

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

THE ACTING CHIEF JUSTICE SHRI SANJAYA KUMAR MISHRA

AND

JUSTICE SHRI RAMESH CHANDRA KHULBE

CRIMINAL APPEAL NO.17 OF 2017

Reserved on: 21.04.2022

Delivered on: 18.05.2022

Between:

Hidayat Ali

..... Appellant

Vs.

State of Uttarakhand

..... Respondent

Counsel for the appellant

: Mr. Sajjad Ahmed, Id. counsel.

Counsel for respondent

: Mr. J. S. Virk, Id. DAG.

Upon hearing the learned Counsel, the Court made the following

Judgment: (Per Shri Justice Ramesh Chandra Khulbe)

This criminal appeal is preferred against the judgment and order dated 03.12.2016 passed by the Court of 2nd Additional Sessions Judge Roorkee, District Haridwar in Sessions Trial No.44 of 2014, "State vs. Hidayat Ali", whereby the appellant has been convicted by the trial Court for the offence punishable under Section 302 of IPC and sentenced him to undergo rigorous imprisonment for life along with a fine of Rs.5000/- and in default to pay the same, the accused was directed to further undergo rigorous imprisonment for three months.

2. Briefly the facts in brief are that PW-1 Geetika Gupta gave a written report (Ex. Ka. 1) on 28.08.2013 at P.S Kotwali Roorkee with the averments that his father Arun Kumar Gupta, who was staying in the Campus of I. I. T. Roorkee had been killed by slitting his throat in the night of 27.08.2013. She was informed about the incident through her uncle.

3. On the basis of said report, the case was registered on 28.08.2013 at 16:40 hours at P. S. Kotwali Roorkee against unknown persons. The matter was investigated and on completion of investigation a charge-sheet (Ex. Ka. 12) was submitted on 27.12.2013 against the accused-appellant.

4. After complying with the provisions of Section 207 Cr.P.C, the case was committed to the Court of Sessions.

5. Learned Sessions Judge, Haridwar framed the charge against the accused-appellant u/s 302 IPC on 25.02.2014, to which the accused-appellant pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case produced PW-1 Geetika Gupta (informant), PW-2 Altaaf, PW-3 Charu, PW-4Kusha Aggarwal, PW-5 I.O. S. I. Ram Kumar Juyal, PW-6 Kuldeep Singh Negi, PW-7 Dr. S. N. Singh (who conducted autopsy), PW-8 Arvind Kumar Aggarwal, PW-9 Virender Kumar Garg, PW-10 I.O Inspector Jasveer Singh Pundir, PW-11 S. I. Pradeep Tomar and PW-12 I.O Rajeev Rauthan, who completed the investigation and submitted charge-sheet.

7. Thereafter, the statement of accused-appellant was recorded u/s 313 Cr. P. C. The accused-appellant pleaded false implication and also stated that he is innocent, the deceased committed suicide and the police have falsely implicated him at the instance of some informant. In defence he produced DW-1 Mohd. Aftaaf and DW-2 Suman.

8. After examination of entire evidence on record, the trial Court came to the conclusion that the prosecution has proved its case against the accused-appellant to the hilt and accordingly it proceeded to convict and sentence the accused-appellant as discussed in paragraph no.1 of this judgment.

9. PW-1 Geetika Gupta has supported the averments of the FIR and stated that on 27.08.2013 she got information through her uncle Shri B. K. Gupta that her father had been killed by slitting his neck and an effort to burn him was also made. When she made a phone call to his father's mobile number, it was found to be switched off. Her uncle further informed her that the phone and wallet of her father were also missing. With these averments she filed the FIR (Ex. Ka. 1).

10. PW-2 Altaaf, who is said to be a witness of recovery, did not support the prosecution story and was declared hostile.

11. PW-3 Charu is another daughter of deceased. She has deposed that her father used to take the appellant along whenever he would go out. She further stated that she used to talk her father on daily basis. On one day her father informed her that he has stopped taking the appellant along with him, since the

appellant would always demand money from her father and he had an evil eye on the domestic articles. About the occurrence of 22.08.2013, she was informed by her father that appellant had forcibly entered the house on which her father scolded the appellant as to why he entered the room without ringing the bell. Then, the appellant demanded money from her father to which her father denied. The appellant then threatened her father to see him in future. On receiving the information about the death of her father she came to Roorkee where the people of vicinity and the domestic maid Suman informed her that they saw the appellant downside the house on the day of occurrence.

12. PW-4 Kusha is another daughter of deceased. She has also supported the fact that the appellant was employed as a driver by her father and she used to talk to her father one to two times a day. In the month of November, 2012 when she came to meet her father, he informed her that the appellant has taken some money on a false pretext and her father also directed Pappu (brother of appellant) not to send appellant to him in future. In the month of December, 2012 her father came to meet her, then also he informed her about the suspicion on the appellant of stealing some diamond, US Dollars her father also informed her about the occurrence of 22.08.2013 on 23rd and 25th August, 2013 that the appellant entered the house without informing and demanded money from him. When his father scolded him why he entered the room without permission, the appellant threatened that he would not leave him. On receiving the information about the death of her father they had

gone to Roorkee where the neighbours informed her that the appellant was seen downside the house on the date of occurrence and when the domestic maid Suman asked the appellant the reason of his presence, he replied that he came to meet her father.

13. PW-5 S. I. Ram Kumar Juyal, who is a formal witness of the case, has proved about carrying out investigation besides recovery of a knife on the pointing out of the appellant.

14. PW-6 Kuldeep Singh Negi is the witness of recovery of bloodstained bed-sheet and pillow cover from the residence of deceased.

15. PW-7 Dr. S. N. Singh is the person who conducted the post-mortem examination on the body of the deceased. According to him, the following ante-mortem injuries were found: -

a. Deep burn with 13 Cm in width trt from right Limbo inguinal region to, same width over back extending upto left iliac spine;

b. 3x1 cm muscle deep incised wound over left side of chest, 8 cm below nipple.

c. 2X1X2 cm deep incised wound left lateral supraclavicular area.

d. 3X2 cm incised wound muscle deep just below left ear pinna.

e. 13X5 cm deep upto to trachea transecting tracheal neuromuscular bundle trt over anterior aspect of neck;

f. 5x1 cm incised wound over right cheek, oblique and vertically directed.

g. 1x1 cm incised wound just below right ear lobule.

In the opinion of the Medical Officer, the cause of death is Asphyxia and haemorrhage due to ante-mortem throat injury.

16. PW-8 Arvind Kumar Agarwal and PW-9 Virender Kumar Garg are the formal witnesses, who have proved their signatures on the inquest report.

17. PW-10 Inspector Jasbeer Singh Pundir is another I.O of the case. He has proved the fact of preparation of recovery memos of the weapon used in the crime and the mobile phone of the deceased said to be lifted by the appellant.

18. PW-11 S. I. Pradeed Tomar is also a formal police witness of the case. He has proved regarding preparation of some necessary documents prepared after the recovery of dead body.

19. PW-12 S. I. Rajeev Rauthan is another I. O of the case who has also proved the fact of carrying out investigation and after culminating the same, he submitted the charge-sheet (EX. Ka. 13).

20. Thereafter, the statement of accused was recorded u/s 313 Cr. P.C in which he pleaded not guilty and also took the plea of false implication. The following two witnesses were examined on behalf of appellant.

21. DW-1 Mohd. Altaaf has mainly proved the fact that he did not give any mobile phone to the appellant on 29.09.2013.

22. DW-2 Suman is the person who is said to be the domestic help in the house of deceased. She has stated that she did not see the appellant nearby the

place of occurrence on 27.08.2013. According to her, when she came inside the house, the deceased was lying flat on the face and there was fire broke out on his back. She brought the water and extinguished the fire.

23. We have heard learned counsel for the parties and carefully perused the entire evidence available in the file of the Court.

24. It is argued by learned counsel for the appellant that there is no eye-witness of the scene. The Police Party did not record the disclosure statement of the accused, accordingly, the recovery allegedly made at the pointing out of the appellant regarding a knife and two mobile phones is irrelevant.

25. Per Contra learned Deputy Advocate General appearing for the State argued that there is sufficient evidence on record to convict the appellant, and there is no illegality in the impugned judgment.

26. As per the FIR, the occurrence took place on 27.08.2013. PW-1 Geetika received the information about the incident from her uncle, and accordingly, she submitted information with the police station on 28.08.2013. As per her statement, she did not see the occurrence.

27. PW3 Charu and PW-4 Khusha, who are also the daughters of the deceased, were abroad at the time of incident, which shows that all the three daughters PW-1 Geetika, PW3 Charu and PW4 Khusha were not at the place of incident.

28. As per the statement of PW4 Kusha, Smt. Suman was the cook of the deceased, who always used

to come at the residence of the deceased for cooking food and the appellant was seen by Suman who was coming down from the room of the deceased on 27.08.2013, but she was not produced by the prosecution rather she was examined as DW-2 and she clearly stated that she did not see the appellant on 27.08.2013 at the house of the deceased.

29. It is the story of the prosecution that the appellant confessed his guilt and on his pointing out a knife (used in the crime) besides two mobiles phones related to the deceased were recovered.

30. The recovery memo Ex. Ka 4 is on record. As per the recovery memo, at the time of recovery, Altaaf and Mehtab (public witnesses) were also present.

31. The prosecution produced Altaaf as PW-2, but he did not support the recovery, while other witness Mehtab was not produced by the Prosecution.

32. It is very relevant to note that it is the case of prosecution that the appellant was arrested and he disclosed before the police that he committed the crime and he can got recovered the knife (used in the crime) as also the mobile phones related to the deceased. Thus, on appellant's pointing out, the above items (knife and two mobiles) were recovered, but the I. O. did not record his statement as envisaged u/s 26 of the Evidence Act. Since there is no disclosure statement was recorded u/s 26 of the Evidence Act, accordingly, the recovery becomes doubtful as per Section 27 of the Evidence Act. Although, the recovery can be looked in the light of the conduct of the accused as per Section 8 of the Evidence Act if such conduct influences or is

influenced by any fact in issue or relevant fact, but, there is no evidence to show that the blood stains found on the knife, were related to the deceased or that the mobile phones were also related to the deceased.

33. As regard to the appeal against conviction is concerned, the Hon'ble Apex Court in *Padam Singh vs. State of U. P. (2000) 1 SCC 621* while dealing with the duty of the Appellate Court, has expressed that: -

"2.... It is the duty of an appellant court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of Appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

34. Similarly, in *Rama v. State of Rajasthan*, reported in (2002) 4 SCC 571, the Hon'ble Apex Court has also cast duty upon the appellate court in the following terms: -

"4.....It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding

such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

35. Furthermore, in *Majjal vs. State of Haryana* (2013) 6 SCC 798, a three Judges' Bench of the Hon'ble Apex Court has ruled thus: -

"7. It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter."

36. At this juncture, it is relevant to take note of a judgment rendered by the Hon'ble Supreme Court in the case of "***Sharad Birdhichand Sarda vs State of Maharashtra***" reported in (1984) 4 SCC Page 116 , wherein the Apex Court has laid down five golden principles of appreciation of evidence in a case based only on circumstantial evidence. They are as follows: -

- a. *"the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;*
- b. *the facts so established should be consistent only with the hypothesis of the guilt of the accused,*

that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

- c. the circumstances should be of a conclusive nature and tendency;*
- d. they should exclude every possible hypothesis except the one to be proved; and*
- e. 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."*

37. The most important aspect of circumstantial evidence is that the circumstance from which the conclusion of guilt is to be drawn, should be fully established. The Supreme Court has further held that the circumstance concerned 'must or should' and 'not' 'may be' established. In other words, the prosecution, in a case based entirely on circumstantial evidence, must establish the circumstance conclusively.

38. In the case based upon circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the accused cannot be convicted in such a situation.

39. In so far as those two mobile phones related to the deceased are concerned, those mobile phones were not identified by any family member of the deceased. Even those mobiles were not equipped with

the SIM card nor their International Mobile Equipment Identity (IMEI) was proved. There is no iota of evidence on record to suggest that those two mobile phones were related to the deceased.

40. Although, as per the FSL report, blood was found on the knife but it has not been proved by the prosecution by adducing any cogent or reliable evidence that the blood found on the knife was related to the deceased.

41. As per the statements of PW-3 Charu and PW-4 Khusha, at an earlier point of time, the accused entered the house of the deceased and demanded money. When the deceased refused for the same, appellant-accused extended a threat to seem him in future, but those witnesses (PW3 and PW4) did not disclose this fact to the informant PW-1 Geetika, who is also another daughter of deceased. The servants, who were very close to the deceased, did not say anything. Even the elder brother of the deceased, who used to live in the same vicinity, did not say anything about the motive of the deceased nor did he inform PW-1 Geetika about the aforesaid demand and the threat extended by the appellant.

42. From the above discussion, the following points are emerged: -

- a. The appellant is not named in the FIR.
- b. There is no motive alleged in the FIR against the appellant.
- c. There is no eye-witness of the scene.

- d. As per the prosecution story, the female cook Suman saw the appellant on 27.08.2013 while coming down from the house of the deceased, but when she appeared as a defence witness, she clearly resiled from the above facts.
- e. No disclosure statement was recorded by the I.O before the recovery of knife and mobiles.
- f. No SIM cards were found in the mobiles related to the deceased.
- g. The mobile phones were not identified by any of the family members of the deceased.
- h. There is no evidence which may show that the two mobiles were related to the deceased.
- i. The recovery alleged to have been made at the instance of the appellant is also doubtful in view of Section 27 of the Evidence Act.
- j. Even no *mens rea* could be attributed by the prosecution against the appellant for commission of alleged crime.
- k. The prosecution could not lead any link evidence to connect the appellant with the alleged crime.

43. We have fully gone through the entire evidence led by the prosecution before the trial Court and have re-assessed the same. On doing so, we find that the prosecution could not produce any clinching evidence against the appellant. The trial Court proceeded to hold the appellant guilty simply on the basis of recovery of weapon of murder and mobile phones, however, from the discussion made by us

hereinabove, we find that the learned trial Judge has fell into error while recording the finding of conviction.

44. The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court, in mindful of caution by the settled principles of law that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.

45. Thus, from the above discussion, we have no hesitation to hold that the prosecution has utterly failed to prove its case against the appellant beyond reasonable doubt. The circumstances pointed out by the prosecution, too, do not complete the chain of circumstances pointing out towards the guilt of the appellant exclusively. In that view of the matter, we are of the firm opinion that there is a reasonable doubt in the case of the prosecution and it is not proper or just to uphold the conviction of the appellant on the basis of aforesaid evidence.

46. In the result, the appeal is allowed. The conviction of the appellant as recorded by the Trial Court under Section 302 IPC is hereby set aside. The sentence awarded to the appellant for that offence is also set aside. The appellant is acquitted of the offence. The appellant is in jail, accordingly, he be released forthwith, if not required in any another case.

47. Let a copy of this judgment and order along with the LCR be transmitted to the Court concerned forthwith.

48. The Registrar Judicial is also directed to send a copy of this judgment to the Jail Authority for forthwith compliance.

SANJAYA KUMAR MISHRA, A.C.J.

RAMESH CHANDRA KHULBE, J.

R.Dang