

In the High Court of Punjab and Haryana at Chandigarh.

Criminal Appeal-D No.-813-DB of 2003

Date of Decision:- August 30, 2017

Ishwar and another

.....Appellants

Versus

State of Haryana

....Respondent

CORAM: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Gurvinder Singh Gill

Present : Mr. Salil Bali and Ms. Aditi Girdhar, Advocates
for the appellants.

Mr. Ankur Mittal, Additional Advocate General, Haryana with
Mr. Manoj Dhankhar, Assistant Advocate General, Haryana.

Gurvinder Singh Gill, J.

1. Ishwar and Ram Phal have filed the present appeal challenging judgment dated 11.08.2003 passed by learned Additional Sessions Judge, Panipat vide which they have been convicted for offences punishable under Sections 302, 364 and 201 of Indian Penal Code, 1860 (for short 'IPC'). The trial Court vide order dated 14.08.2003 sentenced both the accused to undergo life imprisonment for offence under Section 302 IPC and to pay a fine of ₹ 5,000/- each; to undergo R.I. For 10 years and to pay a fine of ₹ 1000/- each for the offence under Section 364 IPC and to undergo R.I. for 3 years and to pay a fine of ₹ 500/- each for offence under Section 201 IPC.

2. FIR No. 337 (Ex.PM) under Sections 302, 364 and 201 read with Section 34 of IPC was lodged at Police Station Model Town, Panipat on 7.8.1998 on the basis of statement (Ex.PL) of Krishan, recorded by ASI Pawan Kumar, wherein he stated that his younger brother Rohtash is a scooter mechanic and his(complainant's) brother-in-law Raj Kumar was learning scooter repair work from his brother and was residing with him. On 5.8.1998 his brother Rohtash and Raj Kumar went to the shop in the morning but in the evening at about 8 p.m. only Raj Kumar returned back home. When complainant inquired about Rohtash then Raj Kumar disclosed that in the morning at about 10/10.30 a.m. Ishwar son of Parbhati of village Garhi Sikandarpur had come to their shop and Rohtas accompanied Ishwar along with his tools. The complainant further stated that after half an hour Sharvan who is running a utensils shop in Hari Nagar came to his house and disclosed that he had received a telephone call in Ram Jyoti Factory from Rohtash who said that he was speaking from Delhi and was going to Bombay and would come back after two months. Sharvan however, said that the voice of the person did not appear to be of Rohtash and was of Ishwar. The complainant stated that he along with his relatives searched for Rohtash and that one day earlier a telephone call was received at about 7 p.m. at the shop of Ahuja Cables which was attended by Ram Dia and the caller demanded an amount of ₹ 20,000/- to be sent through Ram Niwas for ensuring safety of Rohtash failing which he would be done to death. Upon inquiries from Ram Niwas he feigned ignorance of the fact. The complainant stated that he suspected that Ishwar had been making the telephone call and had kidnapped his brother Rohtash with an intention to kill him because there

was a dispute regarding payment of ₹ 5,000/- between him and Rohtash.

3. Pursuant to recording of aforesaid statement(Ex.PL) of complainant Krishan, the FIR was registered and the police conducted investigation. A dead body, which was in a gunny bag, was recovered on 12.08.1998 in the area of Naya Bans, Police Station, Sampla, from a water course. The post mortem examination was got conducted on the recovered dead body. It is the case of prosecution that on 13.8.1998 both the accused confessed their guilt before Mahinder Singh of village Binjoi who produced both the accused before SHO, Police Station, Model Town, Panipat. During interrogation Ishwar made a disclosure statement that he had kept the leather belt used for strangulating the deceased in dicky of his scooter and he could get the same recovered. In pursuance of the said disclosure statement Ex.PJ the accused led the police party to the disclosed place where the scooter in question was parked and after opening the dicky of the same got the leather belt recovered which was taken into possession vide recovery memo Ex.PD.
4. Upon conclusion of investigation, the police filed its report under Section 173 Cr.P.C. in the Court of learned Chief Judicial Magistrate, Panipat on 21.10.1998, who on finding that the facts prima-facie disclosed commission of an offences punishable under Sections 302 and 364 IPC which are exclusively triable by the Court of Sessions, committed the case to the Court of Sessions vide order dated 2.11.1998.
5. The case was assigned to learned Additional Sessions Judge, Panipat who upon finding sufficient grounds to presume that the accused had committed

offences punishable under Sections 302, 364 and 201 read with Section 34 of IPC, framed charges against the accused on 13.2.1999 to which the accused pleaded not guilty and claimed trial.

6. The prosecution in order to establish charges framed against the accused examined as many as 16 witnesses. PW-1 Surinder Singh, Photographer stated that he had taken photographs of the dead body at the place of its recovery and proved the photographs as Ex.P-1 to P-9. PW-2 Constable Jagbir Singh, Draftsman stated that on 5.9.1998 he had prepared the site plan Ex.PA on demarcation of PW Om Parkash. PW-3 Head Constable Ranbir Singh is a formal official witness who proved entry dated 12.8.1998 as Ex.PB in Roznamacha. PW-4 Constable Rajinder Singh is another formal official witness. PW-5 Ram Dia stated that on 5.8.1998 at about 11 a.m. when he was present at his '*rehri*' in village Garhi Sikandarpur then he saw Ishwar, Ram Phal and Rohtash passing through that place and that he had asked Rohtash as to where he was going to which he replied that he was going to repair a scooter of Ishwar. He further stated that on 6.8.1998, when he was sitting at the house of Rohtash then at about 7 p.m. a *cab-wala* informed him that there was a telephone call from Rohtash from Delhi upon which he(PW-5) went to the shop of *cab-wala* and attended the call and the caller asked for an amount of ₹ 20,000/- to be paid to a Harijan living in the vicinity of Rohtash and that the said person knew him and whereabouts of Rohtash and threatened that in case the said amount is not paid, Rohtash would be killed. PW-5 further stated that the voice was not of Rohtash but of Ishwar.

7. PW-6 Om Parkash son of Sita Ram deposed that on 13.8.1998 he had gone to

Police Station Model Town, Panipat where the accused were in custody and he accompanied the police party to Garhi Sikandarpur where Ishwar led them to his house and opened the lock of the store of his house where a scooter was parked and Ishwar took out a leather belt from the dickey of the scooter which was taken into possession vide recovery memo Ex.PD. He further stated that accused Ram Phal and Ishwar also led the police party to the place where Rohtash was killed and to the canal where the dead body was thrown.

8. PW-7 Om Parkash son of Risala resident of Village Sambhi, District Karnal stated that he knew Rohtash and upon coming to know about murder of Rohtash, he had come to Kuldeep Nagar, Panipat on 8.8.1998. He further deposed that he along with Sanjay had gone to Rohtak along the canal and they spotted the dead body near village Naya Bans which was wrapped in a gunny bag which was tied with a plastic rope and that they informed the police. He further deposed that the gunny bag was torn and from that portion he could see the clothes of the dead body from where he identified the dead body to be that of Rohtash. PW-8 ASI Rajbir Singh deposed that on 12.08.1998, Om Parkash s/o Risala had made a report which was entered in Daily Diary Register and in pursuance of which he had gone to the place where the dead body was lying in the area of village Naya Bans and where he conducted the inquest proceedings and prepared Inquest Report Ex.PH.
9. PW-9 Mahinder Singh stated that on 13.8.1998 when he was present in his house along with Raghbir Singh then both the accused came to his house and disclosed that they had committed a blunder and had killed Rohtash and disposed off his dead body in a gunny bag which was tied with a piece of

electric wire and thrown in the main canal. He deposed that he produced both the accused before SHO of Police Station, Model Town, Panipat and upon interrogation the accused Ishwar made a disclosure statement regarding his having kept concealed a leather belt used for strangulating the deceased in his scooter and that he could get the same recovered. He further deposed that accused Ram Phal also made a disclosure statement that he could point out the place where the murder was committed and where the dead body was thrown in the canal.

10. PW-10 Krishan, complainant deposed in tune with the allegations levelled in the FIR. PW-11 ASI Balbir Singh (Retd.) is a formal official witness who stated that upon receipt of the ruqa Ex.PL, the FIR Ex.PM had been recorded. PW-12 Raj Kumar stated that the complainant Krishan is his brother-in-law and that on 5.8.1998 he and Rohtash went to the shop after taking breakfast in the morning at about 10/10.30 a.m. and that Ishwar had come to their shop and Rohtash went with him, along with his tools to repair scooter of Ishwar but he did not return back in the evening. PW-13 Sanjay stated that he knows Rohtash and Krishan. He further stated that Rohtash was his '*sala*' (brother-in-law). He deposed that on 12.08.1998 when he and Om Parkash were searching for Rohtash, they spotted the dead body of Rohtash wrapped in a gunny bag near village Naya Bans and that he and Om Parkash identified the dead body of Rohtash.
11. PW-14 Dr. Vijay Pal Khanagwal who had conducted post mortem examination of dead body of Rohtash proved the post-mortem report as Ex.PN. He described the condition of the dead body in detail and opined that the cause of

death was strangulation by means of ligature. He further opined that the death was instantaneous and that the duration between the death and autopsy was between one week. During the course of cross-examination he admitted that the body was not identifiable. PW-15 Inspector Randhir Singh stated that on 7.8.1998 he was posted as SHO Police Station, Model Town, Panipat and that upon receipt of a message regarding registration of the present case he went to the spot and recorded statements of four witnesses under Section 161 Cr.P.C. and thereafter the investigation was conducted by ASI Pawan Kumar. He further deposed that on 13.08.1998 Mohinder and Raghbir produced both the accused before him and he arrested and interrogated them and during the course of interrogation Ishwar made a disclosure statement Ex.PJ to the effect that he had kept concealed a leather belt, used for strangulating the deceased in dicky of his scooter and thereafter got the same recovered which was taken into possession vide recovery memo Ex.PD. He further deposed that even the accused Ram Phal made a disclosure statement Ex.PK and in pursuance of the disclosure statement both the accused led the police party to the disclosed place and '*nishan dehi*' Ex.PE and PF was prepared of the place where the deceased had been murdered and where his dead body had been thrown. PW-16 Pawan Kumar who is the Investigating Officer in the present case stated in detail in respect of the entire investigation conducted in the case and proved various documents and memos prepared during the investigation of the case.

12. Upon conclusion of the prosecution evidence, statements of accused were recorded in terms of Section 313 Cr.P.C. wherein entire incriminating evidence against them was put to them to enable them to explain the same but

the accused pleaded false implication. Accused, in their defence examined DW-1 Rameshwar son of Munshi Ram resident of Garhi Sikandarpur who deposed that he remained Sarpanch of his village during 1991 to 1993 and that he had seen Rohtash alive on 10.5.2003 who was accompanied by a woman. He deposed that at that time three more persons were with him namely his uncle Tek Chand, his cousin Attar Singh and his nephew Sammat. He had a conversation with Rohtash and he had asked Rohtash to return to the village as there was a great '*lafra*' (dispute) in the village due to his absence but the lady who was accompanying him insisted him to go away. Rohtash told him that he would come to the village after 2/4 days but Rohtash could not be traced thereafter. He has further stated that he had narrated about the incident to many other persons in the village.

13. The learned trial Court upon appraisal of evidence on record held the accused guilty of committing offences under sections 302, 364 and 201 IPC vide impugned judgment dated 11.8.2003. The accused, aggrieved by the judgement, have challenged the same by filing this appeal.
14. The learned counsel for the appellants while assailing the impugned judgment has first of all submitted that the present case is a case where Rohtash went missing and since the dead body recovered was not in identifiable condition, therefore it cannot be said with certainty that the same was of Rohtash or that Rohtash has been killed. The learned counsel has further submitted that the case of prosecution is based solely on circumstantial evidence in the shape of extra judicial confession, 'last seen' evidence and the alleged disclosure statements of the accused and that the testimonies of witnesses examined to

prove the aforesaid evidence do not inspire confidence and that the circumstantial evidence led in the present case does not meet the standards prescribed for acceptance of such evidence especially where the case is based solely on circumstantial evidence. The learned counsel in order to hammer forth his aforesaid submission has placed reliance upon a judgment reported as 2012(2) RCR (Criminal) 899 Sahadevan and another Vs. State of Tamil Nadu. The learned counsel has thus submitted that in the wake of the abovesaid infirmities especially the lack of identification of the dead body, the impugned judgment cannot sustain and thus, prayed for acceptance of his appeal and for acquittal of the accused.

15. On the other hand the learned counsel appearing for State has submitted that the impugned judgment is a well reasoned judgment and that all the links in the chain of circumstantial evidence are complete leading to one and only one inference that it is the accused who had murdered Rohtash and had disposed of his body in a canal in an attempt to destroy evidence. The learned counsel thus, prayed for dismissal of the appeal.
16. We have considered the rival submissions addressed by the learned counsel before this Court and with their able assistance, have perused the evidence on record.
17. As far as the evidence regarding the death being homicidal is concerned, the prosecution examined PW-14 Dr. Vijay Pal Khanagwal who had conducted autopsy on the recovered dead body and who proved the post mortem report as Ex.PN. He opined that the cause of death in this case was strangulation by

mean of ligature and that while the death was instantaneous, the duration between death and autopsy was about one week. The witness was briefly cross-examined but nothing could be elicited the course of his cross-examination so as to doubt his veracity of his statement or his opinion regarding the cause of death. As such, there is nothing to discredit the opinion of the doctor that it is a case of homicidal death.

18. However, the material question in the present case would be as regards the identification of the dead body. In the present case the dead body was recovered after about one week of the alleged occurrence from a canal. The dead body had been put in a gunny bag. The body was in a state of decomposition. The Doctor(PW-14) while describing the condition of the dead body stated as follows:

“The length of the body was 5.8”. It was emitting foul smell, maggots of size 7-10 mm were crawling all over the body. The scalp was missing from the vault of skull and only decomposed portion of scalp was seen over lower most portion of parieto temporal and occipital regions. Both the ears were deformed. Eyes were also deformed. Eye balls were softened and putrified. The orbits, nasal bone, maxilla and mandible were exposed completely except the condyles of mandible on both sides and the inferior border of mandible. Moustaches over available part of lip on the left side were black, 1 to 1.2 cm and bearded hairs were black, 4-6 mm long. The tongue was softened, shrunken and putrified. The facial features were blotted and unrecognizable.”

19. PW-14 Dr. Vijay Pal Khanagwal during the course of cross-examination specifically admitted that the body was not identifiable.

20. It is worth mentioning that the body was not got identified from the real brother of the deceased but from Om Parkash son of Rishala and Sanjay son of Birkha Ram. PW-7 Om Parkash who is stated to have found the dead body and identified the same has stated as follows:

“I alongwith Sanjay had gone towards Rohtak along canal. Near Naiya Bans Village we spotted the dead body. It was wrapped in a gunny bag and the mouth of the gunny bag was tied with a plastic rope. I kept aside the aforesaid gunny bag of the dead body and informed the police. Sanjay was left behind to take care of the dead body. The aforesaid gunny bag was torn. From that place we could see the clothes of the dead body and from those clothes we could identify that the dead body was that of Rohtash. Police recorded my statement.”

21. During cross-examination, PW-7 Om Parkash son of Risala stated that it was from the vest and underwear of the dead body that he could identify the body. The relevant extract is reproduced below for the ready reference:

“From the Vest and underwear of the dead body, I could identify the dead of Rohtash. Only the vest and underwear were on the person of Rohtash.”

22. Aforesaid PW-7 Om Parkash does not reside with the complainant or the deceased and infact resides in a different village i.e. Sambhi, District Karnal. It remains unexplained as to how he could identify the dead body to be that of

Rohtash merely by seeing his vest and underwear. The dead body was otherwise not in identifiable condition as stated by the doctor who conducted post mortem examination. One could understand that the brother or some other relative of deceased who resides in the same house with the deceased would be knowing about the kind and the brand of underclothes that the deceased used to wear but certainly a person who is not staying in the same house, even if he is a relative, is not expected to identify the underclothes of the deceased. Infact PW-16 S.I. Pawan Kumar, during his cross-examination, stated that there were no marks of identification on both the clothes. In these circumstances we are not inclined to accept the evidence led by prosecution as regards the identification of the dead body and it is thus held that the dead body which, as per the categorical statement of PW-14 Dr. Vijay Pal Khanagwal, was admittedly not in identifiable condition, can not be said to be that of deceased.

23. Since in this case there is no eye-witness to the occurrence, the prosecution relies upon the circumstantial evidence to establish its case. The most important being the extra-judicial confession allegedly made by both the accused before PW-9 Mahinder Singh. PW-9 Mahinder Singh deposed that on 13.8.98, when he was present in his house along with PW Raghbir Singh, then the accused Ishwar Singh and Ram Phal came there and confessed that they had murdered Rohtash and requested him to produce them before the police as he was a member of Block Samiti. PW-9 further deposed that the accused disclosed that Ishwar had taken along Rohtash on the pretext of repairing scooter of Ishwar. PW-9 stated that the accused

disclosed that after murdering Rohtash they had disposed of his dead body in a gunny bag which was tied with a piece of electric wire and thrown in canal. PW-9 deposed that he produced the accused before SHO of police station model town Panipat where they were interrogated by the police and during interrogation they disclosed that they had tied the neck of Rohtash with a leather belt and strangled him and further volunteered to show the place where the murder was committed and where the dead body had been thrown in canal. The accused Ishwar further disclosed that he could lead the police party to the place where he had kept concealed the leather belt used in the occurrence.

24. It is well settled that extra-judicial confession is a very weak type of evidence and before accepting the same, it should be scrutinised minutely. Normally, an accused person would confess his guilt before such a person who is well known to him and whom the accused believes to be able to help him out in some manner. In the present case though PW-9 Mahinder Singh has stated that he is member of Block Samiti but during his cross-examination he has also admitted that village Sikandar does not fall within Block Samiti Panipat. Both the accused belong to village Garhi Sikandar and as such it remains unexplained as to how they knew PW-9 Mahinder Singh who is a resident of a different village i.e village Binjol. Further, PW-9 Mahinder Singh, during his cross-examination, admitted categorically that both the accused were not known to him earlier. If this be the position, then it certainly cannot be said that the accused either knew PW-9 Mahinder

Singh earlier or believed that he would help them so as to prompt them to confess their guilt before him. As such the alleged extra-judicial confession does not inspire confidence and it is not safe to rely upon the same.

25. Another piece of evidence that the prosecution relies upon is in the shape of '*last seen*' evidence. The prosecution relies upon testimony of PW-5 Ram Dia and PW-10 Raj Kumar. PW-5 Ram Dia deposed that on 5.8 98 when he was present at his '*Rehri*' (hand-cart), then Ishwar, Ramphal and Rohtash passed through that place and when he asked Rohtash as to where he was going, he replied that he was going to repair the scooter of Ishwar. To a similar effect is the statement of PW-10 Raj Kumar who has also stated that he alongwith Rohtash had come to the shop in the morning at about 10 AM and that Rohtash went with Ishwar but did not return back. It is pertinent to mention here that the dead body was recovered after about a week. However as per statement of PW-5 Ram Dia himself, he had received a telephone call on the next day in the evening at 7 PM and the caller asked for ransom of ₹ 20,000 to ensure safety of Rohtash. The said witness further stated that the voice of the caller was that of Ishwar. If this be so, then Rohtash was alive even till the evening of next day and as such the fact that the witness had seen accused in the company of deceased one day earlier would lose significance as it cannot be said that there is proximity between the time when the accused was last seen in the company of Rohtash and death of Rohtash.

26. As a sequel to the discussion made above where neither the recovered dead

body can be said to be of deceased Rohtash nor the extra-judicial confession inspires confidence and there is no eyewitness to the alleged murder of deceased Rohtash, the conviction of the accused certainly cannot sustain and is liable to be set-aside. Consequently the appeal merits acceptance and is hereby accepted. The impugned judgement is hereby set aside and the accused are acquitted of all the charges framed against them.

(Rajesh Bindal)
Judge

(Gurvinder Singh Gill)
Judge

August 30, 2017
mohan

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No