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ASRAF SK AND ANR.

v.

STATE OF WEST BENGAL
(Criminal Appeal No. 720 of 2004)

OCTOBER 20, 2008

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[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]

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Penal Code, 1860 – s.302 r/w s.34 – Conviction under, by Courts below—Based on circumstantial evidence – Justification of – On facts, held: Not justified – Evidence of deceased's daughters, on which strong reliance was placed by Courts below, full of contradictions – Circumstances not pointing to guilt of the accused.

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According to the prosecution, the two Appellants alongwith another person murdered the father of PWs 1 and 2 by throttling and torturing him. Earlier the Appellants had allegedly kidnapped the daughter of PW2 and had also threatened to kill the entire family of the deceased.

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Shortly before the incident all the accused were seen following the deceased.

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The Trial Court convicted the appellants under s.302 r.w. s.34 IPC but acquitted the third accused. The conviction of the Appellants was upheld by the High Court. Hence the present appeal.

Allowing the appeal, the Court

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HELD:1.1. Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable

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doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. [Para 5] [755,C-E]

1.2. The Trial Court and the High Court held that the evidence of PWs 1 and 2 can be acted upon and, therefore, the circumstances were established. However, in the opinion of this Court the circumstances do not present a complete chain of circumstances. The evidence of PWs 1 and 2 on which strong reliance has been placed by the trial Court and the High Court are full of contradictions. PW-1 stated that she had seen the actual assault. This was her statement in Court which is contrary to her statement recorded during investigation. In the FIR there was also no reference that PWs 1 and 2 had seen the actual occurrence. PW-2's version is entirely different. The present case is certainly not a case where the prosecution has established the accusations. The accused persons are entitled to acquittal. [Paras 15, 16, 17] [759,D-F; 760,A; 760,D]

Hukam Singh v. State of Rajasthan AIR (1977) SC 1063; *Eradu and Ors. v. State of Hyderabad* AIR (1956) SC 316; *Earabhadrapa v. State of Karnataka* AIR (1983) SC 446; *State of U.P. v. Sukhbasi and Ors.* AIR (1985) SC 1224; *Balwinder Singh v. State of Punjab* AIR (1987) SC 350; *Ashok Kumar Chatterjee v. State of M.P.* AIR (1989) SC 1890; *Bhagat Ram v. State of Punjab* AIR (1954) SC 621; *C. Chenga Reddy and Ors. v. State of A.P.* (1996) 10 SCC 193; *Padala Veera Reddy v. State of A.P. and Ors.* AIR (1990) SC 79; *State of U.P. v. Ashok Kumar Srivastava* (1992) Cri.LJ 1104; *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh* AIR (1952) SC 343; *Sharad Birdhichand Sarada v. State of Maharashtra* AIR (1984) SC 1622; *State of Rajasthan v. Rajaram* (2003) 8 SCC 180 *State of Haryana v. Jagbir Singh and Anr.* (2003) 11 SCC 261 and *Chatter Singh and Ors. v. State of Haryana* [Criminal Appeal No.180/2001 disposed of by S.C. on 26th August, 2008] – relied on.

A *Circumstantial Evidence by Alfred Wills (Chapter VI)* – referred to.

CASE LAW REFERENCE

	AIR (1977) SC 1063	relied on	Para 5
B	AIR (1956) SC 316	relied on	Para 5
	AIR (1983) SC 446	relied on	Para 5
	AIR (1985) SC 1224	relied on	Para 5
	AIR (1987) SC 350	relied on	Para 5
C	AIR (1989) SC 1890	relied on	Para 5
	AIR (1954) SC 621	relied on	Para 5
	(1996) 10 SCC 193	relied on	Para 6
	AIR (1990) SC 79	relied on	Para 7
D	(1992) Cr.LJ 1104	relied on	Para 8
	AIR (1952) SC 343	relied on	Para 11
	AIR (1984) SC 1622	relied on	Para 12
E	(2003) 8 SCC 180	relied on	Para 13
	(2003) 11 SCC 261	relied on	Para 13

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 720 of 2004

F From the final Judgment and Order dated 8.10.2002 of the High Court of Calcutta at Calcutta in CrI. Appeal No. 399 of 1989

Pradip Ghosh, R.K. Gupta, S.K. Gupta, Arun Yadav and Manoj K. Mishra for the Appellants.

G Avijit Bhattacharjee, Saumya Kundu and Subrata Biswas for the Respondent.

The Judgment of the Court was delivered by

H **DR. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court

upholding the conviction recorded by learned Additional Sessions Judge, 12th Court, 24 Parganas (South) in Sessions Trial No.1(6) of 1988. Both the appellants were convicted for offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and sentenced to imprisonment of life.

2. The prosecution case, in brief, is that Jayanta Kr. Mukherjee (PW-12) was posted as Officer-in-Charge of Bishnupur Police Station at the relevant point of time. On 18.08.83 at about 0.02 hours when this witness came to Jhanpur Keyatala Hat, he received written complaints of Anita Pal (PW-1) alleging, inter-alia, that her niece Kumari Archana Pal, aged about 16 years was kidnapped by the appellants. Kumari Archana Pal was the daughter of her sister Pasani Pal (PW-2). Her niece could not be traced out since she was kidnapped by appellant no.1 Asraf Sk. and further that as appellant no.1 Asraf Sk. was absconding and on the date of occurrence the said appellant was seen loitering openly around their house. Her elder sister Pasani Pal upon seeing the appellant no.1 became emotional and started crying. On 17.08.1983 early in the evening, when PW-2 was so crying loudly, appellant no.1 Asraf Sk. alongwith appellant no.2 Rashid Molla Suddenly entered their house and assaulted P.W. 2 for crying loudly. Seeing this, Shibcharan Pal (hereinafter referred to as the 'deceased') being the father of P.Ws. 1 and 2 came out from his hut and protested against the acts of the appellants in assaulting P.W.2. At this the appellants threatened that they would murder every member of the family of the deceased. Apprehending danger, P.W. 1 alongwith the deceased went to the house of one Suphal Pal, being a local leader, to complain about the aforesaid incident. But said Suphal Pal was not available at his residence then. Thereafter they reported the incident to one Shah Alam Molla, being a member of the local Panchayat. Shah Alam Molla assured P.W. 1 and her father that necessary steps would be taken on the next day. Thereafter they returned home at about 8 p.m. After returning back home, the deceased went out to the

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- A field to ease himself. Immediately the witnesses saw the two appellants following the deceased quickly. They became suspicious about the movement of the two appellants. The deceased having not returned home despite passage of 5/7 minutes since he left for the field, P.W. 1 alongwith P.W.2 Pasani Pal became suspicious and they went out in search of their father.

- As soon as they reached near the local hat (market) they noticed the two appellants were running away quickly "by their side". Soon after they noticed their father Shibcharan Pal, aged about 65/70 years was lying dead on the steps of the tank on the southern side situated near the hat (market). The legs of the deceased were lying submerged in the water of the tank while upper part of the body was lying above water on the bank. They further alleged in the said complaint that their father was murdered by throttling and other methods. They further expressed their suspicion that at about 8 p.m. appellants Asraf Sk., Rashid Molla and others had murdered their father by throttling and by torturing him and left the dead body on the bank of the tank of Keyatala Market (hat) and fled away. This Complaint was reduced into writing by the scribe, Niranjana Pal (PW-9) and handed over to P.W.14 when he came to the place of occurrence. Said complaint was taken to the police Station and was registered as an F.I.R. under Section 302/34 I.P.C., against the two appellants at 3.30 a.m. on 18.8.1983. After investigation Police submitted charge sheet against the two appellants and one Basir Sk. (since acquitted). The case was committed to the Court of Session, North 24, Parganas. On perusal of the materials on record learned trial Court framed charges against the two appellants and another accused, namely, Basir Sk., under Section 302/34 I.P.C., to which the appellants and other accused pleaded not guilty. In course of the trial, 16 witnesses were examined. As noted above, the present appellants were convicted while accused Basir Sk. was acquitted.

- Before the High Court the stand was that the case rests on circumstantial evidence and the circumstances do not war-

rant conclusion of guilt of the accused. The High Court did not accept this plea and confirmed the conviction. A

3. In support of the appeal, learned counsel for the appellants submitted that the trial Court and the High Court have erred in holding that the circumstances were sufficient to hold the appellants guilty. B

4. Learned counsel for the respondent-State on the other hand supported the judgments of the trial Court and the High Court.

5. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan* AIR (1977 SC 1063); *Eradu and Ors. v. State of Hyderabad* (AIR 1956 SC 316); *Earabhadrapa v. State of Karnataka* (AIR 1983 SC 446); *State of U.P. v. Sukhbasi and Ors.* (AIR 1985 SC 1224); *Balwinder Singh v. State of Punjab* (AIR 1987 SC 350); *Ashok Kumar Chatterjee v. State of M.P.* (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt. C
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6. We may also make a reference to a decision of this Court in *C. Chenga Reddy and Ors. v. State of A.P.* (1996) 10 SCC 193, wherein it has been observed thus: G

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of H

A guilt is drawn should be fully proved and such
circumstances must be conclusive in nature. Moreover, all
the circumstances should be complete and there should
be no gap left in the chain of evidence. Further the proved
circumstances must be consistent only with the hypothesis
B of the guilt of the accused and totally inconsistent with his
innocence.....”.

7. In *Padala Veera Reddy v. State of A.P. and Ors.* (AIR
1990 SC 79), it was laid down that when a case rests upon
circumstantial evidence, such evidence must satisfy the follow-
C ing tests:

- (1) the circumstances from which an inference of guilt is
sought to be drawn, must be cogently and firmly
established;
- D (2) those circumstances should be of a definite tendency
unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively should form a
chain so complete that there is no escape from the
E conclusion that within all human probability the crime
was committed by the accused and none else; and
- (4) the circumstantial evidence in order to sustain
conviction must be complete and incapable of
F explanation of any other hypothesis than that of the
guilt of the accused and such evidence should not
only be consistent with the guilt of the accused but
should be inconsistent with his innocence.

8. In *State of U.P. v. Ashok Kumar Srivastava*, (1992 Cr.L.J
1104), it was pointed out that great care must be taken in evalu-
G ating circumstantial evidence and if the evidence relied on is
reasonably capable of two inferences, the one in favour of the
accused must be accepted. It was also pointed out that the
circumstances relied upon must be found to have been fully
established and the cumulative effect of all the facts so estab-
H lished must be consistent only with the hypothesis of guilt.

9. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

10. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

11. In *Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh*, (AIR 1952 SC 343), wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

A 12. A reference may be made to a later decision in *Sharad*
Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC
1622). Therein, while dealing with circumstantial evidence, it
B has been held that onus was on the prosecution to prove that
the chain is complete and the infirmity of lacuna in prosecution
cannot be cured by false defence or plea. The conditions pre-
C cedent in the words of this Court, before conviction could be
based on circumstantial evidence, must be fully established.
They are:

- C (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;
- D (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;
- E (3) the circumstances should be of a conclusive nature
and tendency;
- F (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.

G 13. These aspects were highlighted in *State of Rajasthan*
v. Rajaram (2003 (8) SCC 180), *State of Haryana v. Jagbir*
Singh and Anr. (2003 (11) SCC 261) and Criminal Appeal
No.180/2001 (*Chatter Singh and Ors. v. State of Haryana*) dis-
posed of on 26th August, 2008.

H 14. The circumstances which were highlighted by the pros-
ecution to substantiate the accusations read as follows:

- (1) Appellant No.1 Asraf Sk. kidnapped the grand-daughter of the deceased and married her. A
- (II) In the early evening on the date of occurrence the mother of the kidnapped girl, being the daughter of the deceased was crying loudly as her daughter was kidnapped by appellant No.1 Asraf Sk. Hearing the cries of PW-1 Smt. Pasani Pal, appellants had the audacity to trespass into the house of the deceased and slap PW-2 Smt. Pasani Pal. They even threatened them that all the members of his family would be annihilated. B C
- (III) An hour or so after the aforesaid incident, deceased went out to the field to ease himself. At that time, though may be intervened by few minutes, the appellants and another were found following the deceased." D

15. The trial Court and the High Court held that the evidence of PWs 1 and 2 can be acted upon and, therefore, the circumstances were established. The circumstances in our considered opinion do not present a complete chain of circumstances. The evidence of PWs 1 and 2 on which strong reliance has been placed by the trial Court and the High Court are full of contradictions. PW-1 stated that she had seen the actual assault. This was her statement in court which is contrary to her statement recorded during investigation. In the First Information Report there was also no reference that PWs 1 and 2 had seen the actual occurrence. Similarly PW-1's statement in court is as follows: E F

"As my father did not return within 5/6 minutes, myself and my sister Pasani had been to the garden. Then the accused Asraf and Rashid Molla then started fleeing away after pushing the father on the ground. We then went to our father and found the legs in the water and upper part of the body on the bank of the pond. We noticed mark of strangulation of his throat and marks of ecchymosis in his H

A hand. We picked up our father from that place. He was then dead.”

16. PW-2's version is entirely different. Her statement in court was to the following effect:

B “As my father did not return within 5/7 minutes myself and my sister Anita then went out of our house in search of my father and to know what happened to him. We had been to tank side of Kaytala Hat, then accused Rashid & Asraf were found fleeing very fast by our side. We then went
C towards the southern Ghat of the said Keyatal tank and found my father lying on the bank side facing downward.

I did not tell I.O. that while I came near the hat pukar tank the accused persons were fleeing away by our side.”

D 17. Above being the position, this is certainly not a case where the prosecution has established the accusations. The accused persons are entitled to acquittal, which we direct. They shall be released from custody forthwith unless required to be in custody in any other case.

E B.B.B.

Appeal allowed.