

ESHWARAI AH AND ANR.

v.

STATE OF KARNATAKA

JANUARY 27, 1994

[K. JAYACHANDRA REDDY AND G.N. RAY, JJ.]

Indian Penal Code, 1860: Section 302/34—Death of a person in the presence of two accused in a house bolted from inside—No plausible explanation—Prosecution could not prove who actually smothered the deceased—Circumstantial evidence that death was homicidal—Held both the accused liable to be convicted.

Criminal Trial: Circumstantial evidence—Circumstances to be closely scrutinised—All circumstances must form an unbroken chain leading to the only inescapable conclusion of the guilt of the accused.

Indian Evidence Act, 1872: Sections 101 and 106—Burden of proof—Presence of accused and none else at the time of death—Burden lies on accused to explain their presence and the circumstances under which the death occurred.

The two appellants, were tried for the offence of murder on one 'R'. The Sessions Judge held that the prosecution case was based on circumstantial evidence and that the prosecution had satisfactorily established 7 out of 10 of these circumstances. However, he did not accept the post-mortem report that the death of the deceased was due to asphyxia on account of smothering, but accepted the expert opinion of the Doctor, DW 1, to the effect that it was a case of natural death and acquitted both the appellant accused.

On appeal by the State, the High Court held that the evidence, though circumstantial, clearly proved the guilt of the accused persons. Accordingly, it set aside the order of acquittal passed by the Sessions Judge and convicted both the accused of the offence of murder under Section 302 read with Section 34 I.P.C. and awarded the sentence of life imprisonment to both the accused.

In the appeal before this Court on behalf of the accused- appellants,

- A it was contended that the factum of homicidal death itself was not established beyond reasonable doubt, and accordingly, the question of conviction on a charge of murder was not sustainable in law, that the usual features suggesting homicidal death were absent and the facts which were noted by the doctors holding post-mortem examination clearly fitted in with the case of a natural death of the deceased; that the expert opinion of DW 1, the Doctor, should have been accepted by the High Court; that it was a case of circumstantial evidence and unless from the circumstances fully established, the chain was full and complete which only pointed to the commission of murder by the accused and no other conclusion was possible, then and then only, the conviction on a charge of murder was permissible in law and if there was any doubt in any aspect, the chain was broken and the circumstances, however intriguing and suspicious they may be, would not warrant conviction because no conviction could be based on suspicion.

D Dismissing the appeal, this Court

- HELD: 1. It has been clearly established from the evidences adduced on behalf of the prosecution that shortly before the death of the deceased, both the accused entered the house at dead of night on the fateful day and both of them had witnessed a cinema show and came to the house.
- E Admittedly, accused No. 2 was the mistress of the deceased and she used to visit the house of the deceased frequently at night. It has been established from the evidence that the accused No. 2 tapped the door which was opened by the deceased and she entered the house and accused No. 1 who had also come with accused No. 2 and was waiting just at a little distance
- F had also entered the house. When the door was broken open by the neighbours and the relations, the deceased was found lying dead in the kitchen and under the cot in bed room of the deceased, both the accused persons were hiding. Despite tapping the door repeatedly by the neighbours and the relations of the deceased, the accused persons who were inside the house did not open the same and the door had to be broken.
- G Both the accused had not given any explanation as to why both of them were present in the house at that late hour in the night. [397-C-F]

2. The High Court has rightly held that the DW 1, the Doctor, had no occasion to see the dead body and the injuries on the person of the deceased
- H and only from the report of the post-mortem the said doctor gave an expert

opinion. On the contrary, two doctors who had held the post-mortem on the deceased had occasions to look at and examine the injuries on the person of the deceased and they had given a clear opinion that the death was due to asphyxia and it was a case of homicidal death. [397-H; 398-A]

3.1. The High Court has rightly rejected the suggestion that it was a case of natural death on account of epileptic fit. If the deceased had suffered from epileptic fit which ultimately caused his death, the accused, particularly the accused No. 2, ought to have called the neighbours for help or at least should have answered to their call when they tapped the door and should have requested the neighbors to render some help to the deceased. [398-C-D]

3.2. The High Court has rightly observed that the turkish towel with blood stains could not have found at a little distance from the dead body if the deceased had met natural death. In an epileptic fit, the blood was not expected to be found in that way and in any event, there was no occasion to wipe the same and throw it away by the person who was under epileptic fit. Though blood group found on the wearing apparel of accused No. 1 was not established as that of the blood group of the deceased, the presence of the blood on the wearing apparel has not been explained in any manner by the accused. [398-E-F]

4. It is not the case of the defence that when accused had tapped the door of the deceased some one else had opened the door. Hence, it must be reasonably accepted that the deceased opened the door and he was alive. Hence he had met his death in the presence of the accused in a house which was bolted from inside thereby preventing any one else from entering the house at the time of his death. Since the murder of the deceased has been established in presence of both the accused, the accused could have explained the same, but they failed to do so. [398-G-H]

5.1. It is true that in a case which is to be established by circumstantial evidence, the circumstances must be very closely scrutinised and all the circumstances must form an unbroken chain which would establish the guilt of the accused and the case of prosecution should not lie in the realm of surmise and conjecture even if the facts and circumstances are very intriguing raising serious suspicion. [398-H; 399-A]

5.2. In the instant case, the circumstance have formed a complete

- A chain which clearly point out the complicity of the accused in causing the murder and no other conclusion suggesting innocence of the accused appears to be reasonable or justified. Although, the prosecution could not lead any evidence as to who had actually smothered the deceased but since both of them were present at the time of commission of the offence, conviction under Section 302 read with Section 34 I.P.C. is warranted against both the accused, and there is no reason to interfere with the same. [399-B, C]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 514 of 1988.

- C From the Judgment and Order dated 1.4.1987 of the Karnataka High Court in Crl. A. No. 138 of 1985.

Indeevar Goodwill for the Appellants.

- D M. Veerappa for the Respondent.

The Judgment of the Court was delivered by

- E G.N. RAY, J. 1. This appeal is directed against the conviction of the appellants under Section 302 read with Section 34 I.P.C. and imposing sentence of life imprisonment to both the appellants by the Division Bench of the Karnataka High Court by Judgment dated April 1, 1987 in Criminal Appeal No. 138 of 1985. By the aforesaid Judgment, the High Court set aside the judgment of acquittal passed in favour of the accused appellants by VIII Additional City and Sessions Judge, Bangalore City on January 2, 1985 in Sessions Case No. 32 of 1983.

- F 2. The prosecution case in short is that the deceased Ramesh was a bachelor and was residing in House No. 6/5, 9th Cross, Adarsha Nagar, Chamaraipet, Bangalore. During the night between 14th and 15th December, 1982, he was murdered by the accused persons. It is undisputed that the accused No. 2, Smt. Mayamma, was a mistress of the deceased for about 3-4 years prior to the date of the incident and she was residing in Ramachandra Rao's Vataru in which the house of the deceased was also situated. The said accused was often visiting the house of the deceased Ramesh during the night time. She had filed an application claiming maintenance from her husband P.W. 7, and had secured an order in her
G favour. While the said accused Mayamma was attending to her case for
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maintenance, she became acquainted with accused No. 1. Eshwarai ah, who
 was a Constable attached to the Wilson Garden Police Station and intimacy
 developed between the accused No.2 and the accused No.1. On December
 14, 1982, both the accused witnessed a cinema show in Uma Talkies and
 returned together. They were seen near the house of the deceased at about
 1 or 1.15 A.M. on December 15, 1982. The accused No. 2 tapped on the
 front door of the house and Ramesh opened the door. At that time the
 accused No. 1 was standing at a little distance from the house. After
 accused No. 2 entered the house, accused No. 1 followed her and also
 entered house. P.W. 1 Ramachandra Rao who was residing in the house
 adjacent to the house of the deceased heard a sound of cries and he woke
 up. He came out and went to the house of his neighbour Hemoji Rao (P.W.
 3), a retired Constable and requested him to accompany him to find out
 what was the cause for the sound. Both of them went near the house but
 they did not hear any sound from the said house. P.W. 4, Sundaresh, the
 brother of the deceased had his house nearby and P.Ws. 1 and 3 went to
 his house and woke him up and informed him about the sound which P.W.
 1 had heard. The three of them then came near the house of the deceased
 and P.W. 4 tapped the door of the house but there was no response. P.W.
 4 thereafter left the place saying that he would inform his brother
 Ramachandra Rao and also his cousin Inderesh. The said two persons were
 informed and they returned immediately to the house of the deceased.
 Seetharama Racedy, P.W. 2, was a neighbour of the deceased and he woke
 up on hearing the barking of a dog and he came near the house of the
 deceased. Then P.W. 1 and P.W. 3 told him what P.W. 1 had heard. P.W.
 2 also tapped the door of the house but there was no response. By that
 time, P.W. 4 returned. One Raju known to P.W. 4 happened to come there
 and P.W. 4 requested Raju to go and inform the police. Raju thereafter
 went away and returned with two Police Constables P.W. 5, H. Nanjundap-
 pa and another Police Constables Basavaraju. After the two police con-
 stables came to the place of incident, P.W. 4 broke open the window pane
 and flashed the torch inside. They did not see anything. Then the front
 door of the house of the deceased was broken open with the size stone
 M.O. 1 and all the said persons entered the house. By that time other
 residents of the Vatara also awoke including P.W. 13 Vijaya. The light of
 the front door of Ramesh was switched on but nothing was seen there. The
 door leading to the bed room was little opened. They entered the bed room
 and switched on the light but they did not see anything. When P.W. 2

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- A flashed the torch underneath the cot they noticed Accused No. 1 and accused No. 2 couched below it, shivering all the while. On being called, both of them came out. They were given to the custody of the said two police Constables. The deceased however, could not be seen there. The light of the Pooja room which was adjacent to the kitchen was switched on.
- B At that stage, they saw the legs of the deceased in the kitchen. When they switched on the light of the kitchen room they saw the deceased lying on his back in the kitchen, and a blood stained turkish towel (M.O.5) was found lying at a little distance away from the body of Ramesh. Scratch marks were found on the face of Ramesh. His neck was swollen and blood was seen on the lips of Ramesh. P.W. 4 went to his house and wrote a
- C complaint Ext. P.3. He then went to the Police Station where Pratap Singh, Sub-Inspector of Police, P.W. 14 was officer-in-charge. The complaint Ext. P. 3 was presented to the Police Station at 2.00 A.M. and the police officer registered the crime and issued first information report being Ext. P. 11. Both the accused were arrested at 2.45 A.M. The Circle Inspector, who on
- D receipt of the information took over the investigation from P.W. 14, noticed that the shirt and pant of accused No. 1 appeared to be stained with blood and he seized the said blood stained wearing apparels by securing panchas. The counter-foils of the two cinema tickets were also recovered from the accused No. 1 and the said tickets were also seized in the presence of the Panchas. The blood stained towel, the stick with which the window pane
- E was broken, some nude photos of Accused 2 being M.Os 12 to 89 were seized by the police. The dead body was sent for autopsy. The post-mortem was conducted jointly by P.W. 17 and P.W. 18 at about 12.00 noon on December 15 1982 and post mortem note was prepared being Ext. P. 14.
- F 3. Both the accused made statements under Section 313 Criminal Procedure Code and they also submitted written statement. Accused No. 1 had denied all the circumstances and contended that he was taken to custody from his house. The Accused No. 2 though admitted that she was the mistress of the deceased and the photos seized by the police were her
- G photos, she stated that the deceased was not only looking after her but also looking after her children. She denied that she had gone to the house of the deceased on the day of occurrence. She stated that the deceased had instructed her not to visit him on 13th and 14th December, 1982 as he would have guests on those dates. Hence, she was all along in her house and the police picked her up from her house. Dr. C.B. Gopalakrishna
- H (DW-1) a retired professor in Forensic Medicine, was examined by the

accused as witness for the defence. It was contended by the accused that the death of the deceased was not homicidal in nature but he died a natural death and the said doctor D.W. 1 also gave expert opinion to that effect. A

4. Learned Sessions Judge held that the prosecution case was based on circumstantial evidence and the following circumstances had been noted by the learned Sessions Judge: B

1. Ramesh was alone residing in his house on the night in between 14th and 15th December, 1982.

2. At about 1 or 1.15 a.m. on December 15, 1982, Ramesh was found opening the front door of his house when accused No. 2 Mayamma tapped on the said door. C

3. Both the accused entered the said house of Ramesh at about 1 or 1.15 a.m. on December 15, 1982.

4. Some sound like cries were heard by the next door neighbour Raghunatha Rao, from inside the house of Ramesh. D

5. Both the accused were found under a cot in the bed room of Ramesh at about 1 or 1.45 a.m. when the neighbours of the said house including Sundaresh entered the house after breaking open the front door. E

6. The presence of blood stain on the shirt and pant of accused No. 1 was found.

7. Ramesh was found lying dead in the kitchen. F

8. Abrasions found on the face and swelling on the neck of Ramesh.

9. Chappals of both the accused found inside the house and on the terrace of the said house.

10. Evidence of Dr. Patil and Prof. Somaiah who had conducted the post-mortem examination of the dead body of Ramesh opined that death was due to asphyxia as a result of smothering (closing mouth and nostrils and pressure over the neck). G

5. The learned Sessions Judge held that the prosecution had satisfac- H

- A torily established circumstances 1 to 5,7 and-8. The learned Sessions Judge, however, did not accept the evidence of Panch witness P.W. 8 as he could not explain why he was present in tailoring shop at 3.00 a.m. The learned Sessions Judge also held that the prosecution case could not establish that the blood of the accused No. 1 was not of A group. Hence, the report of the Chemical Examiner and Serologist in regard to the blood stain on shirt and pant of the deceased would not be of any assistance. The learned Sessions Judge also did not believe the statement as to recovery of chappals of the accused as deposed by P.W. 13. The learned Sessions Judge also did not accept the post mortem report that the death of the deceased was due to asphyxia on account of smothering but he accepted the expert opinion of the doctor D.W. 1 to the effect that it was a case of natural death. In that view of the matter, both the accused were acquitted by the learned Sessions Judge.

6. On appeal, the High Court has accepted the evidence of witness P.W. 6 an Advocate, who had stated that he had also witnessed the cinema show at night and while he was returning by the side of the house of Ramesh, the deceased, he had seen accused No. 2 tapping the door and on the door being opened, accused No. 2 had entered the house of Ramesh and thereafter accused No. 1 who was standing little away also entered the house. The High Court has held that P.W. 6 is an independent and disinterested witness and nothing was brought out in cross-examination to show that he had any animosity against any of the accused persons which prompted him to depose falsely. The High Court has also accepted the evidence that harsh sound was heard by one of the witnesses being a close neighbour of the deceased. The High Court after analysing the evidences and indicating reasons came to the finding that the evidence of P.W. 5 is to be accepted and if such evidence is accepted, the depositions of P.Ws. 1 to 4 that the two accused were found in the house of the deceased which was closed from inside should also be accepted. The presence of the accused in the house of the deceased had not been explained by the accused because both of them came out with a case that they had been picked up by police from their respective residence. The High Court has accepted the evidence that the front door of the house of the deceased was broken open and only on such breaking open the door the neighbours and relations could gain entry to the house of the deceased and on such entry they could find out that both the accused were hiding under the cot in the bad room of the deceased. The High Court has come to the finding that

both the doctors P.Ws. 17 and 18 had performed the autopsy on the dead body of the deceased and the expert opinion of the doctor examined on behalf of the accused DW 1 was not acceptable. It has also been noted by the High Court that the said Doctor D.W. 1 had not seen the deceased but he gave the expert opinion only from the papers, namely, the post mortem report. Analysing the circumstances and the injuries found on the person of the deceased, the High Court came to the finding that the case sought to be made out by the accused that the deceased had died on account of epileptic fit from which he had been suffering cannot be accepted. The accused has not examined the doctor who according to the accused had been treating the deceased for epileptic fit for a long time. The High Court has also observed that at the dead of night, both the accused entered the house of deceased. Shortly after their entrance, cries were heard from the house of the deceased and on tapping the door nobody opened the door and on breaking open the door, both the accused were found under the cot in the bed room of the deceased and the deceased was found dead in the kitchen with marks of injuries and a blood stained towel was lying near the body. There was stains of blood on the shirt and pant of the accused No. 1. It has also been observed by the High Court that there was no reason for accused No. 2 to hide in the bed room of the deceased without opening the door if the deceased had in fact suffered an epileptic fit. Admittedly, she used to visit the house of the deceased quite often at nights. Hence if Ramesh had epileptic fit in the presence of accused No. 2, it was only natural for the said accused to respond to the call of neighbours and seek their help to save Ramesh. The High Court has also observed that if the blood had oozed out from the body of the deceased when he was in epileptic fit, it is not likely that the deceased himself would wipe out such blood with the turkish towel which was lying near his body. The High Court has held that all these circumstances also support the post mortem report of P.W. 17 and 18 that it was a case of homicidal death and the expert opinion of another doctor D.W. 1 should not be accepted in the facts of the case. The High Court has come to the finding that the evidence, though circumstantial, clearly prove the guilt of the accused persons and no other conclusion about the innocence of the accused persons was possible. Accordingly, the order of acquittal passed by the learned Sessions Judge was set aside by the High Court and both the accused were convicted for the offence of murder under Section 302 read with Section 34 I.P.C. and the sentence of life imprisonment was awarded to both the accused per-

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A sons.

7. At the hearing of this appeal, it has been very strongly contended that the factum of homicidal death itself was not established beyond reasonable doubt. Accordingly, the question of conviction on a charge of murder was not sustainable in law. The learned counsel for the appellant has contended that the usual features suggesting homicidal death were absent and the facts which were noted by the doctors holding post mortem examination clearly fit in with the case of a natural death of the deceased. The expert opinion of D.W. 1 should have been accepted by the High Court and if there was a reasonable basis for such opinion of D.W. 1 about the nature of death of the deceased and if the opinion of the said doctor was not wholly perverse and had been accepted by the learned Sessions Judge, the same should not have been discarded by the High Court on reappraisal of the evidences. It has been contended by the learned counsel for the appellant that it is a case of circumstantial evidence and unless from the circumstances fully established, the chain is full and complete which only points to the commission of murder by the accused and no other conclusion is possible, then and then only, the conviction on a charge of murder is permissible in law. If there is any doubt in any aspect, the chain is broken and the circumstances, however intriguing and suspicious they may be, will not warrant conviction because no conviction can be based on suspicion. It has been contended by the learned counsel for the appellant that even if it is assumed and accepted that both the accused were found under the cot in the bed room of the deceased, such finding by itself does not establish that they had committed the murder of the deceased. It is not unlikely that the accused became frightened when the neighbours broke open the door and entered the house and out of natural instinct they hid their presence but that by itself does not indicate that they had committed the murder.

8. It has also been contended that accused No. 2 was admittedly the mistress of the deceased for a number of years and the deceased had supported her and also her children. Hence, there cannot be any motive for the accused No. 2 to hatch any conspiracy for the murder and to take part in the commission of the murder of the said deceased. Simply because accused No. 2 was known to the accused No. 1 and they were friendly, there was no occasion for them to conspire to murder the deceased and commit that murder as alleged by the prosecution. The learned counsel has also contended that it has not been proved that the blood stains on the

wearing apparel of the accused No. 1 contained that same blood group as of the deceased. In the absence of such evidence, the presence of blood stain on the wearing apparel, even if it is accepted, is of no consequence. The learned counsel for the appellant has contended that in any event, it could not be established as to who among the accused had really murdered the deceased even if the case of murder is accepted. Unless it can be pin-pointed as to who had taken part in the murder, no conviction can be awarded against the accused. In the aforesaid circumstances, the learned Sessions Judge has contended that the order of acquittal passed by the learned Sessions Judge was fully justified and no interference is called for.

9. After giving our anxious consideration to the facts and circumstances of the case and the arguments advanced by the learned counsel for the appellant, it appears to us that the order of acquittal passed by the learned Sessions Judge was not was not at all justified and the same was not consistent with the evidence adduced in the case. The High Court, in our view, has given very good reasons for accepting the evidences adduced in the case including the evidences of P.W. 5 and P.W. 6. It has been clearly established from the evidences adduced on behalf of the prosecution that shortly before the death of Ramesh, both the accused entered the house at dead of night and both of them had witnessed a cinema show and came to the house. It is an admitted position that accused No. 2 was the mistress of the deceased and she used to visit the house of the deceased frequently at night. It has been established from the evidence in the case that the accused No. 2 tapped the door which was opened by Ramesh and she entered the house and the accused No. 1 who had also come with accused No. 2 and was waiting just at a little distance had also entered the house. When the door was broken open by the neighbours and the relations, the deceased was found lying dead in the kitchen and under the cot in the bed room of the deceased, both the accused persons were hiding. Despite tapping the door repeatedly by the neighbours and the relations of the deceased the accused persons who were inside the house did not open the same and the door had to be broken. It may be noted that both the accused had not given any explanation as to why both of them were present in the house at that late hours in the night. On the contrary, they has taken a bold plea that both of them had been picked up from their respective houses. The learned Sessions Judge has devoted much of his attention in considering the expert opinion as to the cause of the death and he preferred to accept the expert opinion of the doctor examined by the accused namely D.W. 1. In our view, the High Court has rightly held that the said doctor

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- A had no occasion to see the dead body and the injuries on the person of the deceased and only from the report of the post mortem the said doctor gave an expert opinion. On the contrary, two doctors who had held the post mortem on the deceased had occasions to look and examine the injuries on the person of the deceased and they had given a clear opinion that the death was due to asphyxia and it was a case of homicidal death. We agree
- B with the High Court in accepting prosecution case that it was a case of homicidal death. When shortly before the death of the deceased both the accused had entered the house and it was bolted from inside and they did not open door despite tapping several times and the door had to be broken by the neighbours and the relations and both the accused were found
- C hiding under the cot in the bed room of the deceased and Ramesh was lying dead with injuries on his person, the accused had an obligation to explain their presence and the circumstances under which Ramesh had died. But they did not give any explanation whatsoever. On the contrary, they tried to set up a false plea of their presence in their respective houses. The High Court, in our view, has rightly rejected the suggestion given by
- D the accused that it was a case of natural death on account of epileptic fit. If the deceased had suffered from epileptic fit which ultimately caused his death, the accused particularly the accused No. 2 ought to have called the neighbours for help or at least should have answered to their call when they tapped the door and should have requested the neighbours to render
- E some help to the deceased. The High Court, in our view, has rightly observed that the turkish towel with blood stains could not have been found at a little distance from the dead body if the deceased had met natural death. In an epileptic fit, the blood was not expected to be found in that way and in any event, there was no occasion to wipe the same and throw
- F it away by the person who was under epileptic fit. Though the group of the blood found on the wearing apparel of the accused No. 1 was not established as that of the blood group of the deceased but the presence of the blood on the wearing apparell has not been explained in any manner by the accused. It is not the case of the accused that when accused had tapped the door of Ramesh, some one else had opened the door. Hence, it must
- G be reasonably accepted that Ramesh opened the door and he was alive. Hence he had met his death in the presence of the accused in a house which was bolted from inside thereby preventing any one else to enter the house at the time of his death. Since the murder of Ramesh has been established in presence of both the accused, the accused are required to explain such murder. It is true that in a case which is to be established by
- H circumstantial evidence, the circumstances must be very closely scrutinised

and all the circumstances must form an unbroken chain which would establish the guilt of the accused and the case of prosecution should not lie in the realm of surmise and conjecture even if the facts and circumstances are very intriguing raising serious suspicion. In the instant case, as rightly analysed by the High Court, the circumstances have formed a complete chain which clearly point out the complicity of the accused in causing the murder and no other conclusion suggesting innocence of the accused appears to be reasonable or justified. Although, the prosecution could not lead any evidence as to who had actually smothered the deceased but since both of them were present at the time of commission of the offence, the conviction under Section 302 read with Section 34 is warranted against both the accused. We, therefore, find no reason to interfere with the decision of the High Court and the instant appeal, therefore, fails and is dismissed. If the appellants are on bail, they should be taken into custody to serve out the sentence.

N.P.V.

Appeal dismissed.