event had taken place on 24.08.2009. On the same day, as per Zakir Hussain (PW-6), the appellant left the hostel at around 6:30 P.M. with deceased. Both of them then visited the house of another student Gulab Singh (PW-3) at around 7:30 P.M., remained there for couple of minutes and then left his house by saying that they are going to visit Ganesh idols. Thereafter, appellant alone returned back to the hostel in the intervening night of 24-25.08.2009 at around 1 O'Clock.

25. Polus James (PW-2) and L.M. Agnihotri (PW-1) categorically deposed that he was full of mud and could not assign any plausible and justifiable reason as to how he is covered by mud. He did not inform whereabouts of deceased and denied that he left the hostel with deceased which was witnessed by Zakir Hussain (PW-6).

26. Gulab Singh (PW-3) firmly deposed that appellant with deceased came to his house and after spending some time, left his house. This statement of Gulab Singh (PW-3) could not be demolished in cross-examination. A conjoint reading of statements of student witnesses leaves no room for any doubt that the mark-sheet of deceased was found missing. Thereafter, the appellant and deceased left the hostel in the evening of the same day i.e. 24.08.2009. After leaving the house of Gulab Singh (PW-3) with appellant, the deceased could not be traced. Thus, prosecution could establish clearly that deceased was last seen with the appellant and appellant has not given any explanation as to when deceased left his company.

27. Learned counsel for the appellant argued that since missing mark-sheet of deceased was neither found nor produced, motive could not be established. In our

view, the existence of motive in cases of circumstantial evidence certainly assumes greater significance and importance. However, as a rule of thumb, it cannot be said that in no case, in absence of motive accused can be held guilty. If circumstantial evidence are clear and complete chain of circumstances are established which clearly proves that accused alone had committed the offence, the accused can be held guilty. In **AIR 2013 SC 912 Munish Mubar Vs. State of Haryana** the Apex Court has held as under :-

“22. In a case of circumstantial evidence, motive assumes great significance and importance, for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. However, the evidence regarding existence of motive which operates in the mind of an assassin is very often, not within the reach of others. The said motive, may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to such evil thought, in the mind of the assassin. In a case of circumstantial evidence, the evidence indicating the guilt of the accused becomes untrustworthy and unreliable, because most often it is only the perpetrator of the crime alone, who has knowledge of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggest sufficient/necessary motive to commit a crime, it may be conceived that the accused has committed the same. (See: Subedar Tewari v. State of U.P. & Ors., AIR 1989 SC 733; Suresh Chandra Bahri v. State of Bihar, AIR 1994 SC 2420; and Dr. Sunil Clifford Daniel v. State of Punjab, JT 2012(8) SC 639)”

(Emphasis supplied)

28. The another limb of argument of learned counsel for the appellant was related with findings given by the court below relating to disclosure of information regarding dead body and weapon. The court below has given finding in this regard in paragraphs 23 to 26 of the impugned judgment.

29. The case of the appellant is that as per Ex.P-15 the accused had given information to the police on 27.08.2009 at 20:30 O'Clock whereas Ex.P-11 shows that he was formally arrested on 28.08.2009 at 00:45 O'Clock. Thus, at the time of disclosure, he was not under arrest / custody. Hence, Section 27 of the Indian Evidence Act cannot be pressed into service.

30. The statement of Rampal Saket (PW-7) shows that on 27.08.2009 he was at Jabalpur and appellant on that day itself was in the custody of police. No doubt, the appellant was formally arrested on 28.08.2009, the statement of this witness Rampal Saket (PW-7) is in tune with the statement of the Investigating Officer that appellant was already in custody at the time of disclosure. Albeit, he was formally arrested on the next day. The pivotal question springs out is whether in this backdrop, Section 27 of Indian Evidence Act is attracted or not. Section 27 of the aforesaid reads as under :-

“27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

(Emphasis supplied)

31. A simple reading of this section shows that ‘a person must be accused of any offence’ and that he must be ‘in the custody of a police officer’ and it is not

necessary that such an accused must be under formal arrest. We find support in our view from catena of judgments and a glance of said judgments shows that the question aforesaid is no more *res integra*. A Division Bench of this Court in **Omkar Vs. State of M.P. [1974 Cri LJ 1200]** has held as under :-

“On the basis of the aforesaid statement it is urged that since the accused was permitted to go home, it would appear that he was not under restraint and as such was not in custody of police. We are not, however, impressed by this statement. The aforesaid statement seems to have been made merely to emphasis that the accused had not been arrested on 7th January. There is a distinction between custody and arrest.”

(Emphasis supplied)

32. The *ratio decidendi* of this Division Bench judgment was again followed by another Division Bench in **Umed Vs. State of M.P., 1978 SCC Online MP 229**. The similar view was taken by yet another Division Bench in **1978 JIJ 347 (Kadori Vs. State of M.P.)**.

33. The Supreme Court in **Vikram Singh Vs. State of Punjab, (2010) 3 SCC 56** opined as under -

“We see that Section 46 deals with “arrest how made”. We are of the opinion that the word “arrest” used in Section 46 relates to a formal arrest whereas Section 27 of the Evidence Act talks about custody of a person accused of an offence.”

(Emphasis supplied)

In **Mohd. Arif Vs. State (NCT of Delhi), (2011) SCC 621**, the Apex Court took the same view.

34. The principles laid down in aforesaid cases are consistently followed in other judgments including **(2014) 5 SCC 509 Dharm Deo Yadav Vs. State of M.P.** and **(2014) 8 SCC 340 Chandra Prakash Vs. State of Rajasthan.**

35. Consistent with the principle laid down in aforesaid cases, we are constrained to hold that evidence led by the prosecution clearly establishes that appellant was indeed in custody on 27.08.2009. Although, he was formally arrested on the next day. The disclosure regarding weapon and dead body was at the instance of appellant. No fault can be found in the findings of the court below given in paragraphs 23 to 26 of the impugned judgment. The other circumstances are also relevant for holding the appellant as guilty. The circumstances are relating to non-disclosure of plausible reason of his mud covered condition at 1:00 O'Clock in the intervening night of 24-25.08.2009. The prosecution has also established that the students and Superintendent of Hostel inquired from appellant regarding whereabouts of Jagdamba for the whole night but no plausible explanation was given. The conduct of appellant was also taken note of by the court below which is an important incriminating circumstance.

36. The dead body and weapon are admittedly recovered at the instance and on the basis of information given by the appellant. The Investigating Officer clearly established that the soil / earth from the place of incident, body of deceased were recovered and same exercise was done to recover the soil/earth from the appellant's shoes, bicycle, paddle etc. The FSL report (Ex. P-20) shows that the soil available on the knife, cycle, shoes of appellant and soil available on the scene of crime are similar. We will be failing in our duty if we fail to consider the argument of Shri Rakesh Jain, learned counsel for the appellant that similarity of soil cannot be a ground to hold the appellant as guilty. Similarity of blood group indeed can become such reason. In the light of judgment of Supreme Court in

Viran Gyanlal Rajput (Supra), this argument sans substance, following paragraphs are relevant in this regard :-

“16. Although it is true that the recovery of articles is to be made based on the statement of the accused immediately after the arrest of the accused and recording his statement, the recovery should be based on the voluntary action relating to showing of the place by the accused. Therefore, unless the accused volunteers to show the place of hiding certain things/facts, the recovery cannot be made by the investigating officers. In this view of the matter, if the accused volunteered to show the place where he had hidden the deceased's clothes at a particular place only after five days, the investigating officer cannot be blamed for the same. In a given case, the accused may confess ten or fifteen days after his arrest and as such the recovery cannot be suspected on this ground alone. Together, these circumstances establish that the appellant had hidden the body of the deceased, as well as her clothes, in a bid to suppress the evidence of his crime.

17. The matching of the mud recovered from the spot of recovery of the victim's body with the mud stains on the pants of the appellant is also highly incriminating, as rightly held by the trial court and the High Court.”

(Emphasis supplied)

37. In the light of this judgment, the aforesaid argument deserves to be rejected.

38. In view of foregoing analysis, the prosecution has established its case beyond reasonable doubt. In our considered judgment, the court below has appreciated the evidence on legal parameters and same is not based on any surmises and conjectures. The prosecution has established the chain of

circumstances with utmost clarity and accuracy. No ingredients are available on which interference of this Court is warranted.

39. Accordingly, appeal fails and is hereby **dismissed**.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

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