

Court No. - 48

Case :- JAIL APPEAL No. - 7291 of 2017

Appellant :- Gulam Rashul

Respondent :- State of U.P.

Counsel for Appellant :- From Jail

Counsel for Respondent :- A.G.A.

Hon'ble Suneet Kumar,J.

Hon'ble Syed Waiz Mian,J.

Per Hon'ble Syed Waiz Mian,J.

1. This Jail Appeal under Section 383 Cr.P.C. has been filed by appellant/accused, Gulam Rashul, through Senior Superintendent of Jail, Agra, against judgment and order dated 30.06.2005, passed by Additional Sessions Judge, Court No. 10, Ghaziabad, in Session Trial No. 576 of 2004, relating to Case Crime No. 37 of 2004, under Sections-302 and 201 I.P.C., Police Station-Muradnagar, District-Ghaziabad, whereby, accused appellant has been convicted under Sections 302 and 201 IPC. Under Section 302 IPC, he has been sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 5,000/-and in the event of default in payment of fine, he has to further undergo six months imprisonment. Under Section 201 IPC, he has been sentenced to undergo Rigorous imprisonment for three years with a fine of Rs. 1,000/- and in the event of default in payment of fine he has to further undergo one month imprisonment. Both sentences are directed to run concurrently.

2. Heard Shri Abhinav Jaiswal, learned Amicus Curiae for the appellant/accused and learned A.G.A. for the State and perused the record.

3. Brief facts of the prosecution story unfolds as under:

4. One Anand Singh- informant, on 15.02.2004 at about 1.30 p.m. to 5.00 p.m., presented a written First Information Report, at Police Station-Muradnagr, District-Ghaziabad, alleging therein that accused Gulam Rashul, who is a native of District-Samastipur, District-Bihar, is a servant of his brother Ashok. Today, he demanded Rupees 500/- on credit from his employer Ashok, who told him that he will lend the amount tomorrow and directed him to go to field to collect fodder. The accused at around 1.30 p.m. took Gaurav, son of Ashok, aged about 9 years, with him to the field but Gulam Rashul, at around 5 p.m., returned all alone without fodder. His nephew was also not accompanying him, therefore, informant and other interrogated him about Gaurav to which he admitted to have killed him in the field of Kripal by strangulation. He had also disclosed that the dead body of Gaurav was lying in the Sugar cane field. Villagers, Ashish Malik, Manoj and others had seen the deceased in the company of accused while he was on his way to sugar cane field. Gulam Rashul has killed his nephew.

5. On the basis of written First Information Report-Paper No. Ka-1, case at Crime No. 227 of 2004, under Sections 302 and 201 I.P.C. came to be registered at the Police Station-Muradnagar, District-Ghaziabad, against the appellant/accused and the substance of First Information Report was entered in the General Diary on the same day by Head Moharrir 270-Chatar Singh, and the investigation was handed over the the investigating officer, who took over the investigation and ensued it.

6. During investigation the inquest over body of the deceased

after appointing 'Panchan' was conducted and papers along with other formalities, were also prepared.

7. The investigating officer inspected the place of occurrence at the instance of the informant and sketched site plan-paper no. Exhibit-Ka-11, on the spot and the Investigation Officer has recorded the statements of the informant and other witnesses.

8. To ascertain the real cause of death of the deceased, the dead body of the deceased was sent to mortuary.

9. On 16.02.2004, Doctor Rajendra Prasad, had conducted post mortem over the body of the deceased and in the autopsy report he has mentioned that the cause of death of the deceased was asphyxia as a result of throttling.

10. The investigating officer after collecting the evidence under Section 161 Cr.P.C., against the accused, concluded that the appellant/accused has killed the deceased and in view of the collected evidence, during investigation, he has submitted charge sheet against the appellant/ accused on 04.02.2004.

11. Charges against the appellant/accused under Section 302 and 201 I.P.C. were framed, by the Additional Sessions Judge, F.T.C. Court No. 2, vide order dated 01.06.2004 which has been denied by the appellant and claimed tried.

12. In order to prove charges, the prosecution has examined P.W.1-Anand Singh, P.W.-2 Ashish Malik, P.W.3-Nand Kishore, P.W.4-Narendra Singh, P.W.5-Manoj Kumar, P.W.6- Head constable Chatar Singh, P.W.7- Doctor Rajednra Prasad (Radiologist) and P.W.8-O.P. Yadav.

13. Statement of the appellant accused Gulam Rashul, under Section 313 Cr.P.C. was recorded in which he has denied the oral as well as documentary evidence on record and has also stated that the same is false. He has further stated that the witnesses have deposed against him on account of enmity.

14. After hearing the learned amicus curiae for the appellant/accused and learned ADGC for both the parties, learned trial court, vide impugned judgment and order dated 30.06.2005 has convicted the accused and also sentenced him under Sections 302 and 201 IPC. Under Section 302 IPC, he has been sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 5,000/- and in the event of default in payment of fine, he has to further undergo six months imprisonment. Under Section 201 IPC, he has been sentenced to undergo Rigorous imprisonment for three years with a fine of Rs. 1,000/- and in the event of default in payment of fine he has to further undergo one month imprisonment. Both sentences are directed to run concurrently.

15. In the First Information Report, informant-Anand Singh, has not disclosed whether at the time of request of accused to lend him Rupees 500/-, on credit, he was present in the house or not.

16. In the First Information Report, Exhibit Ka-1, it is specifically described that in the evening at about 5.00 p.m. when the appellant/ accused returned all alone and on his admission of murder of his nephew, the informant along with other had gone to the field. Perusal of First Information Report reflects that the informant was present with others at 5.00 p.m. when the appellant had returned from the field all alone.

17. Learned trial Court has also recorded the conviction of the appellant/accused under Section 201 I.P.C. and sentenced him, accordingly.

18. It is manifested from the First Information Report and other material on record that the appellant had taken the deceased with him to collect fodder and had returned to the house of his employer, Ashok, without fodder all alone. Ashok inquired from him about his son to which he admitted that he had killed him and the dead body of the deceased was found, on the same day, lying in the sugar cane field. There is no evidence on record that appellant/accused had concealed the dead body of the deceased or the identity of the deceased. It is an admitted fact that the deceased was not killed brutally but by strangulation. There is no evidence on record to show that how the deceased was throttled, but, as said above, appellant/accused had himself told Ashok, in the presence of the witnesses that he had strangled the deceased, therefore, we do not find any evidence on record to show that the appellant/accused had tried to screen himself from the legal punishment or he had misled the informant or any one. There is no evidence to establish that appellant had caused any evidence of the commission of crime i.e. murder, to disappear.

Section 201 I.P.C. postulates that :

“ Section 201- Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he

knows or believes to be false, shall if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine;”

19. In our view to constitute an offence under Section 201 I.P.C. there must be disappearance of some evidence of the commission of offence; removing the corpse of a murdered man from the scene of murder to another place does not come under Section 201 as the removal does not cause the disappearance of evidence of commission of the murder. Section 201 looks upon a person giving false information with intent to screen an offender as an accessory after the fact and makes him culpable as an offender committing an offence against public justice. Section 201 will apply only when the false information touching the offence with intent to screen the offender is given to those interested in bringing the offender to justice.

20. Since there is no evidence pertaining to offence under Section 201 I.P.C., therefore, the conviction under the aforesaid section by learned trial Court is erroneous, perverse and without any evidence, therefore, the conviction of the appellant/accused, under Section 201 I.P.C. cannot be upheld against the appellant and as such the appellant/accused Gulam Rashul is accordingly acquitted of the charge under Section 201 I.P.C.

21. P.W.1 Anand Singh, has narrated the averments of the First Information Report in his examination in chief.

22. P.W.-1 Anand Singh, in his cross examination has stated that Ashok is his elder brother. Ajai and Arun are also older to him, he

is youngest. He and Arun are engaged in milk business, whereas, Ashok is doing agriculture. All of them are living in a joint family. Next he has deposed that at 5.00 p.m. all his brothers along with him were present in the house. He has further stated that among the brothers, no partition has taken place. It is reflected that they are living in a common house. However, no specific question in this regard has been put to the witnesses. Therefore, it cannot be denied that about the incident, P.W.-1 Anand Singh had knowledge of the incident as has been alleged in the First Information Report-Exhibit-Ka-1.

23. P.W.-1 Anand Singh, has also stated in his examination that the dead body of the deceased was found in the sugar cane field; he and other had gone there; the face of the deceased was covered with cloth and his hands were at his back; his back was stained with soil; dead body was lying straight; there was no sign of injury over body; it was 7-7.30 p.m; the field is situated at a distance of one kilometer from the village.

24. Thus, P.W.-1 Anand Singh, has corroborated the allegations contained in the First Information Report-Exhibit Ka-1. There is no inconsistency in his oral account.

25. Eye witness-P.W.-2 Ashish Malik has stated in his examination in chief that he knew Ashok Kumar. He is an agriculturist. Accused Gulam Rashul was his servant. The incident had occurred on 15.02.2004. On 15.02.2004, Gulam Rashul had asked Ashok to lend him money but instead of paying him the said amount, Ashok had directed him to collect fodder. Gaurav, son of Ashok, had also accompanied the accused. At around 1.30 p.m., he

had seen Gaurav in the company of Gulam Rashul. Deceased was 9 years old. In the evening Gulam Rashul did not collect fodder from the field and at that time, Gaurav was also not with him. At around 5.00 p.m. Gulam Rashul was asked about Gaurav to which he had admitted that he had killed the deceased by strangulating him and dead body of the deceased was lying in the field. He along with others had gone to see the dead body of the deceased and in the field, dead body of the deceased was found lying.

26. P.W.-1-Anand Singh, neither in the First Information report, Exhibit Ka-1, nor in his ocular evidence has stated that the accused had demanded Rs. 500/- from Ashok in his presence. Therefore, the deposition of P.W.-2 Ashish Malik, in this connection is not direct and he has not disclosed in his evidence who had narrated him the incident, however, he has corroborated the averments of First Information Report-Exhibit Ka-1 and the testimony of P.W.-1 Anand Singh that he had seen the deceased in the company of accused on 15.02.2004, at around 1.30 p.m. and at 5.00 p.m. accused had disclosed to the informant, Ashok and others about the killing of the deceased. At that time also P.W. 2 Ashish Malik was not present. However, as far as his testimony regarding the facts that he had seen the deceased in the company of accused at around 1.30 p.m. and he had gone along with others to see the dead body of the deceased in the field at 5.00 p.m. is concerned is trustworthy as it finds support from allegations in the First Information Report and also the testimony of P.W.-1 Anand Singh.

27. P.W.-2-Ashish Malik has also admitted in his cross

examination that in his presence accused had not requested to lend the money on 14.02.2004, nor on the following day he had demanded Rs. 500/- from Ashok on credit, he had come to know about it.

28. P.W.-2 Ashish Malik has not disclosed in his cross examination as to who had apprised him about the request of accused to Ashok to lend Rs. 500/- on credit. However, P.W.-2 Ashish Malik, in his remaining cross examination, has categorically stated that he had seen the accused along with Gaurav at that time while he was returning from field; other persons had also witnessed the deceased Gaurav in the company of the accused; he did not see the accused when he had returned from the field. He has also denied the suggestion put on behalf of the accused that it would be true to say that he had not seen the deceased Gaurav in the company of the accused. He has further denied that he is deposing for being co-caste of P.W.-1.

29. P.W.-5 Manoj Kumar has stated in his cross examination that in his presence, accused had requested to lend Rs. 500/- at around 8 a.m. on credit but, in our opinion this piece of evidence of this witness does not inspire confidence because neither in the First Information Report-Exhibit Ka-1, nor P.W.-1 Anand Singh, nor P.W.-2 Ashish Malik, has stated that during the demand of money by the accused to Ashok Kumar, D.W.-5 Manoj Kumar was present. However, P.W.-5 Manoj Kumar, in his cross examination unequivocally has stated that he had seen the accused along with Gaurav. He has also admitted that accused had not returned with fodder, nor he had seen accused while he was returning from field

to the village. He has admitted that he had not gone to the field to see the dead body of the deceased, nor he had accompanied the informant to the police station. It is wrong to suggest that he has been pressurized to depose. As such, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, have candidly stated, in their cross examination that on 15.02.2004, at around 5.00 p.m. they had seen the deceased in the company of accused while they were coming from field towards village. P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, have supported and corroborated not only the testimony of P.W.-1 Anand Singh but also the allegations contained in this regard in the First Information Report-Exhibit Ka-1.

30. Accused in his statement has stated that the witnesses have deposed against him on account of his enmity with them but on his behalf the testimony of P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar has not been confronted in their cross examination that they were inimical to him or they have deposed against him due to animosity. Further, in support of alleged enmity, no oral or documentary evidence has been adduced, therefore, no enmity prior to incident of accused/appellant with P.W.-1 Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar has been established.

31. P.W.-7, Dr. Rajendra Prasad, radiologist, has stated in his examination that on 16.02.2004, during his posting at mortuary, he had conducted the post mortem over the dead body of the deceased-Gaurav, who had been identified by Constable Narendra Kumar and Constable Manoj Kumar. He has also adduced evidence in detail pertaining to autopsy report-Exhibit Ka-9 and in this

connection he has admitted that the said report Exhibit-Ka-9 was in his writing and signature.

32. P.W.-7 Dr. Rajendra Prasad has also deposed in his testimony that the death of the deceased was caused approximately one day before, on the basis of examination of the dead body of the deceased, he has concluded that the death of the accused was caused due to asphyxia as a result of throttling.

33. Evidence of P.W.-7 Rajendra Prasad, lends credence to the evidence of P.W.-1 Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar that the death of the deceased has been caused due to throttling. These witnesses have candidly stated in their statements that no mark of injury was found on the body of the deceased and Gaurav was throttled by the appellant/accused. However, P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, are not eye witnesses but P.W.-1 Anand Singh has stated that accused had taken the deceased along with him from Ashok's house to the field to collect fodder, whereas, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar had seen the deceased in the company of accused at around 5 p.m. on 15.02.2004, accused on his return from the field to house the appellant had admitted before Ashok Kumar and P.W.-1 Anand Singh, that he had killed the deceased by strangulating him, thereafter, on the admission of killing of the deceased by the accused, P.W.-1 Anand Singh and P.W.-2 Ashish Malik, had gone to the spot at around 7.00 p.m. and they had seen the dead body of Gaurav lying in the sugar cane field, therefore, time of last seen on 15.02.2004, was at 5.00 p.m. and on the same day the dead body of the deceased was

seen by the informant P.W.-1 Anand Singh and P.W.-2 Ashish Malik, at around 7.00 p.m. on 15.02.2004, therefore, between the evidence of last seen and the time on sees the dead body is in close proximity, and accused in his statement under Section 313 has not stated that the appellant/accused had left the deceased or had separated from him, nor in this regard P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, have been confronted.

34. Hon'ble Apex Court has observed consistently that in a criminal case based on the circumstantial evidence, chain of circumstances must be complete and on completion of such chain, only one conclusion can be drawn that it is only the accused who had committed the crime.

35. In *Suraj Singh vs. State of U.P., reported in 2008 (11) SCR 286* the Hon'ble Apex Court has held as follows:

“The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

36. In the case of *Sharad Birdhi Chand Sarda vs. State of Maharashtra (1984) 4 SCC 116*, in paragraph 153, Hon'ble Apex Court has laid down five golden principles (Panchsheel). Para 153 is reproduced as follows:

“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

(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."

37. In a case that rests upon circumstantial evidence motive is a relevant factor but is not essential if proved otherwise. We have seen that there is cogent and clinching evidence of P.W.-1, Anand Singh, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar and the accused has failed to adduce iota of evidence in his favour with regard to the deceased having separated from him, therefore, it was also in the knowledge of the accused as to why or for what reason he had done the deceased to death. There was no prior animosity between the accused with deceased and his family members, and accused has failed to prove any such prior enmity.

38. It was also submission of the learned Amicus curiae, on behalf of the appellant that had accused killed the deceased then he would not have returned from the village to the house of his master/ employer. In this connection the learned A.G.A. has

contended that the appellant/accused appears to have returned to the house so that he can set up a defence of innocence.

39. In our view merely on the basis of the subsequent conduct of the accused the trustworthy evidence of the witnesses on record cannot be disbelieved.

40. On the appraisal of the evidence on record it is evident that on 15.02.2004, at around 1.30 p.m. accused had taken the deceased along with him from his house to the field which is situated at a distance of one kilometre from the village to collect fodder, but and had returned to the house of Ashok all alone; while he along with the deceased was going towards the field, P.W.-2 Ashish Malik and P.W.-5 Manoj Kumar, had witnessed them. Further, accused had confessed on 15.02.2004, at around 5.00 p.m. to Ashok and others about killing of the deceased and the dead body, as referred above was found in the sugar cane field at around 7.00 p.m. Accused has not denied that he had not taken the deceased from the house towards the field to collect the fodder and has also not taken a defence that on way from the house of Ashok to the sugar cane field deceased had parted his company. In such circumstances, the inference has to be drawn against him that he had killed the deceased in the sugar cane field.

41. It is for the prosecution to prove the involvement of the accused in the commission of the crime beyond all reasonable doubts. In the present case the prosecution has successfully completed the chain of circumstances. The fact that what happened to the victim after he was lastly seen by P.W.2-Ashish Malik, P.W.-5-Manoj Kumar, was within the knowledge of the accused but

he has not spilled beans about the fact which was specifically in his knowledge.

42. Section 106 of the Indian Evidence Act is as follows:

“106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations”

43. Accused has miserably failed to rebut the presumption under Section 106 of Evidence Act.

44. Hence, applying the principles laid down by the Hon'ble Apex Court in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that conviction of appellant under Section 302 I.P.C. is proper and justified in the law and the impugned judgment and order is not excessive or exorbitant and no question arises to interfere in the matter on the point of punishment imposed upon him.

45. In view of the above facts and circumstances, impugned judgment and order dated 28.03.2011 deserves to be affirmed to the extent of conviction and sentence of appellant under Section 302 I.P.C. and appeal is liable to be dismissed to that extent. Ordered accordingly.

46. In the result, the Criminal Appeal is allowed partly to the extent it relates to the conviction under Section 201 I.P.C.

47. Impugned judgment and order dated 28.03.2011, is hereby confirmed/affirmed to the extent of conviction of appellant under Section 302 I.P.C. The appellant, who is in jail, shall serve out the

sentence awarded to him by the Trial Court.

47. Copy of this order along with lower Court record be sent to Court concerned forthwith.

48. A copy of this order be also sent to Appellant through concerned Jail Superintendent.

49. Shri Abhinav Jaiswal, learned Amicus Curiae, for his assistance, is entitled to fee, assessed at Rs. 21,000/-, to be paid by the State Government.

Order Date :-23.12.2022

Deepak/

(Syed Waiz Mian,J.)

(Suneet Kumar,J.)