

A.F.R.

**High Court of Judicature at Allahabad
(Lucknow)**

Neutral Citation No. - 2024:AHC-LKO:29115-DB

Reserved on :- 12.02.2024

Delivered on :- 10.04.2024

Court No.3

Case :- CRIMINAL APPEAL No. - 18 of 1992

Appellant :- Maiku And Another

Respondent :- State of U.P.

Counsel for Appellant :- Amar Nath Dubey
(Amicus), Brij Mohan Sahai, Prince Singh, Raghunath Prasad

Counsel for Respondent :- G.A.

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per : Ajai Kumar Srivastava-I, J.)

1. This appeal challenges the judgment and order dated 27.11.1991 passed by the learned Vith Additional Sessions Judge, Unnao in Sessions Trial No.171 of 1990 arising out of Case Crime No.151 of 1990, under Sections 377, 302, 201 and 404 of the Indian Penal Code¹, Police Station Safipur, District Unnao, whereby the appellants, Maiku and Manzoor alias Mansoor have been convicted and sentenced to undergo life imprisonment for the offence under Section 302 read with Section 34 I.P.C. The appellant ¹ **hereinafter referred to as "I.P.C."**

no.1, Maiku has also been convicted and sentenced to undergo five years' rigorous imprisonment for the offence under Section 377 I.P.C. The appellant no.2, Manzoor alias Mansoor has also been convicted and sentenced to undergo five years' rigorous imprisonment for the offence under Section 377 read with Section 34 I.P.C. The appellant no.2, Manzoor alias Mansoor has also been convicted and sentenced to undergo one year's rigorous imprisonment for the offence under Section 403 I.P.C.

2. At the outset it is relevant to mention that this appeal was filed by the appellants, Maiku and Manzoor alias Mansoor. However, due to death of co-convict, Manzoor alias Mansoor, during pendency of this appeal, the appeal in respect of him has been abated vide order dated 20.01.2020 passed by a Co-ordinate Bench of this Court. Therefore, the present appeal survives with regard to accused/ appellant, Maiku only.

3. The prosecution case, in nutshell, is that on 15.03.1990 the first informant, Afsar Ali gave an oral information at Police Station Safipur that dead body of the deceased, Satya Narayan was spotted afloat in a well situated in the agricultural field of Mahadev Singh, which was noticed by the shepherds.

4. The inquest proceeding started on 15.03.1990 at 09:30 A.M. and got concluded on 15.03.1990 at 10:30 A.M. The inquest report has been

duly proved by P.W.-7, Shiv Harsh Tiwari, Investigating Officer as Ext. Ka.6.

5. On the basis of an oral information given by the first informant, Afsar Ali, the first information report, Ext. Ka-18 came to be lodged against the appellants on 16.03.1990 under Sections 377, 302, 201 and 404 I.P.C.

6. The Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C. He visited the place of occurrence and prepared site plans thereof Ext. Ka-11 to 14.

7. Upon conclusion of investigation, a charge-sheet, Ext. Ka-15 came to be submitted in the Court concerned, which has been proved by P.W.-7, Shiv Harsh Tiwari, Investigating Officer.

8. The accused/ appellants were charged under Sections 302/34, 377/34, and 403 I.P.C., who pleaded not guilty and claimed to be tried.

9. In order to bring home guilt of the appellants, the prosecution has examined Afsar Ali as P.W.-1, Hari Narayan as PW-2, Jurakhan as P.W.-3, Jugnu as P.W.-4, Balram as P.W.-5, Dr. P. N. Verma as P.W.-6, Investigating Officer, Shiv Harsh Tiwari as P.W.-7 and Sri Krishna Shukla as P.W.-8.

10. The accused/ appellants, in their statements, recorded under Section 313 Cr.P.C., have stated the

prosecution story to be false. They also stated to have been falsely implicated in this case and claimed to be innocent.

11. No evidence in defence was adduced by the accused/ appellant before the learned trial court.

12. The postmortem on the cadaver has been conducted by Dr. P. N. Verma, P.W.-6, which has been proved by him as Ext. Ka-5. As per postmortem report of the deceased, following ante-mortem injuries were found on the person of the deceased :-

"1. Superficial burn I degree, 2.5 cm x 1 cm on uppermost part of forehead in the middle. Hair adjacent are burnt.

2. Abrasion 14 cm x 11 cm on lower part of chest and upper part of abdomen (epigastrium) in the middle.

3. Abrasion 6 cm x 3 cm on back of Lt. elbow.

4. Abrasion 4 cm x 3 cm on back of Lt. hand in middle.

5. Abrasion 4 cm x 4 cm on back of right elbow.

6. Abrasion 6 cm x 4 cm on back of right forearm in middle.

7. Superficial burn II degree 4 cm x 1.5 cm on back of right middle finger, proximal phalynx.

8. Abrasion around anus in 2.5 cm diameter. Seminal stains not present. (Swab smears from inside taken and sent for examination to pathologist)."

13. According to the postmortem report, Ex. Ka-5, the cause of death of the deceased, Satya Narayan is reported to be asphyxia as a result of drowning.

14. At the conclusion of trial, learned Trial Judge found that the prosecution had succeeded in proving its case on the basis of evidence adduced by the prosecution, therefore, learned trial Court convicted the surviving appellant for the offence under Sections 302/34 and 377 of I.P.C. as stated above.

15. Being aggrieved, the surviving appellant and other co-convict, Manzoor alias Mansoor preferred this appeal.

16. It is contended by learned counsel for the surviving appellant that the surviving appellant, Maiku is innocent, who has been falsely implicated in this case. He submits that the entire prosecution case is based on circumstantial evidence. A complete chain of circumstances pointing out guilt of the surviving appellant only has not been proved by the prosecution. Therefore, he submits that the surviving appellant has been wrongly convicted by the learned trial Court without there being any evidence against him.

17. His further submission is that the name of the surviving appellant was not mentioned in the oral information which was given by P.W.-1, Afsar Ali, Village Chowkidar at Police Station Safipur. According to prosecution story, co-convict, Manzoor alias Mansoor only is stated to have taken away the deceased on the fateful day. The surviving appellant was falsely implicated in this case only on the basis of confessional statement of co-convict, which is not admissible in law.

He has drawn attention of this Court to the fact that the deceased had gone missing four days' prior to the alleged recovery of his dead body from a well. However, no missing report in respect of the deceased having gone missing was lodged by the elder brother of the deceased, P.W.-2, Hari Narayan, which lends support to the submission of the appellant that the deceased was done to death by some unknown culprits. Therefore, after recovery of the dead body of the deceased, the surviving appellant was falsely implicated in this case.

18. Shri Brij Mohan Sahay, learned counsel for the surviving appellant has vehemently argued that motive assumes significance in cases based on circumstantial evidence. However, in the present case, the prosecution has miserably failed to attribute any motive to the surviving appellant. Therefore, the surviving appellant could not have been convicted by the learned trial Court.

19. While concluding his submissions, learned counsel for the surviving appellant has submitted that if the testimonies of P.W.-1, Afsar Ali and P.W.-2, Hari Narayan are examined together, it would show that they are not reliable witnesses as there appear major contradictions in their testimonies which have wrongly been ignored by the learned trial Court while appreciating their evidence.

20. In order to buttress his aforesaid submissions, he has placed reliance upon a judgment

rendered by Hon'ble Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra** reported in **(1984) 4 SCC 116** and on the basis thereof, he has submitted that the impugned judgment being unsustainable deserves to be set aside and the surviving appellant deserves to be acquitted of all charges levelled against him.

21. Shri Umesh Chandra Verma, learned A.G.A., on the other hand, has submitted that though the prosecution case is based on circumstantial evidence, however, the prosecution has been able to prove a complete chain of events, which indicates the guilt of surviving appellant. He has submitted that it is settled law that minor contradictions in the statements of prosecution witnesses do not go to the root of the matter; rather existence of minor contradictions lend support to the contention of State that the prosecution witnesses were not tutored.

22. He has submitted that the impugned judgment and order dated 27.11.1991 is based on proper analysis of the prosecution evidence adduced before the learned trial Court and finding arrived at by the learned trial Court cannot be said to be perverse, therefore, no interference by this Court in exercise of power under Section 386 Cr.P.C. is warranted. The present appeal lacks merit which deserves to be dismissed for the aforesaid reasons.

23. Having heard learned counsel for the surviving appellant, learned A.G.A. for the State and upon perusal of the record, it transpires that on 15.03.1990 at 8:10 A.M., the first informant, Afsar Ali orally informed at Police Station Safipur, District Unnao that dead body of the deceased, Satya Narayan was spotted afloat in a well situated in the agricultural field of Mahadev Singh, resident of Mirzapur which was noticed by the shepherds, who informed this fact to the first informant, Afsar Ali. On the basis of aforesaid oral information, General Diary entry bearing No.19 was recorded on 15.3.1990 at 8:10 A.M. The first informant, Afsar Ali, who is a Village Chowkidar, was examined as P.W.-1.

24. The prosecution case is based on circumstantial evidence as there is no eye-witness, who claims to have seen the incident of murder of the deceased. A perusal of testimony of P.W.-1, Afsar Ali, who informed the police station about the dead body of deceased having been seen in a well situated in the agricultural field of Mahadev Singh, reveals that at the time of recovery of dead body of deceased, Satya Narayan, the family members of the deceased had also reached there.

25. P.W.-2, Hari Narayan, who is the elder brother of the deceased, Satya Narayan, has also admitted in his testimony that not only he had reached the well from where dead body of deceased was recovered, but he had also retrieved the dead body of the deceased

from the well on the instructions of police personnel. This witness has also stated that five days before the day of recovery of dead body of the deceased from the well i.e. , co-convict, Manzoor alias Mansoor had come to his house to take away the deceased with him. Even at the cost of repetition we may again mention that the oral information regarding recovery of dead body of deceased from the well was given by P.W.-1, Afsar Ali, who is a Village Chowkidar. However, despite being present at the time of recovery of dead body of deceased, P.W.-2, Hari Narayan did not get the first information report lodged by himself stating therein that his brother was taken away by co-convict, Manzoor alias Mansoor. This fact casts serious doubt on the veracity of testimony of P.W.-2, Hari Narayan.

26. P.W.-3, Jurakhan has deposed that the co-convict, Manzoor alias Mansoor had told him that he had committed unnatural sexual acts with the deceased many times. This fact was communicated to this witness by co-convict, Manzoor alias Mansoor about 20 days prior to the date of incident. This witness is admittedly cousin brother of the deceased. However, even after recovery of dead body of deceased, he did not tell this fact that co-convict, Manzoor alias Mansoor had told him of having committed unnatural sexual acts with the deceased, to the real elder brother of the deceased, P.W.-2, Hari Narayan. He has stated this fact for the first time in the Court which appears to us to be

an afterthought effort to improve upon the prosecution case.

27. P.W.-4, Jugnu has stated that he had seen the deceased, Satya Narayan with the surviving appellant, Maiku and co-convict, Manzoor alias Mansoor. The co-convict, Manzoor alias Mansoor told this witness that they are going to have a walk. According to this witness, he had seen the deceased, Satya Narayan in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor prior to death of the deceased. P.W.-4, Jugnu says that he had informed the family members of the deceased that he had seen the deceased in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor before the death of deceased. However, when we examine the statement of P.W.-2, Hari Narayan, who is the real elder brother of the deceased carefully in its entirety, we find that P.W.-2, Hari Narayan does not admit that he was intimidated by P.W.-4, Jugnu about any such fact that P.W.-4, Jugnu had seen the deceased in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor. This renders testimonies of P.W.-2, Hari Narayan and P.W.-4, Jugnu to be unreliable.

28. The recovery of wristwatch of the deceased which has been proved by P.W.-7, Shiv Harsh Tiwari as Ext Ka-2 relates to the co-convict, Manzoor alias Mansoor, who has already died and the appeal in respect of him has already been abated. Therefore, the

same is not of any assistance to the prosecution insofar as the surviving appellant, Maiku is concerned.

29. Thus, if we remind ourselves of the chronology of this incident, we find that dead body of the deceased was recovered on 15.03.1990. The deceased, Satya Narayan had gone missing five days prior to the date of recovery of his dead body. His dead body was spotted by the shepherds afloat in the well situated in the agricultural field of Mahadev Singh on 15.03.1990. The oral information in this regard was given by the first informant, Afsar Ali, Village Chowkidar, who has been examined as P.W.-1. From a bare perusal of the statements of P.W.-2, Hari Narayan and P.W.-4, Jugnu, we find that the dead body of the deceased was spotted in the well and was retrieved therefrom. This place of recovery of dead body of deceased is shown in site plan, Ext. Ka 11. At the time of recovery of dead body of deceased, the family members of the deceased, Satya Narayan were present there, but P.W.-2, Hari Narayan, the elder brother of the deceased did not lodge any first information report himself. He even did not lodge any missing report in respect of deceased having gone missing and who remained untraceable for about five days despite having seen the deceased being taken away by the co-convict, Manzoor alias Mansoor. Also at the time of inquest report being prepared Maiku and Manzoor alias Mansoor were present along with other villagers and Hari Narayan and Satya Narayan did not say at the

time that Maiku or Manzoor alias Mansoor were responsible for taking away the deceased and later killing him.

30. Keeping in view the aforesaid admitted facts, we find it very strange, unnatural and unbelievable that the real elder brother of the deceased would not lodge any missing report about his younger brother having gone missing and not traceable for many days, especially when P.W.-2, Hari Narayan says that the deceased had gone with the co-convict, Manzoor alias Mansoor.

31. Upon a careful scrutiny of statements of P.W.-2, Hari Narayan and P.W.-4, Jugnu, we find their statements to be unreliable for the reason that P.W.-4, Jugnu says that he had informed the fact that he had seen the deceased in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor, to the family members of the deceased. However, P.W.-2, Hari Narayan does not admit of any such information having been given by P.W.-4, Jugnu to him. Therefore, we are constrained to observe that P.W.-2, Hari Narayan and P.W.-4, Jugnu have named the co-convict, Manzoor alias Mansoor and the surviving appellant, Maiku only with a view to introduce a case of "last seen" in order to rope in the surviving appellant.

32. The celebrated judgment of **Sharad Birdhichand Sarda (Supra)** has been recently quoted with approval by Hon'ble Supreme Court in para 14 of

the judgment in **Raja Naykar vs. State of Chhattisgarh** reported in **2024 SCC OnLine SC 67** which, for ready reference, is quoted hereinbelow :-

"14. Undoubtedly, the prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, wherein this Court held thus:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 " 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra[(1972) 4 SCC 625 : AIR 1972 SC 656}. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 :1953 Cri LJ 129]:

"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 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."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(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,

(3) the circumstances should be of a conclusive nature and tendency,

(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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

15. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused 'must be' and not merely 'may be' proved guilty before a court can convict the accused. It has been held that

there is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved'. It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that 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 probabilities the act must have been done by the accused.

16. *It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt."*

33. After a careful analysis of testimonies of prosecution witnesses of fact, we have no hesitation in holding that the case of prosecution rests entirely on circumstantial evidence, as there was no ocular witness to this incident. For the reasons stated above, we find that the statement of alleged witness of fact, P.W.-2, Hari Narayan and P.W.-4, Jugnu, to be unreliable. Even otherwise mere evidence of "last seen", in want of any other corroborative evidence cannot, per se, be sufficient to hold any accused guilty in a case based on circumstantial evidence. In this regard, we are supported by a judgment rendered by Hon'ble Supreme Court in **Navaneethakrishnan vs. State By Inspector of Police** reported in **(2018) 16 SCC 161**. Para 22 of the same, being relevant, is quoted hereinbelow:

"22. PW 11 was able to identify all the three accused in the court itself by recapitulating his memory as those persons who came at the time when he was washing his car along with John Bosco and further that he had last seen all of them sitting in Omni van on that day and his testimony to that effect remains intact even during the cross-examination in the light of the fact that the said witness has no enmity whatsoever against the appellants herein and he is an independent witness. Once the testimony of PW 11 is established and inspires full confidence, it is well established that it is the accused who were last seen with the deceased specially in the circumstances when there is nothing on record to show that they parted from the accused and since then no activity of the deceased can be traced and their dead bodies were recovered later on. It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. **Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone cannot discharge the burden of establishing the guilt of the accused beyond reasonable doubt and requires corroboration.**

(emphasis supplied)

34. So far as the alleged extra judicial confession made regarding surviving appellant by the co-convict, Manzoor alias Mansoor is concerned, it is no more res integra that an extra judicial confession must be accepted with great care and caution. It is considered as a weak type of evidence and is generally used as a corroborative link to lend credibility to the other evidence on record. In **Moorthy vs. State of Tamil Nadu** reported in **(2023) SCC On Line SC 1027**,

Hon'ble Supreme Court while reiterating the evidentiary value of an extra judicial confession in para 6 has held as under :

"6. Firstly, we will deal with the prosecution case about the extra-judicial confession. As regards extra-judicial confession, the law has been laid down by this Court in the case of Pawan Kumar Chourasia v. State of Bihar 2023 SCC OnLine SC 259. In paragraph 5 it is held thus:

*"5.As far as extra-judicial confession is concerned, the law is well settled. **Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith.** Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility."*

35. As the prosecution has failed to bring on record any other incriminating evidence against the surviving appellant, therefore, the alleged extra judicial confession made by the surviving appellant to the co-convict, cannot be of any assistance to the prosecution in proving its case beyond a reasonable doubt in so far as the surviving appellant is concerned.

36. Having carefully examined the entire evidence adduced by the prosecution in the trial Court, we are of the considered view that learned trial Court, while holding the surviving appellant guilty, proceeded on the basis of conjectures and surmises and failed to bear in mind the true import of law laid down by Hon'ble Supreme Court in **Sharad Birdhichand Sarda (Supra)** which has recently been quoted with approval by Hon'ble Supreme Court in **Raja Naykar (Supra)** for ascertaining whether there was indeed a complete chain of events that excludes any other possibility except the involvement of the surviving appellant in commission of crime in question.

37. The upshot of aforesaid discussion is that the impugned judgment and order dated 27.11.1991 rendered by learned Vith Additional Sessions Judge, Unnao, whereby it held the surviving appellant guilty for the offence under Sections 302/34 and 377 I.P.C., is unsustainable which deserves to be set aside and the present appeal deserves to be allowed.

38. Accordingly, the present appeal is **allowed**. Consequently, the impugned judgment and order dated 27.11.1991 is set aside. The appellant is acquitted of all charges levelled against him.

39. The surviving appellant, Maiku is in jail. Let him be released from jail forthwith, if he is not wanted in any other case.

40. The appellant is directed to file a personal bond and two sureties in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A Cr.P.C. within a period of four weeks from the date of his release.

41. Let the record of trial Court along with a copy of this judgment be transmitted forthwith to the concerned trial Court for information and necessary compliance.

(Ajai Kumar Srivastava-I, J.) (Sangeeta Chandra, J.)

Order Date :- 10.04.2024
Mahesh