HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 54 of 2017

Irfan .....Appellant

Versus

State of Uttarakhand ....Respondent

Present:-

Mr. Arvind Vashistha, Senior Advocate with Mr. Hemant Singh Mahra, and Ms. Disha Vashistha, Advocates for the appellant.
Mr. J.S. Virk, Deputy Advocate General for the State.

Criminal Appeal No. 425 of 2016

Phool Singh alias Phullu .....Appellant

Versus

State of Uttarakhand ....Respondent

Present:-

Mr. Tapan Singh, Advocate for the appellant.
Mr. J.S. Virk, Deputy Advocate General for the State.

JUDGMENT

Coram:

Hon'ble Ravindra Maithani, J.
Hon'ble Alok Kumar Verma, J.

Hon'ble Ravindra Maithani, J. (Oral)

Since both these appeals arise from one and the same Sessions Trial, they are heard together and being decided by this common judgment.

2. Present appeals are preferred against the judgment and order dated 05.10.2016/06.10.2016 passed in Sessions Trial No. 79 of 2009, State v. Phool Singh alias Phullu and others, by the court of Additional Sessions Judge, Vikas Nagar, Dehradun ("the case"). By the impugned judgment and order, the appellants have been convicted under Section 302 read with 34 IPC and sentenced to life imprisonment, with a fine of Rs. 30,000/- each, with a stipulation that in default of payment of fine, they shall undergo simple imprisonment for a further period of one year.

3. Heard learned counsel for the parties and perused the record.

4. The prosecution case, briefly stated is as follows. The deceased Mahboob Hasan was asleep in a shop in the night of 30.12.2008. Next morning, on 31.12.2008, he was found dead. A report was lodged by PW 1 Shoaib Ahmed, based on which Case Crime No. 209 of 2008 under Section 302, 120B read with Section 34 IPC was lodged at Police Station Vikasnagar, District Dehradun. Investigation was undertaken. Inquest of the deceased was conducted on 31.12.2008. On the same day, post-mortem of the deceased was conducted. Three

injuries were detected on the person of the deceased. They are as follows:-

(i) Incised wound on front forehead vertically, lower end trending downward; clean cut margin of 4 c.m. x 1 c.m. x bone deep; towards the left side of eye.

(ii) Incised wound; transversely placed; size 11 c.m. x 4 c.m. x neck cutting deep up to cervical vertibrae bone. All soft tissues including trachea, oesophagus, vessels and all tissues cut through and through, clotted blood 6 c.m. above chest and 6 c.m. below chin.

(iii) Abraided contusion of size 3 c.m. x 2 c.m. near back side of wrist of right hand.

5. Blood stained soil as well as simple soil was also taken into custody by the police from near the place

of incident. The Investigating Officer prepared the site plan. According to the prosecution case, the appellants were arrested on 05.01.2009. On 06.01.2009, at the instance of the appellant Phool Singh, the weapon of offence i.e. an iron rod (*Saria*) was recovered from the forest area and at the instance of the appellant Irfan, a knife was recovered. Both these articles were sent for forensic examination.

6. On 27.07.2009, charge under Sections 302 read with 34 was framed against the appellants and the co-accused. Rizwan was also charged under Section 120B read with Section 302 IPC. The appellants and the co-accused denied charges and claimed trial.

7. The co-accused Rizwan was acquitted by the trial court for the charge under Section 120B read with 302 IPC. In para 13 of the impugned judgment and order, it is recorded that Arjun Singh was a child in conflict with law, therefore, his file was separated for inquiry by the Juvenile Justice Board, Dehradun.

8. In order to prove its case, the prosecution examined as many as 14 witnesses, namely, PW 1 Shoaib Ahmed, PW 2 Aurangjeb, PW 3 Rajesh Kumar, PW 4

Javed Khan, PW 5 Dr. K.C. Pant, PW 6 Jahid, PW 7 Farookh, PW 8 Rajesh @ Rizwan, PW 9 Gulfam, PW 10 Dr. K.S. Chauhan, PW 11 CP 913 Pankaj Singh Rawat, PW 12 Constable 263 Himanshu Amoli, PW 13 SI Yashpal Singh and PW 14, Sri V.K. Jetha, the Investigating Officer.

9. After the prosecution evidence, the appellants were examined under Section 313 of the Code of Criminal procedure, 1973. According to them, they were falsely implicated.

10. After hearing the parties, by the impugned judgment and order, the court below convicted and sentenced the appellants, as stated hereinbefore.

11. Learned Senior Counsel for the appellants would submit that the prosecution has not been able to prove its case beyond reasonable doubt; the court below has committed an error in law in convicting and sentencing the appellants. He would also raise the following points in his submission:-

(i) The only evidence that has been placed before the court by the prosecution is that on 30.12.2008,

the appellants were spotted near the place of incident. It is argued that it is a very weak kind of evidence; it has no link to connect the appellants with the alleged incident.

(ii) According to the prosecution, on 06.01.2009, at the instance of the appellant Phool Singh, a *Saria* and at the instance of appellant Irfan, a knife, both the weapons of offence, were recovered. It is submitted that both these articles are not connected with the crime. It is argued that the recovery may not be read under Section 27 of the Indian Evidence Act, 1872 ("the Evidence Act"), because the prosecution has utterly failed to prove any disclosure statements of the appellants, based on which the alleged recovery was made.

(iii) The prosecution has not been able to prove any last seen evidence.

Therefore, it is argued, that this is a case, which is based on circumstantial evidence; it is not such a case in which it may be said that the prosecution has been able to prove its case beyond reasonable doubt.

(iv) Even the forensic science report does not connect the alleged recovered articles to the offence.

12. Learned counsel for the State would submit that PW 1 Shoaib and PW 2 Aurangjeb have stated that on 30.12.2008, the appellants did inquire as to who sleeps in the shop in the night and the next morning, the deceased was found dead in his shop. Learned State Counsel would also refer to the statement of PW 11 CP 913 Pankaj Singh Rawat, who has stated that on 26.12.2008, he had visited the shop of Rizwan, where the appellants were also present and spotting the presence of PW 11 CP 913 Pankaj Singh Rawat, they were alarmed. Learned State Counsel would also submit that on 06.01.2009, at the instance of the appellant Phool Singh,

a *Saria* and at the instance of the appellant Irfan, a knife was recovered, which are weapons of offence.

13. Before discussion is made, it would be apt to see as to what the witnesses have stated.

14. PW 1 Shoaib, PW 2 Aurangjeb and PW 11 CP 913 Pankaj Singh Rawat have somehow stated about the presence or the conduct of the appellants Irfan and Phool Singh.

15. PW 1 Shoaib has stated that on 30.12.2008, the appellants along with one more person had visited the shop and inquired as to who sleeps in the shop in the night, to which this witness replied that Mahboob sleeps in the shop in the night. This witness also stated about some enmity with Rizwan, who was working with the deceased Mahboob. It may be noted that the deceased and the Arjun both were in scrap business.

16. PW 2 Aurangjeb is another witness. He has stated that on 30.12.2008, the appellants along with Arjun had visited the shop and had inquired as to who sleeps in the shop in the night, to which he replied that the deceased Mahboob would sleep. According to this witness, on his query as to why they were asking such

question, the appellants replied that he would come to know about it in the morning; and the next morning, the deceased was found dead.

17. PW 1 Shoaib has proved the first information report. PW 2 Aurangjeb has proved some recovery memos, by which the police had taken blood stained soil as well as a cell phone from the place of incident. He has also proved those articles, which were taken by the police in his presence. He has also signed the inquest Ex. A-4.

18. PW 11 CP 913 Pankaj Singh Rawat was posted at the concerned police station at the relevant time. According to him, on 26.12.2008, he visited the shop of Rizwan, where the appellants were also present and spotting his presence, all of them were alarmed. This is one part of the evidence, which the prosecution has led to connect the appellants with the alleged offence.

19. PW 3 Rajesh Kumar, PW 6 Jahid, PW 7 Farookh, PW 8 Rajesh @ Rizwan and PW 9 Gulfam, all have not supported the prosecution case. They have been declared hostile.

20. PW 4 Javed Khan is a witness of inquest. He has stated about it. PW 5 Dr. K.C. Pant had conducted

post-mortem of the deceased on 31.12.2008 and he had detected injuries on the person of the deceased, which have already been quoted hereinbefore. This witness has proved the post-mortem report, Ex. A-5.

21. PW 10 Dr. K.S. Chauhan had examined Arjun on 06.01.2009. He has stated about the injury report Ex. A-6. As stated, Arjun was declared a child in conflict with law and his file was separated for inquiry by the Juvenile Justice Board, Dehradun.

22. PW 12 is the police constable, who recorded the chik FIR at the police station on 31.12.2008. He has proved the chik FIR and the general diary entry. This witness has also proved general diary report No. 37 time 20:40 hrs. of 05.01.2009, by which the appellants were lodged at the police station after their arrest on that day. These all are formal witnesses.

23. The prosecution has adduced another set of evidence to prove the alleged recovery at the instance of the appellants. PW 13 SI Yashpal Singh had joined the company of PW 14 V.K. Jetha, the Investigating Officer of the case on 06.01.2009 when according to the prosecution, at the instance of the appellants certain

articles were recovered. According to this witness, at the instance of appellant Phool Singh, a *Saria* was recovered, of which recovery memo Ex. A-10 was prepared. According to this witness, at the instance of the appellant Irfan, a knife was recovered, of which a recovery memo Ex. A-11 was prepared. This witness has also stated about recovery made from other persons and has proved those articles as well.

24. PW 14 V.K. Jetha is the Investigating Officer. He has also stated about the recovery and other steps that were taken during investigation.

25. The prosecution has also filed a forensic science laboratory report. Some blood stains were detected on the knife. But, according to the report, the blood was disintegrated, therefore, its origin could not be established.

26. It is a case based on circumstantial evidence. In the cases of circumstantial evidence, the prosecution has to establish the chain of circumstances in such manner, which may indicate only one and one conclusion i.e. the guilt of the accused.

27. In the case of Sharad Birdichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116, the Hon'ble Supreme Court has laid down those guidelines, which are essential to be established by the prosecution in a case based on circumstantial evidence, so as to bring home the guilt of the accused. In para 153 of the judgment, the Hon'ble Supreme Court observed as follows:-

> **"153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
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> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (*2*) 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,
>
> (*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."

28. One of the factors that is being relied on by the prosecution is the alleged recovery at the instance of the appellants. As a general rule, any confession made before the Police Officer by an accused is not admissible. Section 27 of the Evidence Act, makes certain exceptions to this general rule. According to this, Section 27 of the Evidence Act, so much of the confession may be proved as it relates to distinct to the fact thereby discovered. This section reads as follows:-

> "**27. How much of information received from accused may be proved**.—Provided that, when any fact is deposed to as discovered inconsequence 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."

29. In the case of Bodhraj alias Bodha and others Vs. State of Jammu and Kashmir, (2002) 8 SCC 45, the Hon'ble Supreme Court laid down guidelines with regard to the applicability of Section 27 of the Evidence Act and admitting such evidence. The Hon'ble Supreme Court observed that **"It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true."**

30. In the case of Ashish Jain Vs. Makrand Singh and others, (2013) 3 SCC 770, the Hon'ble Supreme Court referred to the principles of law, as laid down in the case of Selvi and others Vs. State of Karnataka, (2010) 7SCC, 263, wherein the Court observed that **"however, Section 27 of the Evidence Act incorporates the**

“theory of confirmation by subsequent facts” i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts.”

31. The principles have further been discussed by the Hon’ble Suprme Court in the case of Shahaja alias Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra, 2022 SCC OnLine SC 883. In para 42 of the judgment , the Hon’ble Supreme Court summed up the principles as follows:-

> **“42.** The conditions necessary for the applicability of Section 27 of the Act are broadly as under:
>
> (1) Discovery of fact in consequence of an information received from accused;
>
> (2) Discovery of such fact to be deposed to;
>
> (3) The accused must be in police custody when he gave informations and
>
> (4) So much of information as relates distinctly to the fact thereby discovered is admissible - Mohmed Inayatullah v. The State of Maharashtra : (1976) 1 SCC 828 : AIR 1976 SC 483 : 1975 CLJ 668
>
> Two conditions for application -
>
> (1) information must be such as has caused discovery of the fact; and
>
> (2) information must relate distinctly to the fact discovered - Kirshnappa v. State of

Karnataka : (1983) 2 SCC 330 : AIR 1983 SC 446 : 1983 Cri LJ 846."

32. Thereafter, the Hon'ble Supreme Court observed:-

> "47. Thus, in the absence of exact words, attributed to an accused person, as statement made by him being deposed by the Investigating Officer in his evidence, and also without proving the contents of the panchnamas, the trial Court was not justified in placing reliance upon the circumstance of discovery of weapon.
>
> 48. Even while discarding the evidence in the form of discovery panchnama the conduct of the appellant herein would be relevant under Section 8 of the Act. The evidence of discovery would be admissible as conduct under Section 8 of the Act quite apart from the admissibility of the disclosure statement under Section 27, as this Court observed in A.N. Venkatesh v. State of Karnataka, (2005) 7 SCC 714,:
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> > "By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was

> exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.) [(1979) 3 SCC 90]. Even if we hold that the disclosure statement made by the accused appellants (Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8."
>
> * * *

50. Further, in the aforesaid context, we would like to sound a note of caution. **Although the conduct of an accused may be a relevant fact under Section 8 of the Act, yet the same, by itself, cannot be a ground to convict him or hold him guilty and that too, for a serious offence like murder.** Like any other piece of evidence, the conduct of an accused is also one of the circumstances which the court may take into consideration along with the other evidence on record, direct or indirect. What we are trying to convey is that the conduct of the accused alone, though may be relevant under Section 8 of the Act, cannot form the basis of conviction."

(emphasis supplied)

33. The question is as to whether the prosecution, in the instant case, has been able to connect the links so as to draw only one conclusion indicating the guilt of the appellants? The statements of PW 1 Shoaib and PW 2 Aurangjeb are not even the last seen evidence. Mere asking as to who sleeps in the shop, in no manner connect the guilt of the appellants. It is a very weak kind of circumstance that has been placed before the Court by the prosecution. It may be noted that PW 1 Sohaib has stated that there has been enmity with one Rizwan with regard to their business. Rizwan has already been acquitted.

34. The statement that has been given by PW 11 CP 913 Pankaj Singh Rawat, this Court is afraid, is not relevant. According to this witness, on 26.12.2008, when he visited the shop of Rizwan, he found the appellants sitting there and they were alarmed, when they spotted this witness. It, in no manner connects the appellants with the alleged offence.

35. The only evidence that is adduced by the prosecution is the alleged recovery made at the instance of appellants on 06.01.2009. What is argued on behalf of

the appellants is that this recovery may not be termed one made under Section 27 of the Evidence Act, because there is no disclosure statement proved by the prosecution.

36. According to the prosecution witnesses, the appellants were arrested on 05.01.2009. They were lodged in the police station by way of General Diary Report No. 37 at 8:40 PM, which is proved by PW 12 Constable, Himanshu Amoli. It is Ex. A9. It also does not record that any interrogation of the appellants were done, in any manner, on that date, when they were lodged in the jail.

37. There are documents, which are recovery memos. There are, in fact, two recovery memos Ex. A10 with regard to recovery of *sariya* at the instance of the appellant Phool Singh and Ex. A11 recovery memo of knife at the instance of the appellant Irfan. But, in both these recovery memos, there is not even a single sentence which may be termed as a disclosure statement. How the recovery was made? There is no statement as such given by the appellants, which led the police party to the place of alleged recovery. Even prosecution has not been able to show that any such confession was made. The statement was nowhere recorded.

38. PW 14 V.K. Jetha is the Investigating Officer. He was asked about it. In para 6 of his statement, he would submit that he did not make any separate memo of the interrogation of the appellants. Although, in para 7 of his statement, he tells that based on the statements of the appellants, they proceeded to recover the articles. Where are those statements of the appellants? What exact words were spoken by the appellants? How it can be said that based on the statement, the police made the alleged recovery? There is no evidence to that effect? In para 8 of his statement of PW14 V.K. Jetha had stated that he had interrogated the appellants separately. But, as stated, there is no record of it. Neither separate record of the interrogation of the appellants was made by PW14 V.K. Jetha or by any Police Officer, nor is there any record of their interrogation in the General Diary Report No. 37 dated 05.01.2009, by which the appellants were lodged in the police station, after their arrest. Therefore, admittedly, there is no disclosure statement as of.

39. In the absence of such disclosure statements, this recovery may at the most be termed as one under Section 8 of the Indian Evidence Act, but this alone may

not be sufficient to convict the appellants, as observed by Hon'ble Supreme Court in the case of Shahaja *(supra).*

40. In view of the above, this Court is of the view that the prosecution has utterly failed to prove the charge against the appellants. The appellants deserve to be acquitted of the charge under Sections 302 read with 34 IPC. Accordingly, both the appeals deserve to be allowed and the impugned judgment and order passed in the case deserves to be set aside.

41. The appeals are allowed.

42. The impugned judgment and order passed in the case is set aside.

43. The appellants are acquitted of the charge under Section 302 read with Section 34 IPC.

44. The appellants are in jail. Let they be set free forthwith, if not wanted in any other case.

45. Let a copy of this judgment along with the lower court record be forwarded to the court concerned.

(Alok Kumar Verma, J.) (Ravindra Maithani, J.)

24.05.2024

Avneet/