

MURLIDHAR AND ORS.

A

v.

STATE OF RAJASTHAN

MAY 9, 2005

[P. VENKATARAMA REDDI AND B.N. SRIKRISHNA, JJ.]

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Penal Code, 1860—Section 364 and 302/34—Commission of abduction and murder—Conviction affirmed by High Court under section 364 and 302/34—Justification of—Held: There was evidence regarding abduction of the victim with an intention to dispose him of as to put him in the danger of being murdered—However, evidence of witnesses regarding criminal conspiracy, beatings given to victim and recovery not inspiring confidence—Also High Court wrongly relied on rule of burden of proof under section 106 of the Evidence Act and drew an inference that the abductors murdered the victim when facts were especially in the knowledge of abductors and they did not give any explanation as to what happened after abduction—Hence, conviction under section 364 justified however, set aside under section 302/34—Evidence Act, 1872—Section 106.

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It is alleged that the appellant along with other accused persons abducted and murdered R. Sessions Court convicted all of them under section 302/149, 148 and 201 IPC. Appellants were also convicted under section 364 IPC. However, High Court convicted and sentenced the appellants under section 364 and section 302/34 IPC and acquitted the other accused persons. Hence the present appeal.

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Partly allowing the appeal, the Court

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HELD: 1. The conviction of appellants under section 364 IPC by the Sessions Court and the High Court is justified and is confirmed. But their conviction under section 302/34 IPC cannot be sustained and as such they are acquitted of the said charges. [185-E]

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2.1. Read as a whole, the testimonies of two prosecution witnesses (PWs 2 and 4) prove that R was pulled out of the cart, belaboured by the accused persons and the others and dragged away to the interior of K's house; and the acts and words imputed to the accused when they pulled

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A R, belaboured him and dragged him leaves no doubt that their intention was to dispose of him so as to put him in danger of being murdered. The evidence of the prosecution witnesses cannot be discarded because of some minor inconsistencies and so called contradictions. [180-D]

B 2.2. High Court rightly concluded that the evidence of three prosecution witnesses (PWs 3, 15 and 31) could not be relied upon for insufficiency of their testimony to establish that there was a criminal conspiracy to abduct and murder; that the evidence of prosecution witnesses regarding beatings given to R in the house of K was wholly unreliable as their evidence was replete with contradictions and inherent improbabilities; that the evidence regarding witnessing the accused persons going in Tractor Trolley was unbelievable; and that the evidence of recovery of lathis and wrist watch was doubtful.

C 2.2. High Court was not justified in relying on and applying the rule of burden of proof under Section 106 of the Evidence Act to the instant case. The rule in section 106 would apply when the facts are “especially within the knowledge of the accused” and it would be impossible, or at any rate disproportionately difficult for the prosecution to establish such facts, “especially within the knowledge of the accused.” In the instant case, the prosecution did not proceed on the footing that the facts were especially within the knowledge of the accused, but that there were eyewitnesses to the fact of murder. The prosecution having put forward a case that what transpired after R was dragged away by the assailants was within the knowledge of witnesses, utterly failed in proving the said facts. Once this was established, it was not open for the High Court to have fallen back on the rule of burden of proof under section 106. In fact, it was nowhere the case of the prosecution that section 106 applied to the facts on record. High Court seems to have brought it out on its own, but without any justification. [184-E-F]

D *State of W.B. v. Mir Mohammad Omar and Ors.*, [2000] 8 SCC 382 and *Shambu Nath Mehra v. State of Ajmer*, [1956] SCR 199, relied on.

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 355 of 2004.

F From the Judgment and Order dated 12.5.2003 of the Rajasthan High Court in D.B.Crl. A. No. 324 of 1999.

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S.R. Bajwa, Sushil Kumar Jain, Ram Niwas, Puneet Jain and Ms. A
Pratibha Jain with him for the Appellants.

Manish Kumar and Ansar Ahmad Chaudhary for the Respondent.

The Judgment of the Court was delivered by

SRIKRISHNA, J. The three appellants before this Court by special B
leave impugn the judgment of the High Court of Judicature for Rajasthan
which has convicted them on charges under Sections 364, 302/34 IPC and
sentenced them appropriately thereunder.

At about 11:40 a.m. on 3rd November, 1996, a written complaint was C
lodged by Rameshwar (PW 1) with the Police Station, Govindgarh, District
Jaipur regarding abduction of his brother, Ramlal stating thus: On 2nd
November, 1996 in the night around 6:30 p.m. Ramlal had left Ringus for his
village Bagdi. He took a lift in camel cart of Manaram (PW 2) of village
Gudiliya. When the camel cart was passing by (Manawali Dhani), the field D
of Khemaram, Khemaram and his family members stopped the camel cart,
pulled Ramlal down the camel cart, beat him up and took him inside the
house of Khemaram. Ramlal was beaten inside the house and, thereafter,
taken to some unknown place. The camel cart owner, on his way, informed
one Girdhari Lal Kumawat and other villagers of village Bagadi Nangal
about the abduction and beating of Ramlal. Next day morning, the villagers E
told the informant about these facts. The informant searched around, but
Ramlal could not be traced. The persons of neighbourhood also told the
informant that at night they have heard the cry of Ramlal coming from
Khemaram's house, and Ramlal was beaten up inside the house and thereafter
taken to some unknown place.

The Police registered a case under Sections 147, 148, 149 and 364 IPC F
and commenced investigation. The investigation turned up the dead body of
Ramlal which was discovered in the path of a dried up nullah under the
Ringus bridge. The police arrested nine persons of which, apart from the
present three appellants, the other accused were Khema Ram, Deepa Ram, G
Sheopal, Babulal son of Deepa Ram, Sagar Mal and Laxman Prasad. The
said nine accused were tried by the sessions court.

The Sessions Court acquitted all the accused from the charges of Section
120B IPC but convicted all the accused as follows:

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A Accused Khemaram, Deeparam, Shyopal, Babulal son of Deeparam, Sagarmal and Laxman Prasad were acquitted of the charge under Section 120B/364 IPC.

Accused Murlidhar was acquitted of charge under Section 394/397.

B Accused Khemaram, Murlidhar, Deeparam, Shyopal, Babulal son of Deeparam, Sagarmal, Babulal son of Chhajuram, Chhajuram and Laxman Prasad were held guilty for offence under Section 302/149 IPC.

C Accused Khemaram, Murlidhar, Deeparam, Shyopal, Babulal son of Deeparam, Sagarmal, Babulal son of Chhajuram, Chhajuram and Laxman Prasad were held guilty for offence under Section 148 IPC.

Accused Murlidhar, Deeparam, Shyopal, Babulal son of Deeparam, Sagarmal, Babulal son of Chhajuram, Chhajuram and Laxman Prasad were held guilty for offence under Section 201 IPC.

D Accused Babulal son of Chhajuram, Chhajuram and Murlidhar were held guilty for offence under Section 364 IPC.

Accused Murlidhar was held guilty for offence under Section 379 IPC.

E All the convicted accused appealed to the High Court. The appeals of Khema Ram, Sheopal, Babulal son of Deepa Ram, Sagar Mal and Laxman Prasad were allowed and they were acquitted of the charges under Section 302/149, 148 and 201 IPC. The appeals of Murlidhar, Chhaju Ram and Babulal, son of Chhaju Ram were dismissed and their conviction and sentence under Section 364 IPC were confirmed. The High Court converted the conviction to one under Section 302/34 IPC instead of Section 302/149 IPC and sentenced each of them to undergo imprisonment for life and fine of Rs. 10,000/- with a default sentence of six months rigorous imprisonment. The sentences were directed to run concurrently. These three accused were, however, acquitted of charges under Sections 148, 201 and 379 IPC. The convicted accused are in appeal before us.

G The evidence before the trial court consisted partly of the evidence of eye witnesses and partly of circumstantial evidence.

The trial court discussed the evidence under the following heads.

H 1. Evidence regarding criminal conspiracy.

2. Evidence regarding abduction of Ramlal. A
3. Evidence regarding beatings with Ramlal in the house of Khemaram.
4. Evidence regarding witnessing the accused persons going in Tractor Trolley. B
5. Medical evidence
6. Evidence regarding recovery
7. Other evidence

1. *Evidence regarding criminal conspiracy:* C

Both, the Sessions Court and the High Court concurrently concluded that the evidence of Ajeet Singh (PW 3), Hari Ram (PW 15) and Kalu Ram (PW 31) could not be relied upon for insufficiency of their testimony to establish that there was a criminal conspiracy to abduct and murder. We are in agreement with the High Court on this issue. D

2. *Evidence regarding abduction of Ramlal:*

Ramlal had taken a ride in the camel cart of Manaram (PW 2), who was also accompanied by his son Sardar Mal (PW 4). Girdhari Kumawat also took a ride in the camel cart. The evidence of Manaram (PW 2) shows that first he dropped Girdhari Kumawat at Manawali Dhani. The camel cart then proceeded towards Hasteda. When the camel cart was passing by Khemaram's well, Murlidhar and Chhajuram suddenly appeared and caught hold of Ramlal and tried to pull him down from the cart. Babulal, son of Chhajuram, and Bhagguram also appeared on the scene and started beating him with lathis. In all the fracas the camel cart started running away. Manaram, sitting on the cart tried to balance and hold the flour mill with which the cart was loaded. Manaram's (PW 2) evidence is corroborated by that of his son Sardar Mal (PW 4). The evidence of these two witnesses suggests that Ramlal was pulled out of the cart, belaboured by the accused persons and the others and dragged away to the interior of Khemaram's house. E F G

The learned counsel for the appellants submitted that the evidence of Manaram (PW 2) and Sardar Mal (PW 4) was not reliable as it was inherently improbable particularly, with regard to identification of the accused. On a careful perusal of the evidence, we are not impressed by this contention. Sardar Mal (PW 4) states in his evidence that although there was some H

A darkness, there was some amount of light in front of the house of Khemaram. It is not, as if, the assailants were unknown to Manaram and his son Sardar Mal. In fact, the evidence suggests that he knew Chhajuram, Murlidhar, Babulal and Bhaggu well for two or three years, as they used to go with him sometimes, and they were meeting once or so in a month.

B We are not satisfied that the evidence of Manaram (PW 2) and his son Sardar Mal (PW 4) can be discarded because of some minor inconsistencies and so called contradictions highlighted by the learned counsel. Nor we are prepared to discard the testimonies of these two eye witnesses merely because of their not immediately rushing to the Police Station, but proceeding to
C Nangal village and requesting the people to inform the police about the abduction of Ramlal.

Read as a whole, the testimonies of these two witnesses prove that, on the fateful day, while the camel cart driven by Manaram was passing by the farm of Khemaram, the accused suddenly appeared on the scene and pulled
D down Ramlal, belaboured him and dragged him away.

Learned counsel for the appellants contended that even assuming the evidence of Manaram (PW 2) and Sardar Mal (PW 4) was accepted, the offence under Section 364 IPC could not be said to have been proved. He contended that in order to make out an offence under Section 364 IPC, it
E must be shown that the abduction must be of some person "in order that some person may be murdered or may be so disposed of as to be put in danger of being murdered". Learned counsel contended that there was no evidence, whatsoever, on this aspect of the matter. We are not inclined to agree. The intention of the accused while dragging away Ramlal is evidenced
F by the statement attributed to one of the accused, Bhaggu addressed to Babulal, son of Chhajuram, calling him to bring a lathi to kill Ramlal. The acts and words imputed to the accused when they pulled Ramlal, belaboured him and dragged him away, leaves us in no doubt that their intention was to so dispose him of as to put him in danger of being murdered. We are, therefore, satisfied that the Sessions Court and the High Court were justified in recording
G a conviction under Section 364 IPC against the accused-appellants.

3. *Evidence regarding beatings given to Ramlal in the house of Khemaram:*

The High Court concluded that the evidence as to what transpired within the house of Khemaram could not have been known by anyone. The
H prosecution examined Babulal (PW 5), Ramratan (PW 7), Isro (PW 10),

Govind (PW 13) and Manbhari (PW 8) on this aspect of the case as to what happened inside Khemaram's house. The High Court has disbelieved this part of the evidence of Babulal (PW 5), Ramratan (PW 7), Isro (PW 10) and Govind (PW 13) as "replete with inherent improbabilities and they are wholly unreliable witnesses". We agree with this finding of the High Court. We also feel that Khemaram and his family would not have kept the doors of their house open so that someone could conveniently witness what was transpiring inside the house. This part of the story appears to be too artificial to believe.

4. *Evidence regarding witnessing the accused persons going in Tractor Trolley:*

The High Court has correctly analysed the evidence in this regard and came to the conclusion that the story given out by the witnesses is unbelievable. The witnesses on this part of the evidence are Mansingh (PW 6) and Surjaram (PW 9). These witnesses stated that on 2nd November, 1996 at about 8:30 p.m. when they were going back from Ringus to their village Bagdi Nagal, they saw a tractor trolley driven by Laxman. They named, Sheopal, Deepa, Bhagirath, Chhajuram, Murli, Sagar, Babulal son of Chhaju and Babulal son of Deepa were riding on the tractor. According to these witnesses, on an inquiry being made as to where they were going, Bhagirath and Chhaju informed them that Ballu Ram had become sick and they were taking him to Srimadhapur Hospital. PW 6 and PW 9 also claimed that they saw some body wrapped in a white gudri lying on the tractor. To say the least, the evidence appears to be wholly unnatural, as the High Court has pointed out that Man Singh (PW 6) is the 'motbir' of most of the memos drawn by the Investigating Officer. Under the cross examination, he admitted that he had not informed the Police at the time of drawing the inquest report that he had seen the appellants carrying some body on the tractor trolley. While in his police statement (Ex. D-1) he named only six accused, but at the trial he gave 10-11 names. Surja Ram (PW 9) under his cross examination stated that, when he reached near the dead body of the deceased lying under the Ringus bridge, the police were already there, but at that time, he did not disclose the fact to the police that he had seen the appellants taking a body on the tractor trolley during the preceding night. We are satisfied that the analysis of the evidences by the High Court is perfectly justified, and we agree with the conclusion of the High Court that the testimony of these witnesses on this aspect of the matter did not inspire confidence.

A 5. *Medical Evidence:*

The medical evidence is acceptable and proves without any doubt that Ramlal was done to homicidal death. The probable cause of death is “asphyxia due to strangulation as well as neurogenic shock as a result of cumulative effect of multiple injuries on the body some of which are on the vital parts, namely, testicles.”

B 6. *Evidence of recoveries:*

The evidence as to recoveries also appears doubtful. The recoveries consisted of lathis and HMT wrist watch from the accused Murlidhar. As to the evidence of lathis, the High Court has rightly refused to attach importance to the recoveries of the lathi as lathi is something to be found in every household in the concerned area.

As to the recovery of the HMT wrist watch, the evidence of Mahendra (PW 20), son of the deceased, is contradictory. While at one time he said that he identified the watch because it had a broken side pin, he changed his testimony later to say that he identified it because the strap was broken. No formal Test Identification Parade was arranged. It was also admitted by the witness that the model HMT-Kohinoor watch was a popular model and there must have been thousands of watches manufactured by the company. The special reason given by PW 20 for identifying the watch was that it had been presented by the in-laws of his younger brother at the time of betrothal ceremony. Neither the said brother of the deceased, who was actually the owner of the watch, nor the in-laws who had gifted the watch had examined to identify the watch. There was nothing special in the watch, which was, in any event broken, for accused Murlidhar to treasure it as a prized possession. There were no marks of blood or finger prints which could have connected the accused with the watch. Significantly, the charges under Sections 397 IPC for alleged robbery, or theft of the watch were failed and Murlidhar was acquitted of the said charges. In these circumstances, the High Court was justified in rejecting the evidence of recoveries.

Finally, the High Court having accepted the evidence as to the offence of abduction punishable under Section 364 IPC came to the conclusion that the prosecution evidence, when considered in the light of the proximity of time within which Ramlal sustained injuries and the proximity of the place within which the dead body was found, was enough to draw an inference that Ramlal’s death was caused by the accused. Relying on Section 106 of the

Evidence Act, 1872 and the observations of this Court in *State of W.B. v. Mir Mohammad Omar and Ors.*,¹ the High Court held that it was established that the appellants were the abductors of Ramlal, and since the facts were especially in the knowledge of the abductors, as the accused-abductors failed to offer any explanation as to what transpired after Ramlal had been abducted, the court would be justified in drawing the inference that the abductors had murdered the victim, Ramlal, after abduction.

The learned counsel for the appellants strenuously urged this last conclusion of the High Court was erroneous in law and that the appellants, even if liable to be convicted under Section 364 IPC, could not have been convicted under Section 302/34 IPC.

In *Mir Mohammad Omar* (supra) it was established that the accused had abducted the victim, who was later found murdered. The abductors had not given any explanation as to what happened to the victim after he was abducted by them. The Sessions Court held that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt as there was “a missing link in the chain of events after the deceased was last seen together with the accused persons and the discovery of the dead body of the deceased at Islamia Hospital”. Rejecting the said contention this Court observed (vide para 31):

“The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.”

This Court further observed thus (vide para 33):

“Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of

¹[2000] 8 SCR 342.

A proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”

B
C The judgment of Vivian Bose, J. in *Shambu Nath Mehra v. State of Ajmer*² lays down the legal principle underlying the shifting of burden of proof under Section 106 of the Evidence Act thus (vide para 38):

D “This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word ‘especially’ stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.”

E In our judgment, the High Court was not justified in relying on and applying the rule of burden of proof under Section 106 of the Evidence Act to the case. As pointed out in *Mir Mohammad Omar* (supra) and *Shambu Nath Mehra* (supra), the rule in Section 106 of the Evidence Act would apply when the facts are “especially within the knowledge of the accused” and it would be impossible, or at any rate disproportionately difficult for the prosecution to establish such facts, “especially within the knowledge of the accused.” In the present case, the prosecution did not proceed on the footing that the facts were especially within the knowledge of the accused and, therefore, the principle in Section 106 could not apply. On the other hand, the prosecution proceeded on the footing that there were eye witnesses to the fact of murder. The prosecution took upon itself the burden of examining Babulal (PW 5) as eye witness. Testimony of Ram Ratan (PW 7) and Isro (PW 10) shows that their agricultural land was situated in a close distance from the house of Khema Ram. As rightly pointed out by the High Court, it is highly unlikely and improbable that their kith and kin Ramlal would have been

given beating resulting in his death by the accused-appellants while keeping lights of their house on and door of the room opened. It is also unlikely that the accused-appellants would have taken the risk of dragging Ramlal to the house of Khema Ram, which was situated in the vicinity of agricultural land and well of Isro (PW 10), the father of Ramlal. The evidence of Govind (PW 13) also appears to be unnatural, as he had not disclosed the incident to anybody. The High Court has correctly analysed that all the witnesses, namely, Babulal (PW 5), Ram Ratan (PW 7), Isro (PW 10) and Govind (PW 13) are wholly unreliable as their evidence is repleated with contradiction and inherent improbabilities.

In the result, we are of the view that the prosecution having put forward a case that, what transpired after Ramlal was dragged away by the assailants was within the knowledge of witnesses, utterly failed in proving the said facts. Once this is established, it was not open for the High Court to have fallen back on the rule of burden of proof under Section 106 of the Evidence Act. In fact, as we notice, it was nowhere the case of the prosecution that Section 106 of the Evidence Act applied to the facts on record. The High Court seems to have brought it out on its own, but without any justification. We are, therefore, of the view that the conviction of Murlidhar, Chhaju Ram and Babu Lal s/o Chhaju Ram under Section 364 IPC is justified and liable to be confirmed, but their conviction under Section 302/34 IPC cannot be sustained and they are liable to be acquitted of the said charges.

In the result, we partly allow the appeal and make the following order:

Appellants-accused, Murlidhar, Chhaju Ram and Babu Lal son of Chhaju Ram are acquitted of the charges under Section 302/34 IPC. Their conviction and sentence under Section 364 IPC stands confirmed.

N.J.

Appeal partly allowed.