

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2496 OF 2009

NANHAR & ORS. .. APPELLANT(S)

vs.

STATE OF HARYANA .. RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 2497 OF 2009



O R D E R

1. Appellant five in number, in both the appeals, feeling aggrieved by the judgment and order of conviction dated 7/5/2008 passed in Criminal Appeal No.919-DB/2006 by Division Bench of High Court of Punjab and Haryana at Chandigarh, arising out of the judgment and order of conviction dated 24/11/2006 and order of sentence dated

25/11/2006 pronounced by Additional Sessions Judge, Bhiwani, convicting them for commission of offences under Sections 302/149 of the IPC and awarding sentence to undergo RI for life, together with fine of Rs.2,000/-, are before us challenging the same on variety of grounds.

2. It may be mentioned herein that initially charge-sheet was filed only against four accused namely Nanhar, Virender @ Binder, Rampat and Rajbir @ Meda under Sections 306/34 IPC. The name of the fifth accused Umed Singh was added subsequently by the Trial Court on an application being filed by the prosecution under Section 319 of the Code of Criminal Procedure and allowed on 3.6.2004. The order of committal makes it clear that the first four appellants were charged and prosecuted for commission of offence under Sections 306/34 IPC. Accordingly it was committed to Court of Sessions for being tried for the aforesaid offences. However, on 5.10.2004 charge was framed by the learned Trial Judge under Sections 302/34 IPC. Even though Umed Singh was added subsequently as one of the accused but the charge was not altered

to one under Section 149 of the I.P.C.

3. Thumbnail sketch of the facts of the case is as under:

Kartar Singh elder brother of Vijay deceased had filed an application on 27/2/2004 before the Superintendent of Police Bhiwani, alleging therein that he is resident of village Malkosh Tehsil Charkhi Dadri, District Bhivani and has been serving Armed forces for last 20 years. He has a residential house of his own in Rewari Town wherein his family and aged mother are residing. His younger brother Vijay, the deceased, was residing in Malkosh and was looking after the agricultural land owned by them. One Bhajani wife of Roop Ram, of the same village was on visiting terms to the house of Vijay as he was having small flour mill in his house. She used to come for grinding of wheat. In the course of time she developed family relations with Vijay. There was a rumour in the village that she had forced her own daughter-in-law Kamlesh, wife of Rampat, one of the accused herein, to have illicit relations with deceased Vijay. In lieu whereof it was said that she had received a

sum of Rs. 1,000/- from Vijay. It was also the case of the prosecution that Vijay and Kamlesh wife of Rampat - appellant No.3 were seen in the field by many villagers and they had a doubt about their relationship. In fact, their relationship had become talk of the village. Rampat, the accused, came to know about the said relationship. Therefore, he along with other co-accused Nanhar Virender and Rajbir decided to finish Vijay. On coming to know about the motive of the accused, Vijay had left village Malkosh for some time.

4. It was further mentioned that aforesaid four accused had told PW.11 Dalip, uncle of deceased Vijay, about their intention. They wanted to take revenge with Vijay on account of his relationship with Kamlesh, wife of Rampat. They further informed that this illicit relationship will not be tolerated by them and therefore they are planning to kill Vijay.

5. On 24/2/2004 PW.7 Sudesh, cousin of deceased Vijay informed PW.9 Kartar Singh, on telephone that Vijay has been murdered and his dead body was lying

in his field. It was further informed that some poisonous substance was administered to Vijay by accused Nanhar, Virender and Rajvir and Rampat. He was asked to reach Malkosh from Rewari immediately. On the same night, Kartar Singh reached village Malkosh and found his brother dead. On enquiries being made by him it was found from the villagers that he has been done away with by administering poisonous substance to him by aforesaid persons. This fact stood fortified from a small note said to be Vijay's dying declaration, written on the inside paper of the match box, recovered from the pocket of his pants. In the same, name of Meda Panch was also mentioned that they had mixed sulphas in the drink which was administered to him and it is likely to take away his life.

6. The said two pages written complaint dated 27.2.2004 was submitted by Kartar Singh to Superintendent of Police, Bhiwani. A note was endorsed by the Superintendent of Police to Deputy Superintendent of Police to look into the matter and do the needful. DSP sent it to SHO of Police Station Bhond Kalan, who was directed to

investigate the matter, in accordance with law. The said written complaint was treated as an F.I.R. and formal FIR came to be registered on 6/3/2004, that is to say almost after 11 days from the date of occurrence of the incident.

7. It is pertinent to mention here that on 24.2.2004, PW.11 Dalip while proceeding to lodge the report had met ASI Raj Kumar (reported to be dead) at the bus stop of Malkosh and had orally informed him about the incident. His statement to the police was entered into Daily Diary (Rojnamcha) by Sub-Inspector Raj Kumar at the Police Station.

8. On such report being received by him, ASI Raj Kumar reached the spot and prepared the inquest report Ext.PN. In column No.12, dealing with in what manner or by what weapon of instrument such marks or injuries appeared to have been inflicted, he recorded: "appears to have taken poisonous substance".

9. In the same inquest report, ASI Raj Kumar recorded detailed version of Dalip as was given to

him. According to Dalip, his nephew Vijay either took poisonous substance himself on account of the fact that villagers had come to know about his illicit relationship with Kamlesh, wife of Rampat or someone had forcibly administered it to him. He further got it recorded that he had left his other nephew PW.7 Sudesh at the place of occurrence for the safety of dead body and had come to the Police Station. But since ASI Raj Kumar met him at the bus stop of Malkosh, he is getting the said statement recorded.

10. ASI Raj Kumar recorded further in the said inquest report that after getting this information he went to the place of occurrence and found dead body of Vijay. The same was lying in a straight posture, mouth and eyes were found to be little open. He was wearing terricot pants along with ready made shirt but no external injuries were found on the body of the deceased. Height of the deceased was about 5' 9". Mouth was full of froth, a steel glass containing poisonous substance, and two bottles containing water and little liquor were found. However, Raj Kumar was not able to come to

definite conclusion with regard to cause of death. Therefore, he thought it fit to wait till post-mortem report was received by him.

11. It is pertinent to mention here that neither in the statement of Dalip nor in the Inquest Report, there was any mention with regard to recovery of hand written dying declaration said to have been ascribed by deceased, from his pants.

12. Recovery memo was prepared by Raj Kumar, ASI in presence of two witnesses namely Dalip (PW.11) and Sudesh (PW.7). In the same it is said following articles were seized from the spot:- one hand written note authored by deceased Vijay, on the cover of the match box, two separate bottles, one containing water and another containing little liquor, one steel glass with name of Rampat ingraved. Earth containing white powder said to be poisonous substance was also collected. They all were sealed in different parcels and taken into police custody.

13. Translated copy of Ext.PG, dying declaration has been filed. The exact Hindi version written by him in the slip reads as thus:

“Daru ke sath Sulphas pila rahe hai. Marenge.”

(underlining by us)

The said Inquest Report was prepared at the spot. In the site plan prepared there, neither recovery of pocket telephone directory nor recovery of pen was made. The statements of witnesses were recorded.

14. As mentioned hereinabove, initially Raj Kumar, ASI (now dead) did not find commission of any cognizable offence, thus he dropped the proceedings. Only after registration of the FIR on 6/3/2004, the criminal machinery was set into motion.

15. Post-mortem on the dead body of the deceased Vijay was performed by PW.4 Dr. Kuldeep Singh. Post-Mortem Report is marked as Ext.PD. Doctor has opined that deceased was aged about 32 years, well built, having a height of about 5' 6", appears to be more appropriate than what was mentioned in the

Inquest. He has further categorically recorded that on the dead body no bruises or wounds were found. Bladder and stomach both were found to be empty. The time of death was shown to be 36 hours prior to performing of post mortem. The cause of death was shown to be excessive drinking of alcohol with poisonous substance. On the strength of FSL report (Ext.P.1), poisonous substance was found to be aluminium phosphide. According to the doctor, consumption of excessive alcohol coupled with poisonous substance was sufficient to cause death in ordinary course of nature.

16. From the post-mortem report Exh. PE as also from the deposition of Dr. Kuldeep Singh-PW.4, either deceased had met with homicidal death or committed suicide.

17. Now the question that crops up for consideration before us is whether it was the act of the aforesaid five appellants, on account of which he met with the homicidal death or it was Vijay himself, with an intention to save his status and glory in the society, had consumed poisonous

substance, thereby committed suicide.

18. Prosecution in all had examined 12 witnesses on its behalf, to bring home the charges levelled against the appellants. The accused had generally denied the charges levelled against them and submitted that Vijay had committed suicide, on account of his misdeeds. They pleaded innocence. They deposed that they have falsely been roped in by the prosecution on the strength of manufactured and engineered documents. The appellants did not lead any evidence on their behalf.

19. On appreciation of evidence available on record, learned Trial Judge found them guilty for commission of offences under Sections 302/149 of the IPC and awarded them sentences as mentioned hereinabove. The appeal filed by them in the High Court of Punjab and Haryana was dismissed and the findings recorded by the Trial Court were affirmed and the judgment and order of conviction of the Trial Court was maintained. Hence these appeals.

20. We have accordingly heard learned senior counsel Mr. S.K. Dubey with Ms. Mrinamayee Sahu and Sh. Ajay Beer Singh for the appellants and Mr. Kamal Mohan Gupta, learned counsel for the respondent and perused the record. Evidence adduced have also been critically and microscopically gone through by us.

21. Sheet anchor of the prosecution story has been the alleged dying declaration Exh. PG said to have been written by deceased Vijay, on the inside paper of a match box. English translation thereof reads thus:

Rajbir Singh S/o Bhuru

Rampat S/o Ruppa

Binder

Nanhar

are drinking liquor by mixing the Sulphas and would kill.

It was written in vernacular language and in Hindi, as mentioned earlier, reads as under: "Daru ke sath Sulphas pila rahe hai. Marenge."

22. The aforesaid dying declaration has been found to be sufficient by the two courts below and appellants have been found guilty for commission of

offences under Sections 302/149 of the I.P.C. and have been awarded sentence as mentioned hereinabove.

23. Whether the same would fall in the category of dying declaration and if so, if it was sufficient to uphold the conviction and sentence awarded to them on the strength thereof, is required to be examined by us.

24. After critically going through the documents, not only Exh. PG but also the oral and other documentary evidence available on record, we find the following lacunae, shortcoming, lapses and deficiencies in the prosecution story:

(i) the said dying declaration has not been signed by deceased Vijay.

(ii) If the appellants were really present when the said dying declaration was said to have been written, then obviously they would not have allowed him to write the said dying declaration.

(iii) No recovery of pen was made from the site or from the person of the the deceased.

(iv) There is nothing either in the site plan

or in the recovery memo to suggest that the deceased was able to get any platform on which he could have written the said dying declaration.

(v) The inner pocket of the match box together with match sticks was not at all recovered.

(vi) It is not established by the prosecution that the deceased was a smoker of bidi or cigarette. No butts or bidis were recovered from the place of occurrence.

(vii) As per the post-mortem report performed on 25.2.2004, the death had occurred within 36 hours from the time of performing of the post-mortem, meaning thereby that the incident must have taken place some time in the night.

(viii) There is nothing on record to show availability of electricity or any source of light at the spot.

(ix) In the Inquest Report prepared by ASI Raj Kumar (now dead), there is no mention with regard to the recovery of the dying declaration Exh. PG or recovery of pocket index telephone directory.

(x) Similarly, in the site plan prepared on the spot, there is no mention with regard to the recovery of dying declaration, pen or pocket diary

from the place of occurrence or from the body of the deceased.

(xi) No finger prints either of the deceased or of the accused were taken, even though the same were available.

(xii) Report of the Chemical Examiner dated 6.10.2004 shows that the packets were received by him only on 10.3.2004 but no remnants of poisonous substance were found either in the two bottles or in the steel glass but were found only in the earth so collected from the place of occurrence. The poisonous substance has been described as Aluminium Phosphide.

(xiii) Except for the evidence of PW-7 Sudesh, PW-8 Ramesh, PW-9 Kartar Singh, PW-11 Dalip, who all happened to be closely related to the deceased, evidence of an independent witness was not recorded, even though there is evidence available to show that many villagers were available.

(xiv) The evidence of PW-7 Sudesh and PW-11 Dalip is highly contradictory inasmuch as Sudesh has not deposed anything with regard to recovery of pocket index telephone diary from the person of the deceased; whereas Dalip has categorically deposed

with regard to recovery of pocket index telephone diary from his possession.

It is pertinent to mention here that PW-7 Sudesh and PW-11 Dalip are the witnesses to the recovery memo said to have been prepared by ASI Raj Kumar who is said to have died during the pendency of the sessions trial, also does not record its recovery.

(xv) It is extremely difficult to comprehend if the deceased was in a position to write the dying declaration, more so, after having consumed excessive amount of Alcohol mixed with poisonous substance. Fact of excessive amount of Alcohol mixed with poison stands proved from the evidence of PW-4 Dr. Kuldeep Singh, who had performed post-mortem (Exh. PD) on the person of the deceased.

(xvi) The post-mortem report further reveals that the deceased was aged about 32 years having a height of 5 feet 6 inches with a robust body. It is inconceivable to believe that if the appellants would have tried to administer him Alcohol mixed with poisonous substance, he would not have resisted to the same or at least would not have made any hue and cry. It also stands proved from the evidence of

PW-4 Dr. Kuldeep Singh and the post-mortem report that no bruises and external injuries were found on the person of the deceased.

(xvii) No explanation has been offered by the prosecution as to why the blank pages of the pocket index telephone diary were not used to scribe it, if the same had been recovered from his possession.

(xviii) The doctrine of motive could not be established by the prosecution at all. Thus another ground of holding them guilty on account of motive, completely shatters the prosecution story and falls flat.

(xix) It could not be established that dying declaration and pocket index telephone diary belonged to the deceased only. This aspect of the matter has not been established by the prosecution.

(xx) Even if it stood established from the opinion of the Handwriting Expert that dying declaration and pocket index telephone diary were in the same hand, still it could not be established that it belonged to the deceased only.

(xxi) Possibility of implanting of these documents cannot be ruled out.

(xxii) The said dying declaration does not

inspire confidence, much less to hold the appellants guilty for commission of the said offence.

25. In fact, the salient features noted above with regard to the deficiencies are sufficient, in our considered opinion, to come to the conclusion that the Courts below committed grave error in holding the appellants guilty for commission of offence under Sections 302/149 of the I.P.C.

But with intention to fortify our views, we would like to reiterate what this Court has already held in its earlier leading judgments.

26. Almost 25 years back, this Court in celebrated judgment in Sharad Birdhichand Sarda vs. State of Maharashtra, reported in 1984 (4) SCC 116, held in paragraph 151 and 161 thereof that it is well settled law that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weaknesses of the defence. For ready reference, the said paragraphs are reproduced hereunder:

"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 than 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 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.

161. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in

Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

27. Similarly, when the case is based on circumstantial evidence, it has now been well settled by several authorities of this Court that the chain of circumstances should be complete in all respect and the pointer of guilt should continuously be on the accused only. Any deviation of the pointer of guilt on the accused would enure him the benefit of doubt.

28. No doubt it is true that ASI Raj Kumar, who had prepared the Inquest Report had died during the pendency of the trial, but no reasons have been assigned as to why other police personnel present along with ASI Raj Kumar, were not examined. They could have at least explained the true picture and proved recovery of dying declaration and pocket telephone index diary from possession of deceased Vijay.

29. Admittedly, from the evidence of PW-7 Sudesh, it has come on record that the deceased Vijay was having bank account and he was also a member of some society, where his standard signatures were available. But those standard signatures were not made the basis for comparison of his hand-writing alleged to have been found from his possession. In the case of Sharad Birdhichand Sarda (supra), it has been dealt with elaborately as to how the chain of circumstantial evidence has to be complete in all respect. The relevant paragraphs 153 & 154 are reproduced herein below:

"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 & Anr. v. State of Maharashtra(') where the following observations were made:

'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 164 (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."

30. The aforesaid cardinal principles with regard to the completion of chain of circumstantial evidence for holding the appellants guilty could not be established at all by the prosecution in the present case. With such broken chain of circumstantial evidence, at many places, it would neither be safe nor prudent to hold the appellants guilty.

31. Apart from the above, it is extremely difficult for us to come to the conclusion if Exh. PG can fall in the category of dying declaration at all or can be said to be legally admissible. Even though we have categorically, minutely and with microscopic eyes gone through the said document number of times, but it does not inspire confidence, more so, the manner in which it has been written. We have already mentioned hereinabove that after having consumed excessive liquor, it would not have been possible for any one, much less for Vijay, to have written the said dying declaration with so much of precision or with steady hand. In our considered opinion, dying declaration should be such, which should immensely strike to be genuine and stating

true story of its maker. It should be free from all doubts and on going through it, an impression has to be registered immediately in mind that it is genuine, true and not tainted with doubts. It should not be the result of tutoring. But dying declaration in the present case does not fulfill these conditions.

32. In HWV Cox Medical Jurisprudence and Toxicology, Seventh Edition, at page 936, under title "Alcohols", deals with handwriting after consumption of liquor. While coming to the general behaviour after excessive drinking, apart from other things, it has specifically been noted: "Character of hand-writing: There is often difficulty with letters, N, M and W."

33. In the same book, it is further described that blood reaches all the organs, mainly the brain and interferes with normal brain functions like judgment and coordination of muscular movements. The blood alcohol level influences the behaviour of the person. The amount of alcohol present in the stomach and intestine has no effect but only indicates the

ingestion.

34. Obviously, it would go to show and we also come to the conclusion that after going through the handwriting, as has been found by us in the alleged dying declaration Ext. PG, it would have been extremely difficult for him to write it as he could not have been in a mentally fit condition to have written the same.

35. Unfortunately, this aspect of the matter has neither been considered by the learned Trial Judge nor has been adverted to by the Division Bench of the High court and yet the appellants have been found guilty for commission of the aforesaid offence.

36. In our considered opinion, the said judgment and order of conviction passed by the Trial Court and upheld by the High Court, cannot be sustained in law. They are accordingly set aside and quashed. As a necessary consequence thereof, the appellants would be set at liberty forthwith, if not required in connection with any other criminal case.

Both the appeals are allowed accordingly.

.....J
(DEEPAK VERMA)

.....J
(K.S. RADHAKRISHNAN)

New Delhi;
June 11, 2010.

