IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No.479 of 2013

Anand Kumar Arya ……..Appellant

Vs.

State of Uttarakhand ……..Respondent

Shri D.K. Sharma, learned senior counsel appearing for learned counsel for the appellant, Mr. Vipul Sharma.
Shri J.S. Virk, learned deputy advocate general for the State of Uttarakhand.

17th December, 2020

Coram : Hon'ble Ravi Malimath, A.C.J.
Hon'ble Alok Kumar Verma, J.

Alok Kumar Verma, J. (Oral)

This instant appeal has been filed by the appellant-accused against judgment dated 30.09.2013 passed by learned Sessions Judge, Udham Singh Nagar in Sessions Trial No.21 of 2008, "State vs. Anand Kumar Arya", by which the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life along with a fine of Rs.50,000/- with default imprisonment.

2. Briefly stated the prosecution story as it emerges from re-appreciation of the evidences on record is that an information was given by PW-1 Bhim Singh, son of the deceased Smt. Mohani Devi to the Police Station Gadarpur,

District Udham Singh Nagar through his written report, Ex.Ka-1, that his mother went to plot no.16, Pipal Parav Range from his house with the Goats on 22.10.2007 at around 1.00 p.m. She did not return. A search was made, but in vain. On the next day, when the informant and other persons were looking for his mother, her dead body was found at 6.30 a.m. in the north of plot no.16.

The FIR was lodged under Section 302 I.P.C. against unknown persons on 23.10.2007. The inquest proceedings and post-mortem of dead body of the deceased were conducted on 23.10.2007 and 24.10.2007 respectively.

The matter was investigated. During investigation, the name of accused came into light. The accused was arrested. On 28.10.2007, the accused confessed his guilt before PW-9 and the police officials while he was in custody and pursuant to this extra-judicial confession, the recovery of a stick and a *patal*, a short edged weapon, have taken place.

After completion of investigation, the Investigating Officer submitted charge sheet under Sections 376 and 302 of the I.P.C.

3. The case was committed to the Court of Session.

4. The charges under Sections 376 and 302 of the I.P.C. were framed. The appellant pleaded not guilty and claimed to be tried.

5. The prosecution, in order to establish the charges examined, altogether, fifteen witnesses.

6. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, he denied the evidences, adduced by the prosecution.

7. Learned trial court heard arguments, appreciated the evidences and held that the prosecution had successfully proved its case against the appellant under Section 302 of I.P.C. However, the trial court acquitted the accused-appellant from the offence punishable under Section 376 of the I.P.C.

8. The State has not filed any appeal against the acquittal under Section 376 of the I.P.C.

9. Heard Mr. D.K. Sharma, learned Senior Advocate assisted by Mr. Vipul Sharma, learned counsel for the appellant-accused and Mr. J.S. Virk, learned Deputy Advocate General for the State through video conferencing.

10. Mr. D.K. Sharma, learned Senior Advocate would submit that PW-4 Khadak Singh, according to the prosecution, last seen witness, saw the appellant and the deceased altogether, when he was grazing the goats. However, this fact does not indicate that the appellant was seen lastly with the deceased; PW-4 stated in his evidence that there was no quarrel took place between the appellant and the deceased, therefore, appellant has no occasion to kill the deceased; PW-13 Dr. Dinesh Singh categorically stated in his evidence that he conducted the post-mortem on the body of the deceased and he did not find any injury

caused by blunt object and there was no motive to kill the deceased.

11. On the other hand, learned deputy advocate general appearing for the State has supported the impugned judgment of the conviction. However, he fairly conceded that in this matter, motive was absent.

12. We have carefully assessed the evidences adduced by the prosecution.

13. PW-1 Bhim Singh, son of the deceased and informant of the FIR, has deposed that his mother went to the plot no.16, Pipal Parav Range for grazing goats on 22.10.2007 at around 1.00 p.m. She did not return. A search was made. On the next day, when he and other persons were looking for his mother, her dead body was found at 6.30 a.m. in the north of plot no.16. He has proved his written report, Ex.Ka-1.

14. PW-2 Lalit, son of the deceased, is witness of inquest proceedings. He proved the inquest report, Ex.Ka-2.

15. PW-3 Vishan Singh stated that simple and blood-stained earth were taken by the police from the spot.

16. PW-5 Harish Panwar stated that the deceased's sandal was lying near her dead body, which was taken by the police.

17. According to the prosecution, the police recovered the broken bangles of the deceased in the presence of Bhagwan Singh from the spot. PW-6 Bhagwan Singh did not support the prosecution. He was declared hostile.

18. According to the prosecution, some women had complained to Ratan Singh Paliwal about the accused, that the accused used to act indecent on seeing them. PW-7 Ratan Singh Paliwal did not support the prosecution. He was declared hostile.

19. PW-8 Harish Singh Koranga stated that the deceased's bangles were taken by the police from the spot.

20. PW-10 Sub-Inspector Indra Singh Rana stated that on 28.10.2007, the accused confessed his guilt while he was in custody. The confessional statement of the accused led to the recovery of one stick from bushes and one *patal* from a thatch (Chhappar).

21. PW-11 Sub-Inspector Arun Kumar Saini was first Investigating Officer. He conducted inquest proceedings. He deposed that the accused was arrested at 13.15 on 28.10.2007.

22. PW-12 P.C. Bhatt was Officer Incharge of Police Station, Gadarpur, District Udham Singh Nagar. PW-11 and PW-12 stated that the accused confessed his guilt on 28.10.2007, when he was in custody and after his confessional statement, one stick from bushes and one *patal* from a thatch were recovered.

23. PW-13 Dr. Dinesh Singh conducted the post-mortem examination on 24.10.2007 at 11.00 a.m. In the autopsy report six anti-mortem injuries, including incised wounds were found on the dead body of the deceased.

According to the post-mortem report, the deceased, aged about 50 years, had died due to anti-mortem head injury.

24. PW-14 Shankar Ram is the scriber of chick report, Ex.Ka-24.

25. PW-15 Sub Inspector Ummed Singh Danu submitted the charge sheet, Ex.Ka-26.

26. The star witnesses of the prosecution are PW-4 and PW-9, witnesses of last seen theory and recovery of stick and *patal*, a short edged weapon, respectively.

27. PW-4 Kharak Singh, witness of last seen stated in his examination-in- chief that the dead body of the deceased was recovered on 23.10.2007 and one day before when he was going towards temple, he saw accused and deceased together. He had not given any statement as to when he saw these two on 22.10.2007.

28. PW-9 Hira Singh stated in his examination-in-chief that on 28.10.2007, the accused confessed his guilt in front of him and in the presence of police officials while he was in custody of the police officer. He stated further that after confession the guilt by the appellant, one stick from bushes and one *patal* from a thatch were recovered.

29. The trial court convicted the appellant *inter alia* on the ground of last seen theory and recovery under Section 27 of the Indian Evidence Act, 1872.

30. The present case rests on circumstantial evidence and when a case rests on circumstantial evidence, such evidence must satisfy these tests:-

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

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, he should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature.

(iv) There must be a chain of evidence to show 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.

31. The principle of circumstantial evidence has been reiterated by the Hon'ble Supreme Court in a plethora of cases. In *C. Chenga Reddy vs. State of A.P., (1996) 10 SCC 193*, the Hon'ble Supreme Court observed, "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances, must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence." The same principles were reiterated by the Hon'ble Supreme Court in *Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681, Mohd. Arif alias Ashfaq vs. State (N.C.T. of Delhi), (2011) 13 SCC 621, Sunil Clifford Daniel vs. State of Punjab, (2012) 11 SCC 205* and a number of other decisions.

32. The argument of Mr. D.K. Sharma, learned Senior Advocate, is that in absence of motive on the part of the

appellant to cause death, benefit of reasonable doubt should be given to the appellant.

33. In *G. Parashwanath vs. State of Karnataka, 2011 (1) CCSC 157 (SC)* held that in a case based on circumstantial evidence where proved circumstances complete the chain of evidence, it cannot be said that in absence of motive, the other proved circumstances are of no consequence. The absence of motive, however, puts the Court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. There is no absolute legal proposition of law that in the absence of any motive an accused cannot be convicted under Section 302 of the I.P.C. Effect of absence of motive would depend on the facts of each case.

34. The instant case of the prosecution is based on last seen theory and recovery of stick and *patal*.

35. PW-4 Kharak Singh, witness of last seen stated in his examination-in- chief that the dead body of the deceased was recovered on 23.10.2007 and one day before when he was going towards temple, he saw accused and deceased together. He had not given any statement as to when he saw these two on 22.10.2007. He stated in his cross-examination that when he saw these two together, there was no fight between these two. The dead body of the deceased was found in the bushes at around 6.30 in the morning of 23.10.2007.

36. In *Nizam and another vs. State of Rajasthan, 2015 (4) CCSC 2247 (SC),* the Hon'ble Supreme Court held that it is well settled that it is not prudent to base the

conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

37. In the present matter, time gap between last seen and recovery of the dead body of the deceased, is long. In view of the time gap between last seen and the recovery of the body, possibility of others intervening cannot be ruled out. Where time gap is long it would be unsafe to be the conviction on the “last seen theory”.

38. PW-9 Hira Singh stated in his examination-in-chief that on 28.10.2007, the accused confessed his guilt in front of him and in the presence of police officials whilst he was in the custody of police officer. Confession made by a person while he was in the custody of the police to a third person is also inadmissible under Section 26 of the Indian Evidence Act unless made in the immediate presence of a Magistrate.

39. PW-9 Hira Singh stated that the appellant confessed his guilt and after confession, a stick and a *patal* were recovered on the pointing out of the appellant. PW-9 stated in his cross-examination that the police had signed him on some blank papers. In *Satpal vs. State of Haryana, 2018 (2) CCSC 1104 (SC)*, the Hon’ble Supreme Court held that any recovery on basis of confession, under Section 27 of the Evidence Act, cannot form the basis for conviction.

40. In invoking the provisions of Section 27 of the Indian Evidence Act, the Court should be very vigilant to

ensure the credibility of the evidence. The statement of PW-9 also does not inspire confidence.

41. Since the entire evidence of the witnesses has not been accepted, it cannot have merely relied upon the post-mortem report to convict the appellant for an offence under Section 302 of the I.P.C.

42. Although, there were injuries, including incised wounds, were found on the dead body of the deceased and the death of the deceased was homicide, the prosecution has to prove that the death of the deceased was caused by the appellant and in all human probabilities, the act must have been done by the appellant only. Even grave suspicion cannot take place of proof. There is no positive evidence placed on record against the appellant by the prosecution to prove its case against him.

43. As a result, we accept the case of the appellant. Accordingly, the appeal is allowed. The impugned conviction and sentence dated 30.09.2013, passed by learned Sessions Judge, Udham Singh Nagar in Sessions Trial No.21 of 2008, “State vs. Anand Kumar Arya”, in so far as it pertains to the conviction and sentence of the appellant under Section 302 of I.P.C. is concerned, is set aside. The appellant is acquitted of the charge under Section 302 I.P.C. His bail bond is cancelled and the sureties are discharged.

44. The appeal is, accordingly, allowed.

(Alok Kumar Verma, J.) **(Ravi Malimath)**
A.C.J.

JKJ/S.K.