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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
B.R. GAVAI; J., PRASHANT KUMAR MISHRA; J.
CRIMINAL APPEAL NO. 465 OF 2017; AUGUST 07, 2023
KAMAL *versus* **STATE (NCT OF DELHI)**

Evidence Law - Test Identification Parade (TIP) - If the accused are already shown to the witnesses in the Police Station, then the sanctity of TIP before the court is doubtful. *(Para 13)*

Evidence Law - Law with regard to conviction based upon circumstantial evidence - Circumstances from which the conclusion of guilt is to be drawn should be fully established - 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" - 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 - Circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so 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 - However strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt. *(Para 18, 19)*

Indian Penal Code, 1860; Section 302 r/w. 34 - Prosecution has utterly failed to prove the case as they need to prove the incriminating circumstances beyond reasonable doubt. The evidence with regard to last seen theory is totally unreliable. The evidence regarding the Call Detail Records (CDRs) also is one which does not inspire any confidence. As such, the appeals deserve to be allowed. *(Para 21)*

WITH CRIMINAL APPEAL NO. OF 2023 [Arising out of SLP(Crl.) No. 6213 of 2021]

For Appellant(s) Mrs. K. Sarada Devi, AOR Mr. R.vijay Nandan Reddy, Adv. Mr. V.krishna Swaroop, Adv. Ms. Kheyali Singh, AOR

For Respondent(s) Ms. Sunita Sharma,Adv. Mr. Shreekant Neelappa Terdal, AOR

J U D G M E N T

B.R. GAVAI, J.

1. Leave granted in appeal arising out of SLP(Crl.) No. 6213 of 2021.

2. The appeals challenge the judgment and order dated 5th August 2014 passed by the High Court of Delhi at New Delhi in Criminal Appeal Nos. 1242, 936 and 1136 of 2013, thereby affirming the judgment and order dated 17th May 2013 passed by the Additional Sessions Judge-II (NorthWest), Rohini Courts, Delhi (hereinafter referred to as the 'trial court'), vide which the trial court convicted the original three accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced them to undergo imprisonment for life.

3. The prosecution story, shorn of details, is as under:

3.1 On 10th September 2009 at around 04.15 pm, complainant-Surat Singh, brother of the deceased Hoshiyar Singh, came to the house of the deceased and found him lying

dead on the cot. In the meantime, his elder brother Jai Singh (PW-20) also reached the spot. The deceased was taken to the hospital where he was declared dead.

3.2 The First Information Report (for short, 'FIR') came to be lodged expressing suspicion on Prem Singh, son of the deceased, since he had a property dispute with the deceased. It is the prosecution case that on earlier occasions, the accused had given beatings to the deceased and had also threatened to kill him.

3.3 It is the prosecution case that Prem Singh fled away from the scene of incident and was apprehended on 12th September 2009. During interrogation, he revealed the names of his associates Kamal Kishore and Manoj, the present appellants. Thereafter, the appellants were also apprehended. At the instance of accused Kamal Kishore, one rusted iron rod was recovered. At the instance of accused Manoj, a sweater was recovered which was used to strangulate the deceased.

3.4 Upon completion of investigation, charge-sheet was filed against all the three accused in the Court of Judicial Magistrate, First class. Since the case was exclusively triable by the Sessions Judge, the case was committed to the Sessions Judge. The trial court, vide judgment and order dated 17th May 2013, convicted all the three accused under Section 302 read with Section 34 of the IPC and sentenced them to suffer rigorous imprisonment for life and imposed a fine of Rs.50,000/- each.

3.5 All the three accused preferred appeals before the High Court. By the impugned judgment and order dated 5th August 2014, the High Court dismissed all their appeals. Hence, the present appeals.

4. We have heard Mr. R.K. Kapoor and Ms. K. Sarada Devi, learned counsel appearing on behalf of the appellants, and Ms. Sonia Mathur and Mr. A.K. Panda, learned Senior Counsel appearing on behalf of the respondent.

5. Mr. Kapoor submitted that the present case is a case of circumstantial evidence. It is submitted that unless the prosecution establishes an unbroken link of circumstances, conviction based upon circumstantial evidence is not permissible.

6. Mr. Kapoor submitted that the prosecution mainly relies on the testimony of Jai Singh (PW-20) and Naresh Kumar (PW-21).

7. Ms. Mathur and Mr. Panda, on the contrary, submitted that the High Court and the trial court have concurrently, on proper appreciation of evidence, convicted the appellants. It is submitted that no interference is warranted in the present appeals.

8. Insofar as Naresh Kumar (PW-21) is concerned, he states that on the date of incident, at around 03.15 pm, he saw that the accused Prem Singh was present in his vehicle Toyota Qualis in front of the room of deceased Hoshiyar Singh, and was pressing the accelerator of his vehicle continuously and making the sound of the vehicle loud. Upon being asked about the reason for the same, accused Prem Singh replied that the vehicle was not starting. PW-21 further states that meanwhile, he saw two boys coming out of the room of deceased Hoshiyar Singh. When PW-21 asked the accused Prem Singh about those boys, he replied that they were the tenants. PW-21 states that, thereafter, he went towards his shop at Gopal Nagar.

9. Further, in the examination-in-chief, PW-21 states that on 16th September 2009, he was called by the police at the house of the deceased Hoshiyar Singh and he went there and saw that two persons, namely Manoj and Kamal Kishore, were in the custody of the police. PW-21 further states that the police had told him that they had committed the murder of Hoshiyar Singh. This witness has been declared hostile, and in the cross-

examination by the Additional Public Prosecutor (APP), he has identified these two persons to be the persons who were seen by him coming out of the house of Hoshiyar Singh. However, further in the crossexamination by the APP, he has again admitted that he has seen the accused persons in the Police Station on 12th September 2009 for the first time. He further admitted that the police officials told him that there was a person namely Kamal Kishore and also told him about the accused Manoj. Another witness for the last seen theory is Jai Singh (PW-20), younger brother of deceased Hoshiyar Singh. He has deposed on similar lines as that of Naresh Kumar (PW-21).

10. The very presence of Jai Singh (PW-20) has been sought to be demolished in the cross-examination. Though, in the examination-in-chief, he states that he and Surat Singh had carried the deceased to the hospital, he states that the clothes of Surat Singh were soiled with blood but his clothes were not soiled because it was Surat Singh who was actually lifting Hoshiyar Singh and he was only helping him with his hands.

11. Though Jai Singh (PW-20) states that he had informed the police about the description of the accused, i.e., he told the police that one boy was fair and the other was having a wheatish complexion, there is substantial improvement inasmuch as his statement recorded under Section 161 of the Criminal Procedure Code, 1973 does not contain such description. He further states that his house is 40 feet away from the room where the incident had taken place. He has further admitted that there is one house situated between his house and the house of Hoshiyar Singh. As such, the very presence of this accused appears to be doubtful.

12. It is pertinent to note that the learned Judges of the High Court have themselves noted that Naresh Kumar (PW21), in his cross-examination, has stated that he was shown Kamal Kishore and Manoj on 12th September 2009 in the Police Station where Kavita and Jai Singh were also present and therefore, the refusal by them for Test Identification Parade (TIP) was justified. The High Court goes on to observe that the witnesses having identified the appellants in the dock is sufficient to hold that they have been duly identified by the witnesses and prove the guilt of the accused.

13. We fail to appreciate the correctness of this finding. If the accused are already shown to the witnesses in the Police Station, then the sanctity of TIP before the court is doubtful.

14. The other circumstance on which the prosecution relies are the Call Detail Records (CDRs). The courts below have relied on the circumstance that when the incident had occurred, the identification of the CDRs of the mobile used by the accused Manoj and Kamal Kishore would show that their location was at the place of incident.

15. Firstly, it is to be noted that one of the mobile numbers 9278453468 alleged to have been used by accused Manoj is not in the name of Manoj but one Ashok Kumar, son of Shri Krishan Kumar, resident of Subhash Nagar, Kanpur. No evidence is placed on record to show as to how the said SIM came to be in possession of the accused Manoj. Apart from that, if at the time of the incident both of them were at the same place and according to the prosecution inside the house of the deceased Hoshiyar Singh, and they were talking to each other on telephone, this itself creates a doubt on the prosecution version.

16. Undisputedly, the present case is a case which rests on circumstantial evidence. The law with regard to conviction based upon circumstantial evidence is very well crystalised in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***[1].

[1] **(1984) 4 SCC 116**

17. We may gainfully refer to the following observations of this Court in the case of ***Sharad Birdhichand Sarda*** (supra):

"**151.** It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

…….

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 Crl 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."

18. It can thus be seen that this Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has been held that the circumstances concerned "must or should" and not "may be" established. 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 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. It has been held that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so 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.

19. It is a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt. In the light of these guiding principles, we will have to consider the present case.

20. We find that the prosecution has utterly failed to prove the case as they need to prove the incriminating circumstances beyond reasonable doubt. The evidence with regard to last seen theory is totally unreliable. The evidence regarding the CDRs also is one which does not inspire any confidence. As such, we find that the appeals deserve to be allowed.

21. In the result, the appeals are allowed. The judgment and order dated 5th August 2014 passed by the High Court of Delhi at New Delhi in Criminal Appeal Nos. 1242, 936 and 1136 of 2013, and the judgment and order dated 17th May 2013 passed by the trial court are quashed and set aside.

22. The appellants are acquitted of all the charges levelled against them. They are directed to be set at liberty if not required in any other case. Bail bonds of the appellants shall stand discharged.

23. Pending application(s), if any, shall stand disposed of.