

Court No. - 40

Case :- CRIMINAL APPEAL No. - 472 of 1988

Appellant :- Sri Ram

Respondent :- State

Counsel for Appellant :- G.C.Saxena

Counsel for Respondent :- A.G.A.

Hon'ble Bala Krishna Narayana,J.

Hon'ble Arvind Kumar Mishra-I,J.

(By the Court)

Case called out in the revised list.

None appears on behalf of the appellant to press this appeal although the name of Sri G. C. Saxena has been shown in the cause list as counsel for the appellant.

Record shows that this appeal is of the year, 1988 and the sole appellant in this appeal is on bail. Record further shows that when this case was called out before another coordinate Bench of this Court on 12.3.2015, none had appeared on behalf of the appellant as the lawyers were on strike. Thereafter the matter came up before us on 18.10.2016, 15.11.2016, 21.12.2016, 9.2.2017, 8.3.2017, 4.4.2017 and on 17.4.2017.

When this matter was placed before us on 17.4.2017, the office report dated 15.4.2017 was placed before us and upon perusing the same, we found that the bail bonds of the sureties furnished by the appellant at the time of his being released before the Chief Judicial Magistrate, Lalitpur, could not be traced out by the Office.

Hence, it is obvious that the appellant is not at all interested in the disposal of this appeal and he has apparently abused the liberty of bail and the Chief Judicial Magistrate, Lalitpur despite having made his best

efforts, has not been able to trace out the whereabouts of the appellant.

Faced with the aforesaid contingency, the question which arises before us is that whether we are bound to adjourn the hearing of this appeal in the absence of both the appellant and his counsel and wait perennially for the appellant to be traced out, if at all, and produced before this Court. Under identical circumstances, the Apex Court after a comprehensive analysis of previous decisions on the issue has distilled the legal position into six propositions in paragraph 19 of its judgement delivered in the case of **K.S. Panduranga v. State of Karnataka** (2013) 3 SCC 721 :

19.1 That the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;

19.2 That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

19.3 That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;"

19.4 That it can dispose of the appeal after perusing the record and judgement of the trial court;

19.5 That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6 That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

Thus, in view of the legal position propounded by the Apex Court in the case of **K.S. Panduranga (Supra)**, we do not find any good reason to adjourn the hearing of this appeal *suo motu* in the absence of the appellant or his counsel and we proceed to examine this appeal on merits with the aid of learned A.G.A. for the State.

This appeal has been preferred by the appellant Sri Ram against the judgement and order dated 19.02.1988 passed by Additional Sessions Judge/ Special Judge, U. P. Dacoity Affected Areas Act, 1983, Lalitpur in S.T. No. 56 of 1987, State Vs. Sri Ram, by which the appellant has been convicted and sentenced to imprisonment for life u/s 302 I.P.C.

Briefly stated the facts of this case are that on 18.04.1987, the informant P.W.1 Babu Lal's father, Ramu Sahu, resident of village- Todhi, P.S.- Bar had gone to visit a relative in village- Gamchari. On 19.04.1987 at about 3 p.m., P.W.2 Kishori Sahu, resident of village- Karmai informed P.W.1 Babu Lal that some unknown person has caused injury to his father by a sharp-edged weapon and he along with three shepherds who were grazing their cattle on the banks of Sajnam river, had brought his father to his house in village- Karmai. Upon receiving the aforesaid information, P.W.1 informant Babu Lal rushed to village- Karmai along with his elder brother Sukh Lal and Devi Lal, Devi Singh and Khuman, residents of the same village on a bullock cart. On reaching the house of P.W.2 Kishori, he found his father lying on the cot in an injured condition and on being questioned by P.W.1 informant Babu Lal, his father told him that while he was returning from village- Gamchari, on reaching the banks of Sajnam river near Karmai Moja between the two mountains, one tall person aged about 20-22 years who was carrying a 'pharsa' with him and wearing sky-blue coloured clothes came to him at about 1 p.m. and asked for bidi on which he told him that he did not smoke whereupon he started hurling abuses at him and when his father objected, he stuck him two blows with his 'pharsa' with the intention of causing his death. He also told him that the person had inflicted other injuries also on him with 'pharsa' and cane and when he shouted, the aforesaid person ran towards Gadyana and after sometime, P.W.2 Kishori and three other shepherds arrived there and took him to their village. While P.W.1 informant Babu Lal was taking his father to the police station for lodging the F.I.R. of the incident on a bullock cart, he became unconscious.

Narrating the aforesaid incident, P.W.1 informant Babu Lal lodged the written complaint (Ext.Ka.1) at P.S.- Bar, District- Lalitpur at 19.04.1987 at about 18.30 hours on the basis of which Case Crime No. 56/87 was registered against the appellant u/s 307 I.P.C. Check F.I.R. (Ext.Ka.5) and the relevant G.D. Entry (Ext.Ka.6) were prepared on the same day.

The injuries of the injured were examined on 19.04.1987 at about 9.40 p.m. in District Hospital, Lalitpur by P.W.3 Dr. R. B. Sharma who prepared his injury report (Ext.Ka.2). The injury report indicated following injuries on his person :-

- 1) *Incised wound 8 cm x ½ cm x bone deep Rt. side skull 3 cm above the eyebrow placed anteroposteriorly. Clotted blood present. The margins are clean cut.*
- 2) *Lacerated wound 2 cm x ½ cm x bone deep 1.5 cm above the right eyebrow, fresh bleeding present after removal of clot.*
- 3) *Incised wound 3 cm x ½ cm x muscle deep over right zygomatic region, fresh bleeding present.*
- 4) *Lacerated wound 3 cm x ½ cm x muscle deep over medial aspect of left forearm in lower 1/3rd region.*
- 5) *Lacerated wound 3.5 cm x ½ cm x muscle deep over posteromedial aspect of right forearm in lower 1/3rd region.*
- 6) *Contusion 9 cm x 1 cm obliquely placed front of chest, in lower sternal region, reddish.*
- 7) *Contusion abraded 6 cm x 1 cm, 6 cm below the left nipple, reddish.*
- 8) *Traumatic swelling over front of right side of chest in the areas of 10 cm x 6 cm.*
- 9) *Abrasion 1.5 cm x 1 cm over outer aspect of right leg in lower 1/3rd region.*
- 10) *L.W. 3 cm x ½ cm x skin deep over right lateral malleolus. Bleeding present.*
- 11) *Multiple contusions over right side back of chest in the area of 31 cm x 13 cm. Reddish in colour.*

The investigation of the case was started by P.W.10 S.I. Yadunath Singh on 19.04.1987 who after recording the statements of P.W.1 informant Babu Lal and P.W.2 Kishori, recorded the statement of P.W.4 Ganu on 20.04.1987 and on the same day, he inspected the place of

occurrence and prepared the site plan (Ext.Ka.11). He also collected blood-stained and plain earth from the place of incident and put the same in two different boxes (material Exts. 3 and 4), sealed the same and prepared their recovery memo (Ext.Ka.12). Upon receiving the information about the death of Ramu Sahu on 21.04.1987, the case was converted to one u/s 302 I.P.C. and the corresponding entry was made in G.D. as (Ext.Ka.8) and thereafter, the investigation of the case was entrusted to P.W.12 Jiledar Singh, S.H.O- Bar. During the course of the investigation, he recorded the statements of P.W.7 Shital Prasad, Sukh Lal, Parvat Singh, P.W.5 Baldu, Lakshmi Singh, Vrikh Bhan, P.W.6 Raghubar, Halku, Beni Prasad and Jasua. He allegedly arrested the accused-appellant on 01.05.1987 at about 3.30 p.m. on the basis of the information received by him from police informant from the culvert of Gadyana Bar link road and recorded his statement. The accused-appellant allegedly expressed his desire to get the 'pharsa' by which he had committed the murder of the deceased and concealed the same, recovered. He got recovered the blood-stained 'pharsa' (material Ext.1) and a blood-stained turban (material Ext.2) from the field of Parshuram Pandit from the bushes near the well in the presence of P.W.8 Jasrath and two other persons. The accused-appellant told them that the turban belonged to the deceased. The 'pharsa' and the turban were seized and packed in different bundles and recovery memo thereof (Ext.Ka.4) was prepared on the spot. The accused-appellant further allegedly admitted that he had thrown his blood-stained clothes in the river which despite a thorough search undertaken, could not be traced. The Investigating Officer prepared the site plan of the place of recovery as (Ext.Ka.14).

Thereafter, the investigation was transferred to P.W.11 S.H.O. Bhan Singh who after completing the same filed charge-sheet against the appellant u/s 302 I.P.C. (Ext.Ka.13) before Chief Judicial Magistrate, Lalitpur who committed the accused for trial to the Court of Sessions Judge, Lalitpur where Case Crime No. 56/87 was registered as S.T. No.

56 of 1987, State Vs. Sri Ram, and made over for trial from there to the Court of Additional Sessions Judge/ Special Judge, U. P. Dacoity Affected Areas Act, 1983, Lalitpur who on the basis of material collected during the investigation and after affording opportunity of hearing to the prosecution as well as the accused, framed charge u/s 302 I.P.C. against the accused-appellant. The accused-appellant pleaded not guilty and claimed trial.

The prosecution in order to prove its case examined P.W.1 informant Babu Lal, P.W.2 Kishori, P.W.3 Dr. R.B. Sharma, P.W.4 Ganu, P.W.5 Baldu, P.W.6 Raghubar, P.W.7 Shital Prasad, P.W.8 Jasrath, P.W.9 Ram Babu, P.W.10 S.I. Yadunath Singh, P.W.11 S.H.O. Bhan Singh and P.W.12 S.H.O. Jiledar Singh.

The prosecution also adduced documentary evidence comprising of affidavits of Constable Vishram Singh and Constable Babu Lal. Report of the forensic examiner, panchayatnama, challan lash and G.D. Entry dated 20.04.1987 were prepared and proved as (Exts.Ka.15 to Ka.20).

The accused-appellant in his examination u/s 313 Cr.P.C. denied the prosecution case and alleged false implication.

Learned Additional Sessions Judge/ Special Judge, U. P. Dacoity Affected Areas Act, 1983, Lalitpur, by the impugned judgement and order, convicted the accused-appellant u/s 302 I.P.C. and awarded aforesaid sentence to him.

Hence, this appeal.

We have heard learned A.G.A. appearing for the State and perused the record.

After having gone through the material on record, we find that the conviction of the appellant in the instant case has been recorded by the trial court on the basis of circumstantial evidence.

In ***Sharad Birdhichand Sarda v. State of Maharashtra***,

reported in *AIR 1984 SC 1622*, it was held by the Apex Court that, the onus is on the prosecution to prove, that the chain is complete and that falsity or untenability of the defence set up by the accused, cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Apex Court then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence. These are :

- (1) 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;
- (2) the facts so established should be consistent only with the hypothesis to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3) the circumstances should be of a conclusive nature and tendency;
- (4) they should exclude every possible hypothesis except the one to be proved; and
- (5) 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”.

Thus, in a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the Court must take utmost precaution whilst finding an accused guilty, solely on the basis of

the circumstances proved before it.

We now proceed to examine the evidence on record on the touchstone of the guidelines laid down by the Apex Court in the case of ***Sharad Birdhichand Sarda (supra)*** which a Court must follow while deciding a case based upon circumstantial evidence.

In the present case, the incident had allegedly taken place on 19.04.1987 at a lonely place between two hills near Sajnam river at about 1 p.m. while the deceased Ramu Sahu, father of P.W.1 informant Babu Lal, was returning from village- Gamchari, in which it is alleged that one unknown person had caused injuries to Ramu Sahu by a sharp-edged weapon. The information about the occurrence was given to P.W.1 informant Babu Lal by P.W.2 Kishori who had told him that he had brought his father to his house as he was unable to walk, with the help of two other shepherds at about 2 p.m. On receiving the aforesaid information, Sukh Lal and Devi Lal, elder brothers of P.W.1 informant Babu Lal along with the villagers Devi Singh and Khuman reached the house of P.W.2 Kishori from village- Karmai on a bullock cart where his father was lying on a cot in an injured state. On enquiry being made from him by P.W.1 informant Babu Lal, his father told him that while returning from village- Gamchari, when he had reached between two hills near the Sajnam river, he met one person who was a tall man, aged about 20-22 years, carrying a 'pharsa' and wearing sky-blue colour clothes, at about 1 p.m. and demanded bidi from him and when his father told him that he did not smoke, he started abusing him and when his father objected and told him that he does not have a bidi, he dealt a blow on his head with a 'pharsa' and thereafter dealt several blows with the cane of the 'pharsa'. On his raising cries for help, the assailant ran away and after sometime, P.W.2 Kishori and some other persons arrived at the place of incident and brought him to their village in a bullock cart and while he was taking his father to the police station for lodging the F.I.R. of the occurrence, he fell unconscious on the way. The injuries on the deceased were examined by

P.W.3 Dr. R.B. Sharma on 19.04.1987 who also prepared his injury report (Ext.Ka.2). The deceased succumbed to his injuries on 20.04.1987 at 1.45 p.m. The postmortem on the body of deceased Ramu Sahu was conducted on 21.04.1987 at 1 p.m. Following ante-mortem injuries were noted on the person of Ramu Sahu :-

- (1) Incised wound 8 cm x ½ cm x bone deep right side skull 3 cm above the eyebrow placed over frontoparietal region. The margins are clean cut with fracture of underlying frontal & parietal bone.*
- (2) Lacerated wound 2 cm x ½ cm x bone deep, 2 cm below & anterior from inj. no. 1 with underlying fracture of frontal bone.*
- (3) Incised wound 3 cm x ½ cm x bone deep over right zygomatic region with fracture of underlying zygomatic bone.*
- (4) Lacerated wound 3.5 cm x ½ cm x muscle deep over postero-medial aspect of right forearm in lower 1/3rd region above the wrist joint.*
- (5) Traumatic swelling over front of right side of chest in the area of 10 cm x 6 cm placed in middle.*
- (6) Abrasion 1.5 cm x 1 cm over outer aspect of right leg in lower 1/3rd region, 6 cm above the lateral malleolus.*
- (7) Lacerated wound 3 cm x ½ cm x skin deep over right lateral malleolus.*
- (8) Multiple contusions in the area of 32 cm x 12 cm over right side back in lower apart of thorax & upper part of abdomen (back).*
- (9) Lacerated wound 3 cm x ½ cm x muscle deep over inner aspect of left forearm in lower 1/3rd region, 4 cm above the wrist joint.*
- (10) Abraded contusion 6 cm x 1.5 cm; 6 cm below the left nipple.*
- (11) Contusion 9 cm x 1 cm at the front of chest, placed obliquely over lower sternal region.*

The cause of death of Ramu Sahu was stated to be haemorrhage as a result of ante-mortem injuries.

The name of the accused in this case surfaced for the first time in the statement of P.W.7 Shital Prasad in which he alleged that the accused-appellant had confessed before him that he had committed the murder of Ramu Sahu because he had refused to give him bidi. Thereafter the accused-appellant was arrested on 01.05.1987 on the culvert of Gadyana

Bar link road. The prosecution case is that after being arrested, the accused expressed his willingness to get the 'pharsa' with which he had committed the murder of Ramu Sahu, recovered. Thereafter, P.W.8 Jasrath, Pratap and Kurey were called as witnesses who accompanied the police party and the accused to Paura Ghat near Sajnam river in a government jeep whereafter stopping the jeep, the accused-appellant got down and followed by the police party and the witnesses, he took out a blood-stained 'pharsa' (material Ext.1) and a blood-stained turban (material Ext.2) from the bushes near the well and admitted that the turban belonged to the deceased and he had committed the murder of Ramu Sahu with the same 'pharsa'. Both the 'pharsa' and turban cloth were seized and packed in different bundles and there recovery memo (Ext.Ka.4) was prepared on the spot. The prosecution further claims that the accused also stated that he had thrown his blood-stained clothes in the river and despite an extensive search being carried out, the same could not be recovered. The Investigating Officer prepared the site plan of the place of recovery (Ext.Ka.14).

P.W.1 informant Babu Lal, P.W.2 Kishori and P.W.4 Ganu in their statements recorded before the trial court proved the statements given by the deceased Ramu Sahu before them with regard to the description of the accused-appellant and the particulars pertaining to the incident.

P.W.5 Baldu deposed before the trial court that before the incident at about 12 p.m., he had seen the accused-appellant Sri Ram standing near the place of occurrence near *mahua* tree armed with a 'pharsa'.

P.W.6 Raghubar stated that on the date of the incident, he was grazing his cattle near the Paura Ghat when he had seen Sri Ram going towards the river with a 'pharsa' and a scarf in his hand. The 'pharsa' and the clothes of the deceased were stained with blood.

P.W.7 Shital Prasad in his statement recorded before the trial court proved the extra-judicial confession allegedly made by the accused-

appellant before him and had implored him to save him. However, before he could inform the Investigating Officer about the extra-judicial confession, the Investigating Officer met him on the same day and he told him about the extra-judicial confession.

P.W.9 Head Constable Ram Babu proved the check F.I.R. as (Ext.Ka.5) and the relevant G.D. entry as (Ext.Ka.6). He also proved the G.D. entry by which the case, after the death of Ramu Sahu, was converted to Section 307 I.P.C. from Section 302 I.P.C., G.D. entry by which the case property was submitted in the police station and the report of the chemical examiner as (Exts.Ka.7, Ka.8 and Ka.9).

P.W.10 S.I. Yadunath Singh, P.W.11 S.H.O. Bhan Singh and P.W.12 S.H.O. Jiledar Singh, the three Investigating Officers of the case in their statements recorded during the trial narrated the steps taken by them during the course of investigation.

Having gone through the record, we find that the recovery of blood-stained 'pharsa' and blood-stained turban is not admissible u/s 27 of the Evidence Act. Before examining the issue whether the recoveries are admissible u/s 26 and 27 of the Act, it would be useful to reproduce Section 26 and 27 of the Indian Evidence Act, 1872 :-

26. Confession by accused while in custody of police not to be proved against him – No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

*[Explanation – In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George 4[***] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)].*

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.

The prosecution case is that after the accused-appellant was arrested by P.W.12 S.H.O. Jiledar Singh, he had expressed his desire to get the crime weapon and the turban of the deceased recovered. We have gone through the statements of P.W.12 S.H.O. Jiledar Singh very carefully. He had merely deposed that on being arrested, the accused-appellant confessed to his crime and expressed his willingness to get the crime weapon and the deceased's turban recovered. There is nothing on record which may indicate that any disclosure statement of the accused-appellant was recorded by P.W.12 S.H.O. Jiledar Singh in which apart from having confessed his crime, the accused-appellant had also revealed the place where he had hidden the crime weapon and the deceased's turban and thereafter, the aforesaid two articles were recovered from the same place which the accused-appellant had mentioned in his disclosure statement. There is another aspect of the matter which renders the recovery of the crime weapon and the alleged blood-stained turban cloth of the deceased on the pointing out of the accused-appellant which was allegedly made from a public place, accessible to the public at large.

P.W.4 Ganu in his cross-examination had stated that when he had noticed injured Ramu Sahu at the place of incident, his turban was on his head which had spots of blood. Now, if the deceased was wearing his turban at the time when the witnesses had found him in an injured condition then how could the same turban be hidden or concealed by the accused-appellant along with the crime weapon ?

Learned A.G.A. has further failed to invite our attention to any link evidence on record connecting 'pharsa' allegedly recovered at the behest of the accused-appellant with the crime in question. The description of the assailant given by the deceased Ramu Sahu to the witnesses also does not match with that of the accused-appellant. Record shows that the height of the accused-appellant is barely 5ft 4 inch while as per the description of the assailant furnished by the deceased Ramu Sahu, he was a tall man. In our opinion, a person having a height of 5ft 4 inch cannot be described as

a tall man.

The extra-judicial confession allegedly made by the accused-appellant before P.W.7 Shital Prasad also does not appear to be reliable. No explanation is coming forth from the side of the prosecution as to why the accused-appellant would have confessed his crime before P.W.7 Shital Prasad. It is not the case of the prosecution that P.W.7 Shital Prasad commanded some clout in the village or he was the Pradhan of the village. P.W.7 Shital Prasad does not even appear to be the resident of the same village as that of the accused-appellant.

Thus, in view of the foregoing discussion, we find that neither there is any chain of circumstances pointing at the guilt of the accused-appellant alone nor there is any reliable or convincing evidence linking the accused-appellant with the crime. Merely because a couple of witnesses had seen him before and after the time of the occurrence near the place of incident, in our opinion, is not a circumstance sufficient to convict the appellant and the appellant is entitled to benefit of doubt.

Accordingly, the appeal succeeds and is allowed.

The impugned judgement and order is hereby set-aside.

The accused-appellant Sri Ram is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged. However, he will comply with the provisions of Section 437-A of Cr.P.C.

Order Date :- 18.4.2017

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