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VIJAY KUMAR

v.

STATE OF RAJASTHAN  
(Criminal Appeal No. 441 of 2009)

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FEBRUARY 18, 2014

[T.S. THAKUR AND C. NAGAPPAN, JJ.]

*PENAL CODE, 1860:*

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*ss. 302 r/w 120-B, 460 and 382 - Circumstantial evidence - Conviction by courts below - Held: Witness has made material improvements while deposing in court and such evidence cannot be safe to rely upon -- Evidence adduced by prosecution to prove second and third circumstances does not pass the test of credibility and is liable for rejection - The recoveries made indicate that the articles recovered were not in exclusive possession of the appellants - Further, none of the precaution that ought to have been taken to ensure fair identification of the articles recovered was ever taken and no weight can be attached to the evidence of identification of property -- Both the courts below fell in error in coming to the conclusion that prosecution has established its case based on circumstantial evidence beyond all reasonable doubt -- Benefit of doubt given to both the appellants -- Conviction and sentences imposed on them by courts below are set aside and they are acquitted of the charges - Evidence - Circumstantial evidence - Identification - Identification of articles.*

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**The appellants-accused A-1 and A-3 were prosecuted for committing offences punishable u/ss 120B, 302, 460 and 382 IPC. Besides, three other accused were tried along with them for offence punishable u/s 411 I.P.C. The prosecution case was that the deceased, a midwife, was residing in the Hospital where A-1, a doctor**

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and his brother-in-law, A-3, were also residing; that the deceased used to give loan on interest on the mortgage of gold and silver ornaments; that A-1 and A-3 conspired and murdered the deceased and stolen the ornaments/articles possessed by her. However, the case was registered on the written report forwarded by A-1 about the death of the said midwife. During the investigation A-1 and A-3 were arrested and on their disclosure, certain ornaments/articles were said to have been recovered. The other three accused were also arrested. Since nobody had witnessed the occurrence and the case was based on circumstantial evidence, the trial court mainly relied on the following circumstances:

(i) The deceased died of homicidal violence.

(ii) A-1 had threatened the deceased of possible income-tax raid and seizure of ornaments possessed by her and persuaded her to shift her residence from village to hospital premise with her belongings.

(iii) Accused no. 5 used to demand the ornaments for wearing from the deceased; and

(iv) On the information furnished by A-1 and A-3 upon their arrest, the ornaments pledged by various persons with the deceased, got recovered from their possession.

The trial court found all the accused guilty of the offences charged. A-1 and A-3 were convicted sentenced to imprisonment for life and to pay a fine of Rs.5000/- each u/s 302 read with s. 120B IPC. Both were further convicted and sentenced to RI for eight years and to pay a fine of Rs.1000/- each for each of the offences u/s 460 IPC and u/s 382 IPC. Accused nos.2, 4 and 5 were convicted and sentenced to RI for two years and to pay a fine of Rs.500 each u/s 411 IPC. On appeal, the High Court acquitted accused nos. 2, 4 and 5 but, maintained

A the conviction and the sentences of the appellants.

Allowing the appeals, the Court

B HELD: 1.1 In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of 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 of the guilt of the accused and totally inconsistent with his innocence. [para 6] [1086-A-B]

D 1.2 In the instant case, from the medical evidence, it is clear that death of the deceased was homicidal in nature and the circumstance (i) stood established. [para 8] [1087-D]

E 1.3 As regards circumstances (ii) and (iii), PW 10, the brother-in-law of the deceased, in his examination-in-chief stated that the deceased had kept her ornaments in the locker of a bank and A-1 told her that the income-tax people could raid the bank and seize her ornaments and, therefore, she took the ornaments with her. PW 10 has further stated that the deceased used to tell him that accused no. 5 demanded ornaments from her for wearing and would dance after wearing the same. In the cross-examination PW 10 has stated that he did not tell these facts to the police during investigation. This witness has made material improvement while deposing in the court and such evidence cannot be safe to rely upon. Thus, the evidence adduced by the prosecution to prove circumstances (ii) and (iii) does not pass the test of credibility and is liable for rejection. [para 10] [1087-F-H; 1088-C]

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*Khalil Khan vs. State of M.P.* (2003) 11 SCC 19 - relied on. A

1.4 As regards the last circumstance pertaining to the recoveries made pursuant to the disclosure made by the appellants, the said recoveries have been made from the respective houses of the accused/appellants where their families were residing. In fact A-3 obtained the key from his father for opening the lock. In such circumstances, it cannot be said that the said articles were in the exclusive possession of the accused/appellants and they came to be recovered only on the information furnished by them. [para 11-12] [1088-D; 1089-C-D] B C

1.5 The identification proceedings of articles was conducted by PW 83 Tahsildar in Tehsil and he has claimed to have prepared 72 identification reports. In the cross-examination he has admitted that there were policemen present at the time of identification and he did not know the articles brought to him were in sealed packets or in open condition and he did not remember whether seal used on the packets was official seal since 12 years have already passed. Further, none of the precaution that ought to have been taken to ensure fair identification was ever taken and no weight can be attached to the evidence of identification of property. Though the trial court has observed in the judgment about the lack of proper identification of the articles, it erroneously proceeded further to accept the same. Besides, recovery of weapons namely knife and screw-driver claimed to have been made on the information given by A-1 is also doubtful. [para 14] [1091-B-D, E-F] D E F G

*Wakkar vs. State of U.P.* (2011) 3 SCC 306 - relied on.

*State of Vindhya Pradesh vs. Sarua Munni Dhimar and others* AIR 1954 V.P. (Vol.41 CN 15) - referred to. H

A 1.6 Both the courts below fell in error in coming to the conclusion that the prosecution has established its case based on circumstantial evidence beyond all reasonable doubt. Benefit of doubt will have to be given to both the appellants. Therefore, conviction and sentences imposed on the appellants by the courts below are set aside and they are acquitted of the charges. [para 15-16] [1091-G-H; 1092-A-B]

**Case Law Reference:**

C (2003) 11 SCC 19 relied on para 10  
AIR 1954 V.P. (Vol.41 referred to para 12  
CN 15)  
(2011) 3 SCC 306 relied on para 14

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 441 of 2009.

E From the Judgment and Order dated 02.05.2007 of the High Court of Judicature for Rajasthan at Jaipur Bench in D.B. criminal Appeal No. 664 of 2001.

WITH

Criminal Appeal No. 1363 of 2009.

F Nitin Bhardwaj, Rajiv Kumar Sinha, Mridula Ray Bhardwaj for the Appellant.

Milind Kumar, Ruchi Kohli for the Respondent.

G The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. These two appeals are preferred against the judgment of the High Court of Judicature of Rajasthan at Jaipur Bench in DB Criminal Appeal No.664 of 2001.

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2. The appellant Dr. Atma Ram in Criminal Appeal No.1363 of 2009 is the accused No.1 and the appellant Vijay Kumar in Criminal Appeal No.441 of 2009 is accused No.3 in the Sessions Case No.28 of 2001 (38/1986) on the file of Additional Sessions Judge (Fast Track) Jhunjhunu, Rajasthan and they were tried for the alleged offences under Section 120B, 302, 460 and 382 IPC. Three other accused namely A-2 Kailash Chand, A-4 Gyanchand and A-5 Radha Devi were also tried in the same case for the alleged offence under Section 411 IPC. The Sessions Court found accused Nos. 1 and 3/ appellants guilty of the charges framed and sentenced them each to suffer imprisonment for life and to pay a fine of Rs.5000/- each in default to undergo rigorous imprisonment for six months each for the offence under Section 302 read with Section 120B IPC and further sentenced them each to undergo rigorous imprisonment for eight years and to pay a fine of Rs.1000/- each and in default to undergo rigorous imprisonment for six months each for the offence under Section 460 IPC and also sentenced them each to undergo rigorous imprisonment for eight years and to pay a fine of Rs.1000/- each and in default to undergo rigorous imprisonment for six months each for the offence under Section 382 IPC and ordered the sentences to run concurrently. The Sessions Court also found accused Nos.2, 4 and 5 guilty of the offence under Section 411 IPC and sentenced them each to undergo rigorous imprisonment for two years and each to pay a fine of Rs.500 and in default each to undergo rigorous imprisonment for three months.

3. Aggrieved by the conviction and sentence accused Nos.1 to 5 preferred appeal in Criminal Appeal No.664 of 2001 and the High Court by judgment dated 2.5.2007 dismissed the appeal preferred by the accused No.1 Atma Ram and accused No.3 Vijay Kumar/appellants herein and at the same time allowed the appeal pertaining to accused No.2 Kailash Chand, A-4 Gyan Chand and Accused No.5 Radha Devi and acquitted them of charge under Section 411 IPC. Challenging their

A conviction and sentence accused No.1 Atma Ram and accused No.3 Vijay Kumar have preferred the present appeals.

4. Briefly the case of the prosecution is as follows:

B Accused No.1 Atma Ram was working as a Doctor in the Government Hospital in village Chhapoli and Keshar Bai was posted as a mid-wife in the same hospital and a month prior to occurrence she started residing in a room on the ground floor under the stair-case of the hospital. She used to give loan on interest on the mortgage of gold and silver ornaments. PW 17

C Sweeper Basanti Lal was also residing in a corner room on the ground floor of the hospital. A-1 Atma Ram was residing on the first floor of the same hospital. Accused No.3 Vijay Kumar was his brother-in-law and he was also residing with him. On 11.11.1985 PW 17 Basanti Lal noticed Kesar Bai sitting

D outside in the hospital and also noticed return of Atma Ram to Hospital. Dr.Atma Ram forwarded a written report on November 12, 1985 through Peon Nand Lal to Udaipurbati Police Station (Jhunjhunu) informing about the murder of Keshar Bai. In the report A-1 Atma Ram stated that in the preceding night around

E 12.30 a.m. he suddenly woke-up hearing voice of sweeper Basanti Lal who was asking to open the door of his room which was bolted from outside. Atma Ram then got up and proceeded towards the room of Basanti Lal but the door of Atma Ram's staircase was also bolted from outside, therefore he could not

F go out and awoke Vijay Kumar, who was residing with him. Vijay Kumar then scaled the roof and unbolted the room of Basanti Lal. Thereafter all the three went down through the staircase and went towards Nohra. They found the room of Keshar Bai open. They called Keshar Bai, but she did not

G respond. Therefore they entered inside the room and saw Keshar Bai lying dead in naked condition in a pool of blood. Her mouth was tied with saree. On her legs a box was lying open. Based on the report a case under Exh.P.13 First Information Report came to be registered under Section 302 and 460 IPC and the investigation commenced. After some

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time the investigation was transferred to CID (CB) Jaipur. PW 85 Investigation Officer Shiv Prasad Sharma arrested A-1 Atma Ram on 9.4.1986 and on inquiry A-1 Atma Ram gave Exh.P105 information leading to recovery of ornaments under Exh.P8 list. Pursuant to his further information given under Exh. P106 one knife and screw driver came to be recovered under Exh.P.30. PW 85 Investigation Officer Shiv Prasad Sharma arrested A-3 Vijay Kumar on 26.4.1986 and on inquiry A-3 Vijay Kumar gave Exh.P.111 information leading to recovery of ornaments/articles under Exh. P5 Memo. The Investigation Officer arrested the other three accused and during investigation examined the witnesses and recorded statements. PW 83 Tahsildar Durga Prasad Sharma conducted identification proceedings of the recovered articles and prepared 72 identification reports. After completion of the investigation the charge-sheet came to be filed against the accused persons. During the trial the prosecution examined 86 witnesses and marked the relevant documents in support of its case. A-1 Atma Ram examined himself as a defence witness, besides 4 other witnesses were examined on the side of defence. The trial Court found accused guilty of the charges and sentenced them as narrated above, on appeal the conviction and sentences imposed on A-1 Atma Ram and A-3 Vijay Kumar were confirmed and the other accused were acquitted. A-1 Atma Ram and A-3 Vijay Kumar have challenged the same in these appeals.

5. We heard Mrs. Mridul Aggarwal the learned amicus curie appearing on behalf of the appellant Atma Ram and Mr. Bhagwati Prasad the learned senior counsel appearing for the appellant Vijay Kumar and also learned Additional Advocate General appearing for the respondent-State.

6. The prosecution case is that the appellants A-1 Atma Ram and A-3 Vijay Kumar conspired and murdered Keshar Bai and stolen the ornaments/articles possessed by her. Nobody has witnessed the occurrence and the case rests on

A circumstantial evidence. In a case based on circumstantial evidence the settled law is that the circumstances from which the conclusion of 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 of the guilt of the accused and totally inconsistent with his innocence.

C 7. The prosecution in order to prove its case mainly relied on the following circumstances:

- i) Keshar Bai died of homicidal violence.
- ii) A-1 Atma Ram, threatened Keshar Bai of possible income-tax raid and seizure of ornaments possessed by her and persuaded her to shift her residence from village to hospital premise with her belongings.
- iii) Accused Radha used to demand the ornaments for wearing from Keshar Bai.
- iv) On the information furnished by A-1 Atma Ram and A-3 Vijay Kumar, upon their arrest, the ornaments pledged by various persons with Keshar Bai, got recovered from their possession.

F 8. PW 14 Dr. Dinesh Singh Choudhary conducted post-mortem on the body of Keshar Bai and found the following ante mortem injuries :

- i) Incised wound 1"x1" x 1.5" towards right of neck below jaw till trachea
- ii) Three Incised wounds on Lt. Side neck till trachea each measuring as 1¼" x ½" x 1", in the middle 1" x ½" x 1 of below ½" x ¼" x ¼"

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- iii) Incised wound 2" x ½" x ½" above Rt. Breast A
- iv) Incised wound 2" x ½" x ½" above Lt. Breast
- v) Three incised wounds below Right Breast ½" x ¼"  
x ¼" lnd 1" x ½" x ¼" llrd ½" x ¼" x ¼" B
- vi) Incised wound Lt. hand from behind 1" x ½" x ½"
- vii) Incised wound Rt. hand from behind 1" x ½" x ½"

According to him the cause of death was hemorrhage due to cut of neck vessels. Exh. P24 is the post mortem report issued by him. From the medical evidence it is clear that death of Keshar Bai was homicidal in nature and the first circumstance stood established. C

9. Circumstances No.2 and 3 are taken up for discussion together. PW7 Kishore Singh is a resident of village Chhapoli and he has testified that Keshar Bai was a nurse in the hospital and was residing as a tenant in his house on rent of Rs.10 per month for more than a decade and she used to lend loan on interest on mortgage of ornaments and she used to keep the ornaments in a box in the house and a month prior to the occurrence she shifted her residence from his house to the hospital with all her belongings. D E

10. PW 10 Jaswant Singh is the brother-in-law of Keshar Bai and in his examination-in-chief he has stated that Keshar Bai kept her ornaments in the locker of a bank and A-1 Atma Ram told her that the income-tax people could raid the bank and seize her ornaments and hence Keshar Bai took the ornaments with her. PW 10 has further stated that Keshar Bai used to tell him that accused Radha demanded ornaments from her for wearing and would dance after wearing the same. In the cross examination PW 10 Jaswant Singh has stated that he did not tell in his statement to the police during investigation about the threat made by A1-Atma Ram to Keshar Bai regarding the possibility of an income-tax raid and seizure of F G H

A ornaments and also the demand of ornaments made by  
 accused Radha to Keshar Bai and her wearing the same. This  
 Court has to form its opinion about the credibility of the witness  
 and record a finding as to whether his deposition inspires  
 confidence. This witness PW 10 Jaswant Singh was admittedly  
 B examined by Investigation Officer during investigation and in that  
 statement he has not stated the facts which he now for the first  
 time stated before the Trial Court. This raises a serious doubt  
 as to the veracity of the said facts [See *Khalil Khan vs. State  
 of M.P.* (2003) 11 SCC 19]. In other words this witness has  
 C made material improvement while deposing in the Court and  
 such evidence cannot be safe to rely upon. Thus the evidence  
 adduced by the prosecution to prove the circumstances 2 and  
 3 does not pass the test of credibility and is liable for rejection.

D 11. The remaining last circumstance pertains to the  
 recoveries made pursuant to the disclosure made by the  
 appellants. The investigation officer PW 85 Shiv Prasad  
 Sharma has claimed that he arrested A-1 Atma Ram on  
 9.4.1986 and on inquiry he gave Exh. 105 information which  
 led to the recovery of ornaments mentioned in Exh.P8 list in the  
 E presence of witnesses. PW 5 Santbax Singh and PW6  
 Madanlal Bhavaria are the witnesses to the said recovery. Both  
 of them have testified that accused No.1 Atma Ram took them  
 and the police to his house and entered a room in the court-  
 yard and opened an almirah and took out a plastic bag and  
 F handed it over, which contained ornaments of gold and silver  
 and the same was recovered by Memo under Exh. P8 list. The  
 further testimony of the investigation officer is that he arrested  
 A-3 Vijay Kumar on 26.4.1986 and on inquiry he gave Exh.P  
 111 information which led to the recovery of ornaments under  
 G Exh.P5 Memo in the presence of witnesses. PW4 Tota Ram  
 is the witness for the said recovery and according to him A-3  
 Vijay Kumar took him and the police to his house and produced  
 silver and gold articles and they were recovered under Exh.P5  
 Memo, which he attested. The relevant portion of Exh.P5 Memo  
 H reads as follows:

"Accused Vijay asked for key of lock of Baithak (room) from father through his brother's wife of Kailash, and opened lock and then entered towards right side of Baithak. Where in a Almirah a box (old) was found and opened it, and found a cloth bag (Potali) which was tied up. Accused told that the potali contains ornaments. When potali was opened found the following ornaments of gold and silver and a wrist watch...."

12. Both the above said recoveries have been made from the respective houses of the accused/appellants where their families were residing. In fact A-3 Vijay Kumar obtained the key from his father for opening the lock. In such circumstances it cannot be said that the said articles were in the exclusive possession of the accused/appellants and they came to be recovered only on the information furnished by them. The learned senior counsel and the amicus curie appearing for the appellants strenuously contended that there was no fair identification proceedings of property conducted by Tahsildar and firstly it was conducted belatedly and secondly the witnesses were already shown the articles and thirdly there is no proof that those articles were kept with deceased Keshar Bai and the recovery and identification are unreliable shaky and fake. In this regard reliance was placed on the following decision in *State of Vindhya Pradesh vs. Sarua Munni Dhimar and others* [AIR 1954 V.P. (Vol.41 CN 15)]. The relevant portion reads thus :

"Further as has been observed in connection with identification of accused persons no presumption attaches to identification proceedings of property. It is for the prosecution to establish affirmatively that every necessary precaution was taken to ensure fair identification. The most essential requirement is that the witnesses should not have had an opportunity of seeing the property after its recovery and before its identification before the Magistrate. For that purpose it is necessary to seal the property as soon as it

A is recovered and to keep it in a sealed condition till it is produced before the Magistrate. The police officers who take the sealed bundles to the thana after recovery and who take it to the Magistrate for identification proceedings should be examined to prove that the sealed bundles were not tampered with in any way. The sealed bundles should be opened in the presence of the Magistrate conducting the identification proceedings and he should depose about it. The property to be mixed with the property to be identified should also be sealed some days before witnesses are called and the bundle containing it should also be opened in the presence of the Magistrate who should testify about it in court. Further as has been observed in the case of identification proceedings of persons the result of identification as well as the fact whether the property mixed was similar to the property identified should be entered in the memorandum by the Magistrate in his own hand."

13. In the present case about 131 articles of gold and silver were recovered. About 60 witnesses have testified the pledging of their articles with Keshar Bai. The ornaments like 'Gorla', 'Chain of gold', 'madalia' 'ring', 'Bitti', 'Karia', 'Pahunchi', 'hasli' etc. are of same kind lookwise having no special marks on them. Learned senior counsel appearing for A-3 Vijay Kumar brought to our notice that one Pahunchi as per Exh.P5 recovery Memo, which contained 59 Mania (Moti) was recovered along with 6 silver ornaments mentioned therein, whereas in Exh.P.68 a copy of Malkhana register the six silver articles alone are found mentioned and there is no mention of the gold ornament 'pahunchi' as having kept safely in the Malkhana and it is not known as to where it was kept and produced. On a perusal of the said documents, this contention cannot be easily brushed aside. It is the further submission of the learned senior counsel that as per the prosecution case PW 28 Smt. Raj Kanwar has pledged above said 'pahunchi' with Keshar Bai and she has stated in her testimony that her 'pahunchi' was of 40 Mania

(Moti). If it is so the recovered 'pahunchi' is not that of PW 28 Smt. Raj Kanwar. It is doubtful as to whether this recovery claimed by the prosecution is established. A

14. It is also the contention of the learned senior counsel that four witnesses examined claimed one ornament as theirs. B The identification proceedings of articles was conducted by PW 83 Tahsildar Durga Prasad Sharma in Tehsil and he has claimed to have prepared 72 identification reports. In the cross-examination he has admitted that there were policemen present C at the time of identification and he did not know the articles brought to him were in sealed packets or in open condition and he did not remember whether seal used on the packets was official seal since 12 years have already passed. Even he did not know as to who has arranged for articles having similarity D to the seized articles for the purpose of identification and identification proceedings were completed in a single day. The Tahsildar even after looking at the Memo was unable to say how many articles of each kind were mixed up with articles to be identified and whether similar articles were new or old, used E or unused etc. None of the precaution that ought to have been taken to ensure fair identification was ever taken and no weight can be attached to the evidence of identification of property. F Though the trial court has observed in the judgment about the lack of proper identification of the articles, it erroneously proceeded further to accept the same. Recovery of weapons G namely knife and screw-driver claimed to have been made on the information given by A-1 Atma Ram is also doubtful. Even assuming to be true that recovery of certain incriminating articles were made at the instance of the accused under Section 27 of the Evidence Act, that by itself cannot form the basis of conviction [See *Wakkar vs. State of U.P.* (2011) 3 SCC 306].

15. In this background we are of the considered opinion that both the Courts below fell in error in coming to the conclusion that the prosecution has established its case based

A on circumstantial evidence beyond all reasonable doubt. Benefit of doubt will have to be given to both the appellants.

B 16. In the result both the appeals are allowed and the conviction and sentence imposed on the appellants by the courts below are set aside and they are acquitted of the charges. They are directed to be released from the custody forthwith unless required otherwise.

R.P.

Appeals allowed.