

A

RAM SUNDER SEN

v.

NARENDER @ BODE SINGH PATEL

(Criminal Appeal Nos. 1793-1794 of 2011)

B

OCTOBER 15, 2015

[PINAKI CHANDRA GHOSE AND R.K. AGRAWAL, JJ.]

C

Penal Code, 1860 – ss. 302, 376(2)(f) and 201 – Murder and Rape – Allegation of commission of rape and murder of a girl aged 12 years against the accused – Conviction of accused for the offence punishable u/s. 302 and imposed death sentence, conviction u/s. 376(2)(f) and sentenced to rigorous imprisonment for life and conviction u/s. 201 and sentenced to rigorous imprisonment for seven years – High Court acquitted the accused since the prosecution failed to prove the chain of circumstances to connect the accused with the offence – Interference with – Held: Not called for – Case is based purely on circumstantial evidence – High Court rightly held that the links collected by the prosecution have not at all been proved by any cogent evidence and, thus, it is difficult to hold that it was the accused who committed rape upon the deceased and thereafter killed her.

D

E

F

Evidence - Circumstantial evidence – Reliance upon by the prosecution to convict the accused – Tests to be established – Stated.

Dismissing the appeals, the Court

G

HELD: 1.1 The instant case is based purely on circumstantial evidence. The prosecution, however, failed at the foremost to link the accused with the incident. The prosecution has the responsibility to present a chain of events. The accused's culpability could have been established if the blood samples were tested and matched,

H

the recovery of underwear is not proven to be that of the deceased. Otherwise, the recovery was unnatural and did not adduce confidence. One prosecution witness who was an independent witness stated that the accused had gone to another village on the date of incident. There were material discrepancies in the statements of the prosecution witnesses. The testimonies of the interested witnesses clearly show that they materially improvised from their earlier depositions. The accused also examined two defence witnesses who stated that the accused was attending function in some other village on the fateful night. The High Court went into each and every material aspect of the case, examined at length the deposition of the witnesses and rightly held that the links which are collected by the prosecution have not at all been proved by any cogent evidence and, therefore, it is difficult to hold that it was the accused who committed rape upon the deceased and thereafter killed her. There is no ground to interfere with the judgment passed by the High Court. [Paras 15, 16] [907-E; 908-G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1793-1794 of 2011.

From the Judgment and Order dated 23.07.2008 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 11 of 2008 and Criminal Reference No. 4 of 2007

WITH

Crl. A. No. 1795-1796 of 2011.

Gagan Gupta, Sunny Choudhary, Mishra Saurabh, Parivesh Singh, M.S. Saran Kumar, Naresh Kumar, Advs., for the appearing parties.

The Judgment of the Court was delivered by

PINAKI CHANDRA GHOSE, J. 1. These appeals, by

A special leave, are directed against the judgment and order dated 23.07.2008, passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.11 of 2008 along with Criminal Reference No.4 of 2007, whereby the High Court allowed the criminal appeal filed by the respondent herein and acquitted him and disposed of the Criminal Reference No.4 of 2007 filed by the State of Madhya Pradesh.

2. The case of the prosecution, stated briefly, is that on 19.05.2004 at 8.30 A.M., the complainant Ram Sunder Sen lodged a report at Police Chowki Kotar stating that there was a function in his house on 18.05.2004 in which his relatives and family members had gathered. His daughter Anita, aged about 12 years, after eating meal, had gone to sleep at 7.00 P.M. in front of the main gate of his house as there was no electricity in the house then. After the function was over, at about 11.00 P.M., he and his family members also slept there. Next morning i.e. on 19.05.2004 at 6.00 A.M., the wife of Sarpanch Vansbahadur informed that the dead body of Anita was lying in Bari near the house of the Sarpanch. She was not wearing underwear and skirt. There were abrasions on her forehead, nose and face. Abrasions were also found on the neck as well as nearby navel region. Blood was oozing out of private part, cut on the face and ankles of both the legs. FIR against an unknown person was lodged, the dead body was sent for post-mortem and investigation was thrown open. The Investigating Officer recorded the statements of the witnesses. On the basis of the statement of the witnesses, accused Narendra @ Bode Singh Patel was arrested who admitted his guilt and at his instance, blood-stained underwears of the deceased as also the accused were recovered from a pitcher kept behind his house.

3. After investigation was complete, Police filed challan before the Court against accused Narendra and the case was committed to the Sessions Court for trial. After considering the material on record and hearing the counsel for the accused,

charges were framed against accused Narendra for offence punishable under Sections 302, 376(2)(f) and 201 of the Indian Penal Code, 1873 ("IPC" for short). The charges were read over and explained to the accused to which he pleaded not guilty and claimed for trial. A

4. The Trial Court by its judgment and order dated 18.12.2007, convicted the respondent accused and awarded capital punishment to him for offence punishable under Section 302 IPC. The Trial Court further sentenced him to rigorous imprisonment for life for offence punishable under Section 376(2)(f), and rigorous imprisonment for seven years and a fine of Rs 100, with default clause, for the offence punishable under Section 201 IPC. Thereafter, the matter was referred to the High Court of Madhya Pradesh for confirmation of death sentence vide Criminal Reference No.4 of 2007. The accused also filed an appeal before the High Court, being Criminal Appeal No.11 of 2008. The High Court by the impugned judgment allowed the appeal filed by the accused on the ground that the prosecution failed to prove the chain of circumstances sufficient enough to connect the accused with the alleged offence and, consequently, the respondent accused was set at liberty. B C D E

5. Aggrieved by the judgment of acquittal passed by the High Court of Madhya Pradesh, the complainant, who is the father of the deceased, has approached this Court by filing Criminal Appeal Nos.1793-1794 of 2011. The State of Madhya Pradesh has also challenged before us the judgment of acquittal passed by the High Court vide Criminal Appeal Nos.1795-1796 of 2011. Learned counsel for the complainant-appellant has inter alia submitted that the judgment of the Trial Court is well reasoned and well considered. Both the counsel for the complainant-appellant and counsel for the State have assailed the reasoning given by the High Court in arriving at a wrong conclusion i.e. the innocence of the accused. F G H

6. The Trial Court convicted the accused respondent on

A the basis of the prosecution story relying upon the circumstantial evidence. The law is well settled in deciding a case based upon circumstantial evidences. The prosecution tried to establish the following facts before the Trial Court :

B (i) Motive : in order to satisfy the lust,

(ii) The recovery of underwear of the deceased as also the underwear of the accused was made at the instance of the accused in his own house,

C (iii) Human blood was found on the underwear of the accused,

(iv) The accused came to the house of the deceased at 11.00pm on 18.05.2004 under the pretext of a Bidi but was turned back by the mother of the deceased.

D (v) Previous acts of the accused to make the deceased sit in his lap and to kiss her for which he was rebuked by the deceased's father reveals his ill-intentions.

(vi) Accused made an attempt to rape the daughter of one Kallu Prajapati of Village Golhata prior to the incident,

E (vii) In the morning of 19.05.2004 the accused was not found in the village,

(viii) Accused was seen around the place of incident at night within close proximate time when the incident occurred,

F (ix) Accused failed to give reasonable explanation about the injuries suffered by him.

G The Trial Court held that the above facts proved the prosecution case beyond reasonable doubt and hence the accused was convicted for the offence charged. However, the High Court pointed out serious lacunae in the above-mentioned evidences and hence the conviction order was set aside by the High Court giving benefit of doubt to the accused.

Hi 7. We shall now examine each and every contention in

light of the arguments advanced before us. It is settled law that motive is not a necessary element in deciding culpability but it is equally an important missing link which can be used to corroborate the evidence where conviction is based on circumstantial evidence. In the present case, the motive of the accused was stated to be 'to satisfy his lust'. For this purpose the prosecution argued that although the accused was married and had children, but his wife was living at her parent's house. The same fact was deposed by Lalli Bai, mother of the prosecutrix (PW4). The Trial Court accepted the said argument. However, the High Court rightly refused to rely only on the statement of PW4 to establish the said fact. Further, it is not adequately established as to for how long the wife of the accused was not living with him. The burden to prove this fact is on the prosecution and not on the accused. The prosecution also tried to impute bad character upon the accused. The High Court rightly held that such evidences are not relevant. Sections 53 and 54 of the Indian Evidence Act, 1872 were discussed at length by the High Court and it was held that the accused neither tried to prove his previous good character, nor the said fact was in question. An earlier instance of attempt to rape by the accused, as deposed by the mother of the prosecutrix (PW4), Savitri, aunt of the deceased (PW5) and Rajendra Kumar Sen, brother of the deceased (PW6), is not established at any stage of the trial. These witnesses are not only interested witnesses but they themselves stated that their evidence is hearsay. The prosecution neither produced any complaint/FIR nor any record was shown that any such incident occurred. Thus, the prosecution squarely failed to impute bad character upon the accused. Further, the motive is also not firmly established against the accused.

A
B
C
D
E
F
G

8. The next aspect for consideration before us is the non-explanation by the accused of the injuries sustained by him. As per the medical examination, the accused had certain abrasions on his wrists and ankles and also some injuries on private part. PW24 - the doctor who examined the accused,

H

A deposed that he examined one Narendra S/o Ram Babu. But this doctor failed to identify the accused before the Court. The prosecution also failed to produce any evidence in order to prove that the name of the father of the accused is Ram Babu. The name of accused's father is Ram Bahore and it is nowhere shown that Ram Bahore is *alias* of Ram Babu. With these discrepancies, the High Court refused to accept that the accused was the same person who was examined by the doctor PW24. However, even if it is presumed that there could have been error in writing down the name of the father of the accused and due to long time, the doctor failed to identify the accused, yet the medical evidences are not clinching enough. The accused is a young man, certain abrasions can be regularly sustained during the day while working in and around. Moreover, the accused having worked in his cousin's wedding might have received the abrasions. Medical opinion for explanation to such abrasion is that such abrasion can occur due to itching also. The other injuries on private part, in medical opinion, could be a result of sexual intercourse with his wife. The accused is a married man having children and it is not established that his wife was living away from him. Hence, non-explanation of the above said injuries is not an incriminating circumstance so as to attribute any criminality upon the accused.

F 9. The next incriminating fact is the recovery of the blood-stained underwear of the deceased made at the instance of the accused, from the house of the accused. However, upon careful examination, serious doubts are cast upon the incident of recovery. The witnesses to this seizure memo are Lalit Kumar Sen (PW9) and Dayanand (PW22). As per the deposition of PW9, many doubts are created. He deposed that red colour underwear as well as an underwear of accused were seized. However, he did not state as to whom did the red colour underwear belong. He also did not mention the place from where it was recovered nor did he mention the manner in which the articles were seized. PW22 further made certain

doubtful revelations stating that at the time of recovery, only he, accused and the police were present. However, he only confirms the recovery of a red colour underwear, but the place and surrounding of the place of recovery were not deposed by PW22. The deposition of the above two witnesses raises various doubts about recovery of material facts. Therefore, the High Court correctly raised doubt that it is highly unnatural that the accused will keep the underwear in a pitcher in his own house.

10. The prosecution failed to prove its case on one more aspect. Upon recovery of the underwear of the accused and the deceased, although the same were sent for Serological examination and it was proved that blood was found on the underwear of the accused, but no blood was found on the undergarments of the deceased. During investigation, the blood sample and soil samples were collected from the place of incident. However, it is shocking to note that none of these samples were sent for FSL examination. The said examination could have been very useful to establish the identity of the accused. There is thus a serious lacunae in the investigating procedure that a necessary test was not conducted.

11. The underwear of deceased vide identification memo Ex.P/14 was put for test identification. PW4 deposed that she identified the underwear as the same was torn from the bottom. However, when this witness was put to cross-examination, she deposed that none of the underwears which were put for identification, was torn from the bottom. PW4 also stated that the underwear was blood-stained. However, it is proved by serological report that no blood was found on the underwear of the deceased. Upon perusal, numerous contradictions appear from the statements made by PW4, and serious doubt is raised not only on recovery of the undergarments, but also upon the identification test.

12. The next evidence is the presence of the accused in the village at and around the time of the incident against which

A the accused has pleaded alibi. The prosecution placed on
record the testaments of Ram Sunder Sen, father of the
deceased (PW3), stating that the accused came to his house
3-4 times during the night of 18.05.2004. He also deposed
that on 18.05.2004 at 11.00 P.M. the accused came to his
B house and asked for bidi, but he was turned back by his wife
PW4. PW4 also made deposition to this effect. However, upon
cross-examination both these witnesses stated that this fact
was told to the police officer upon examination. But no such
fact is present in their statements made to the police during
C investigation. The High Court disbelieved the said fact as there
was a deviation from the earlier statement. Further, the High
Court examined the statements of the defence witnesses, who
deposed that on the date of incident, the accused was present
in another village to attend the marriage function of his cousin.
D The defence witnesses specifically deposed that the accused
was present during and after the function on 18.05.2004 and
the accused stayed there at night. It was further deposed that
the accused left for his home only after breakfast. This also
explains the absence of the accused in his village in the
E morning of the incident. The High Court rightly relied upon the
statement of an independent witness, namely, Kalawati (PW1)
who deposed that the accused was not in the village on the
fateful night as he had gone to the marriage ceremony in other
village. The said factum of marriage ceremony and function in
F other village has been admitted even by the family members
of the deceased.

13. The prosecution also placed on record an incident
alleged to have occurred a few days prior to the fateful day,
when the accused made the deceased sit on his lap and kissed
G her, for which the accused was rebuked and beaten by the
father of the deceased. However, in their statement to the
police, no such fact was deposed by PW3 or PW4 and it was
only before the Court that the above witnesses stated this fact.
H Even if the said fact is presumed to be true, we concur with the
reasoning of the High Court that mere snuggling the deceased

once, in itself, is no ground to connect the accused with the alleged incident. A

14. The prosecution also adduced the testimony of Sanjeev Kumar Sen (PW28), cousin of the deceased, who alleged that in the night intervening between 18th and 19th May, 2004 at about 4:30 A.M., he woke up to attend the call of nature when he saw the accused coming towards his house from the Badi of the house of Vanshgopal Sarpanch. Very close to that place, the deceased was found dead in the morning. However, upon careful examination, it can be gathered that this witness did not state such an important fact to the police officer. Although he alleged that the said fact was known to him yet the report was lodged against an unknown person. Further, if the veracity of this statement is tested, it fails to adduce confidence. PW28 himself stated that he saw the accused at 4:30 A.M., however, none of the details as to the distance, surrounding, etc. were given. The source of light in which the witness saw the accused is also not stated. Therefore, the High Court correctly rejected the testimony of PW28. B
C
D

15. The present case is, thus, based purely on circumstantial evidence. It is a settled law that when prosecution relies on circumstantial evidence, the following tests to be clearly established: E

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogent and firm; F

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and G

(iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the ac- H

A cused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

B The prosecution, however, in the present case, has failed at the foremost to link the accused with the incident. The prosecution has the responsibility to present a chain of events. The accused's culpability could have been established if the blood samples were tested and matched, the recovery of underwear is not proven to be that of the deceased. Otherwise, the recovery was unnatural and did not adduce confidence.

C One prosecution witness who is an independent witness has stated that the accused had gone to another village on the date of incident. There were material discrepancies in the statements of the prosecution witnesses. The testimonies of the interested witnesses, namely, PW3, PW4, PW5 and PW28

D clearly show that they materially improvised from their earlier depositions. The accused also examined two defence witnesses who stated that the accused was attending function in some other village on the fateful night. The High Court went

E into each and every material aspect of the case, examined at length the deposition of the witnesses and rightly held that the links which are collected by the prosecution have not at all been proved by any cogent evidence and, therefore, it is difficult to

F hold that it was the accused who committed rape upon the deceased and thereafter killed her.

16. Thus, in the light of the above discussion, we do not find any ground to interfere with the judgment passed by the High Court. The appeals are, accordingly, dismissed.

G Nidhi Jain

Appeals dismissed.