SUNITA

v.

STATE OF HARYANA

(Criminal Appeal No. 546 of 2010)

JULY 30, 2019

[L. NAGESWARA RAO AND HEMANT GUPTA, JJ.]

Penal Code, 1860 – s.302 – Murder – Prosecution case was that one dead body was found burning on 'Bitora' (conical storage of cow dung cakes) – Post-mortem of the remains of body was conducted – It was found to be a dead body of a female – DNA test was conducted – The bones and tissues of the dead body matched with DNA profile of PW-3 and his wife – It was body of 'S', daughter of PW-3 – FIR was lodged – As per prosecution, deceased and the appellant were familiar with each other and both had gone to a village together – Further, PW-4 had seen appellant with the deceased and her two children on 03.01.2004 going towards a village and when he was returning back he saw appellant on a Scooty with a gunny bag on it footrest – PW-5 also deposed that he saw the deceased along with her two minor children in the house of the appellant at about 5 pm on 03.01.2004 – Appellant was convicted for murder – The appeal against the said judgment was dismissed by the High Court – On appeal, held: High Court required appellant u/s. 106 of the Evidence Act to explain the circumstances under which the body parts of the deceased came to be recovered from the burning 'Bitora' – The finding of the High Court was erroneous inasmuch as 'Bitora' was not in possession of the appellant much less exclusive and it was located in an open field of another person – Further, such explanation would be necessary, if the prosecution had discharged the initial onus on it – Therefore, the appellant was not required to explain the circumstances of body parts being found in 'Bitora' – Further, PW-4, 5 were inimical towards the appellant inasmuch as she had filed a suit for claiming a estate, a right which was denied by the said witnesses – Thus, their statements cannot be relied upon readily in absence of corroboration – The other evidence of the prosecution was of extra-judicial confession made to PW-12, which is again untenable – There was no blood mark on the Scooty

A *recovered – Therefore, the only evidence against appellant was of last seen by PW-4 and 5 and such evidence does not complete the chain of circumstances so as to maintain conviction of the appellant for an offence u/s. 302 IPC – Thus, the appellant acquitted of the charges levelled against her – Evidence Act, 1872 – s.106.*

B **Allowing the appeal, the Court**

HELD : 1. The prosecution story is that the deceased and the appellant planned to visit a village together to wish the birth of nephew of the deceased sometime back. On way, they stopped at another Village. The deceased had no occasion to be in that C **Village unless she accompanies appellant who is cousin of her husband. Therefore, the needle of suspicion is on the appellant. [Para 13] [787-E-F]**

2. According to (PW-3), height of deceased 'S' was 5' whereas as per (PW-4), the lady with the appellant at the bus D **stop was 5'7". There is a margin of approximation in the height of the deceased stated by (PW-3) and (PW-4), but such discrepancy is a factor to test the veracity of the statement of (PW-4). (PW-4) deposed that he had seen the appellant with a gunny bag placed on the footrest of a Scooty driven by the appellant. The carrying of a weight of a dead body on a Scooty is not believable. Still** E **further, (PW-4) has left his father, after his father started living with appellant and started staying with his grandfather (PW-5). There is a civil suit (Ex. D-5) filed by the appellant to claim estate of father of PW-4. Therefore, such statement has to be taken with pinch of salt as it is by a person, who is inimical to the accused. The statement of (PW-5) is only to the fact that he had seen the** F **dead body recovered from *'Bitora'* (conical storage of cow dung cakes). Though, he deposed that he had seen the deceased on January 3, 2004 in the house of appellant but again this is a statement of a witness who is at loggerhead with the appellant. Therefore, such statement cannot be relied upon readily in the** G **absence of any corroboration. Therefore, the only evidence against the appellant is of last seen by (PW-4) at 2 pm and that of (PW-5) at 5 pm and later in the night, appellant with a gunny bag on her Scooty by PW-4 at 2 am. Such evidence does not complete**

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the chain of circumstances so as to maintain conviction of the appellant for an offence under Section 302 IPC. [Para 15] [788-B-E]

3. The High Court referred to Section 106 of the Indian Evidence Act, 1872 to hold that the appellant was required to explain the circumstances under which the body parts of the deceased came to be recovered from the burning *'Bitora'* . This Court finds that finding of the High Court is erroneous inasmuch as *'Bitora'* was not in possession of the appellant much less exclusive. It was located in an open area in the field of 'RS'. Still further, such explanation would be necessary, if the prosecution has discharged the initial onus on it. Therefore, the appellant was not required to explain the circumstances of body parts being found in *'Bitora'* in the village where she resided with father of PW-4. The other evidence of the prosecution is of extra-judicial confession made to (PW-12) brother-in-law of father of deceased. Such statement is again untenable. The prosecution has not produced on record any special circumstance as to give confidence to the appellant to make extra judicial confession before (PW-12). The other evidence is recovery of Scooty on the basis of disclosure statement made by the appellant. Apart from statement of (PW-4) that he has seen the appellant riding Scooty with gunny bag, there is no other evidence of use of Scooty in a crime. There is no blood mark on the Scooty or any other evidence that it was used by the appellant in disposing of the body. The prosecution has failed to prove at what place, victim was murdered. There is no evidence in the manner of cause of death or place of death available on record. Therefore, this Court finds that the prosecution has not been able to prove that it is the appellant and the appellant alone who is guilty of the offence of murder of victim. [Para 17] [788-G-H; 789-A-D]

Satpal v. *State of Haryana* **(2018) 6 SCC 610;** *Asar Mohammad* v. *State of U.P.* **2018 SCC OnLine SC 2179 – relied on.**

Case Law Reference

(2018) 6 SCC 610	**relied on**	**Para 10**

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 546 of 2010.

From the Judgment and Order dated 25.03.2008 of the High Court of the State of Punjab and Haryana at Chandigarh in Criminal Appeal No. 241-DB of 2006.

B Shaurya Sahay, Amit Kumar, Advs. for the Appellant.

Raj Singh Rana, Pankaj Kumar Singh, Sanjeet Paliwal, Avisek Minj, Vishwa Pal Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

C **HEMANT GUPTA, J.**

1. The appellant Sunita stands convicted for the murder of Sushila, wife of Shish Pal, by the learned Additional Sessions Judge, Karnal on January 13, 2006. The appeal against the said judgment was dismissed on March 25, 2008.

D 2. Shish Pal is son of Dharma and resident of Village Dadola, District Panipat. Shish Pal and Sushila had two children, one son Sagar aged about 3½ years and one daughter Shivani aged about 1½ years. The accused Sunita is daughter of Roshan, cousin of father of Shish Pal, who was also a resident of Village Dadola. Roshan had three daughters, E the other two being Santosh and Geeta.

3. Pirthi Singh (PW-5) is resident of Village Kailash, which is 55 kms. from Village Dadola on way to Village Sangatehra (UP), the paternal village of Sushila, the deceased. Pirthi Singh's eldest son Baburam was married with Shiksha Devi. She died about 18-20 years back. Baburam F had a son Neeraj and a daughter Nirjesh Kumari from his first wife. Sunita is alleged to have married Baburam after death of his first wife. The said fact is disputed by Pirthi Singh (PW-5) though he admits that accused Sunita was living with his son Baburam and had given birth to a son. It is admitted by learned counsel for the appellant that Sangatehra, a village in Uttar Pradesh, is about 100 kms. from Dadola and Village G Kailash is about 55 kms. from Dadola on way of Sangatehra.

4. The prosecution case is that one Munshi Ram, son of Ram Diwaya, resident of Village Kailash, lodged a report (Ex.P/24) at 8:30 am on January 4, 2004. He stated that he is a tenant on payment of 1/3rd batai over the land of Baburam, son of Pirthi Singh (PW-5). At about 6 H

am, he was going towards his field and on his way, Ram Lubhaya, another co-villager, told him that someone has set his '*Bitora*' (conical storage of cow dung cakes) on fire. He saw many persons standing there. He found that a foul smell was coming from the fire and noticed the burning of a dead body. On the basis of his statement, the Police went to the place of occurrence. The inquest report (Ex.P/25) reflected burning of a dead human body. SI Shamsher Singh (PW-14) went to the place of occurrence and made request for postmortem of the remains of the body to Senior Medical Officer, Civil Hospital, Karnal. However, the Medical Officer sent the flesh and bones to PGIMS, Rohtak vide (Ex.P/8) for opinion by the Board of doctors. On January 5, 2004, the postmortem was conducted. The report is Ex.P/26. It was found to be a dead body of a female. It was on February 4, 2004, the blood samples of Isham Singh (PW-3) (father of Sushila) and Kanti (mother of Sushila) were taken and sent for DNA test. Report of such DNA test is Ex. P/35 dated June 1, 2004 which shows that bones and tissues match with DNA profile of Kanti and Isham Singh (PW-3). On the basis of report, a formal FIR (Ex.P/10) was lodged on June 15, 2004 by Isham Singh.

5. On January 9, 2004, Shish Pal, husband of the deceased Sushila informed Isham Singh (PW-3) that he had seen the photographs of his missing children, Sagar and Shivani, in a newspaper, said to be with Manav Sewa Sangh, Panipat. Shish Pal also informed that Sushila was not with the children in Panipat. Isham Singh reached Village Dadola but, in the meantime, Shish Pal got the children back from Panipat.

6. Isham Singh has appeared as PW-3 and deposed that, on January 16, 2004, he came to know that one lady was burnt in *'Bitora'* at Village Kailash. He went to Village Kailash along with his brother-in-law Kashmir Singh (PW-12) and came to know that aforesaid incident has taken place during the intervening night of 3rd/4th January, 2004. The accused was the suspect.

7. The investigations were conducted by SI Shamsher Singh (PW-14), SI Ramesh Chand (PW-19) and Inspector Baljinder Singh (PW-20). After completion of the investigations, the appellant was made to stand trial. On an application filed by the prosecution, one Ashok Kumar and Seth Pal were made to stand trial but both the co-accused stand acquitted by the trial Court itself.

8. Learned counsel for the appellant argued that the prosecution story is unbelievable and full of contradictions. The entire prosecution

A case is the evidence of last seen by Neeraj (PW-4), son of Baburam and Pirthi Singh (PW-5), father of Baburam. It is argued that both the persons are inimical towards the appellant inasmuch as the appellant has filed a suit for claiming estate of Baburam as his wife which right is denied by the said witnesses. It is argued that Neeraj (PW-4) is said to have seen the appellant with the deceased and her two children on January 3, 2004 B at the turn from G.T. Road towards his village when he was returning back from Karnal at about 2 pm. Neeraj (PW-4) further deposed that at about 2 am in the intervening night of 3rd/4th January, 2004, when he got up for urinating, he found Sunita going on a Scooty with a gunny bag placed on its footrest. In the morning, he saw *'Bitora'* situated in the C field of Ratan Singh burning from a distance. At about 9 am, he saw crowd gathered there and he along with his three friends went there. The Police also reached at the spot. Part of the cross-examination related to the role of other two co-accused Ashok Kumar and Seth Pal which is not relevant at this stage. He deposed that lady with the appellant was of a height of 5'7". The father of deceased Sushila, Isham Singh D (PW-3) has deposed that Sushila was 5' in height. It is, thus, argued that had the witness seen the deceased with the appellant, he would have noticed the height correctly. It is also argued that Neeraj (PW-4) has not identified Sushila when he allegedly saw her with the appellant which is quite unbelievable as he was a step son of the appellant. It is further E argued that it is impossible to ride a Scooty with a dead body in a gunny bag on the footrest, therefore, prosecution story is full of inherent improbabilities.

9. Learned counsel for the appellant submitted that Pirthi (PW-5) deposed that he has seen the deceased along with her two minor children F in the house of the appellant at about 5 pm on January 3, 2004. However, in cross-examination, he admits that his statement was recorded 7-8 days after burning of *'Bitora'* but he has not stated that he has seen the deceased with minor children in the house of Sunita.

10. Learned counsel for the appellant relied upon ***Satpal*** v. ***State*** G ***of Haryana***[1] to contend that the evidence of Neeraj (PW-4) and Pirthi Singh (PW-5) is weak evidence and by itself is not sufficient to maintain conviction. There is no other evidence to link the appellant with the death of Sushila. It has been held that evidence of last seen theory is a

H [1] (2018) 6 SCC 610

weak kind of evidence by itself to convict upon the same singularly. The Court held as under:-

> "6. *We have considered the respective submissions and the evidence on record. There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly.* But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."
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> (Emphasis Supplied)

11. In another Judgment, this Court in ***Asar Mohammad*** v. ***State of U.P.***[2], reiterated when conviction on the basis of circumstantial evidence can be maintained. The Court held that:-

> "9. Before proceeding to consider the rival submissions, be it noted that in the present case, no direct evidence has been produced by the prosecution regarding the involvement of the appellants in the commission of the crime. The prosecution rests its case solely on circumstantial evidence. The legal position as to how such matter

[2] 2018 SCC OnLine SC 2179

A should be examined has been expounded in Padala Veera Reddy v. State of Andhra Pradesh[3] in the following words:—

"10. ….. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

B (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

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

C (3) 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

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other D 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. (See Gambhir v. State of Maharashtra[4].)

E 11. See also Rama Nand v. State of Himachal Pradesh[5], Prem Thakur v. State of Punjab[6], Earabhadrapa alias Krishnappa v. State of Karnataka[7], Gian Singh v. State of Punjab[8], Balwinder Singh v. State of Punjab.[9]"

10. In Mulakh Raj v. Satish Kumar[10], the Court succinctly F restated the legal position in paragraph 4 as under:

"4. ……Undoubtedly this case hinges upon circumstantial evidence. It is trite to reiterate that in a case founded on circumstantial evidence, the prosecution must prove all the circumstances connecting unbroken chain of links leading

G [3] 1989 Supp (2) SCC 706
[4] (1982) 2 SCC 351
[5] (1981) 1 SCC 511
[6] (1982) 3 SCC 462
[7] (1983) 2 SCC 330
[8] 1986 Supp SCC 676
[9] (1987) 1 SCC 1
H [10] (1992) 3 SCC 43

to only one inference that the accused committed the crime. If any other reasonable hypothesis of the innocence of the accused can be inferred from the proved circumstances, the accused would be entitled to the benefit. What is required is not the quantitative but qualitative, reliable and probable circumstances to complete the chain connecting the accused with the crime. If the conduct of the accused in relation to the crime comes into question the previous and subsequent conduct are also relevant facts. Therefore, the absence of ordinary course of conduct of the accused and human probabilities of the case also would be relevant. The court must weigh the evidence of the cumulative effect of the circumstances and if it reaches the conclusion that the accused committed the crime, the charge must be held proved and the conviction and sentence would follow."

12. We have heard the learned counsel for the parties and find merit in the argument raised by learned counsel for the appellant.

13. As per prosecution story, the parental village of Sunita is Dadola i.e. same village as that of Shish Pal, husband of the deceased. Sunita is daughter of cousin of father of Shish Pal, therefore, she is familiar with the deceased. Sunita was living with Baburam in Village Kailash, which is at distance of about 55 kms. from Dadola. The prosecution story is that the deceased and the appellant planned to visit Sangatehra together to wish the birth of nephew of the deceased sometime back. Therefore, both went from Village Dadola to Village Sangatehra and on way stopped at Village Kailash. The deceased had no occasion to be in Village Kailash unless she accompanies Sunita who is cousin of her husband. Therefore, the needle of suspicion is on the appellant.

14. Sushila went missing on January 3, 2004 but no missing report was lodged. Isham Singh (PW-3), father of the deceased, lodged the FIR on June 15, 2004 i.e. after the identity of the dead body of his daughter was established. He deposed that Roshan, father of the accused-appellant was looked after by his daughter and that the motive to take the life of the deceased was that appellant apprehended that her father may give his property to Sushila. Roshan has appeared as DW-3 who deposed that he was not looked after by the deceased. Therefore, the primary motive is not made out. The children of the deceased were found at Manav Sewa Sangh, Panipat. Such fact came to the notice of

A Shish Pal, husband of the deceased from an advertisement but who left the children at Manav Sewa Sangh has not come on record.

15. According to Isham Singh (PW-3), Sushila's height was 5' whereas as per Neeraj (PW-4), the lady with the appellant at the bus stop was 5'7". There is a margin of approximation in the height of the B deceased stated by Isham Singh (PW-3) and Neeraj (PW-4), but such discrepancy is a factor to test the veracity of the statement of Neeraj (PW-4). Neeraj (PW-4) deposed that he had seen the appellant with a gunny bag placed on the footrest of a Scooty driven by the appellant. The carrying of a weight of a dead body on a Scooty is not believable. Still further, Neeraj (PW-4) has left his father Baburam after his father C started living with Sunita and started staying with his grandfather Pirthi Singh (PW-5). There is a civil suit (Ex. D-5) filed by the appellant to claim estate of Baburam. Therefore, such statement has to be taken with pinch of salt as it is by a person, who is inimical to the accused. The statement of Pirthi Singh (PW-5) is only to the fact that he had seen D the dead body recovered from *'Bitora'*. Though, he deposed that he had seen the deceased on January 3, 2004 in the house of Sunita but again this is a statement of a witness who is at loggerhead with the appellant. Therefore, such statement cannot be relied upon readily in the absence of any corroboration. Therefore, the only evidence against the appellant is of last seen by Neeraj (PW-4) at 2 pm and that of Pirthi E Singh (PW-5) at 5 pm and later in the night, Sunita with a gunny bag on her Scooty by Neeraj at 2 am. Such evidence does not complete the chain of circumstances so as to maintain conviction of the appellant for an offence under Section 302 IPC.

16. The prosecution has been able to prove only death of Sushila F on the basis of DNA test from the body recovered from '*Bitora'* in the Village Kailash. Even if the statement of Neeraj (PW-4) is relied upon that he may not be aware of the identity of the deceased being resident of another village but the fact at best is that the inference can be drawn that he has lastly seen the deceased with the appellant at 2 pm on January G 3, 2004.

17. The High Court referred to Section 106 of the Indian Evidence Act, 1872 to hold that the appellant was required to explain the circumstances under which the body parts of the deceased came to be recovered from the burning *'Bitora'* at Village Kailash. We find that H finding of the High Court is erroneous inasmuch as *'Bitora'* was not in

possession of the appellant much less exclusive. It was located in an open area in the field of Ratan Singh. Still further, such explanation would be necessary, if the prosecution has discharged the initial onus on it. Therefore, the appellant was not required to explain the circumstances of body parts being found in *'Bitora'* in the village where she resided with Baburam. The other evidence of the prosecution is of extra-judicial confession made to Kashmir Singh (PW-12) brother-in-law of father of Sushila. Such statement is again untenable. The prosecution has not produced on record any special circumstance as to give confidence to the appellant to make extra judicial confession before Kashmir Singh (PW-12). The other evidence is recovery of Scooty on the basis of disclosure statement made by the appellant. Apart from statement of Neeraj (PW-4) that he has seen the appellant riding Scooty with gunny bag, there is no other evidence of use of Scooty in a crime. There is no blood mark on the Scooty or any other evidence that it was used by the appellant in disposing of the body. The prosecution has failed to prove at what place, Sushila was murdered. There is no evidence in the manner of cause of death or place of death available on record. Therefore, we find that the prosecution has not been able to prove that it is the appellant and the appellant alone who is guilty of the offence of murder of Sushila.

18. Consequently, granting benefit of doubt to the appellant, the appeal is allowed. The appellant is acquitted of the charges levelled against her. The bail bonds shall stand discharged. She be set at liberty, if not wanted in any other case.

Ankit Gyan Appeal allowed.