

Non-Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. _____ OF 2021
(Arising out of SLP (CrI) No. 6965 OF 2019)

Surendra Kumar & Anr.

APPELLANT(S)

VERSUS

State of U.P.

RESPONDENT(S)

J U D G M E N T

Hrishikesh Roy, J.

Leave granted. This appeal is the culmination of a tragedy which decimated two families in its course. The murder of a recently married young woman, where the finger of suspicion was raised towards her own husband, brother-in-law and even her father-in-law as an accused who met an unnatural demise during the pendency of the trial. This Court has been approached to lay to rest the litigation which has followed suit for more than two decades.

2. Heard Mr. Shadan Farasat, learned counsel for the appellants. Also heard Mr. V. Diwakar, learned AAG representing the State of Uttar Pradesh. The challenge in this appeal is to the common judgment and order dated 12.3.2019 in Criminal Appeal No. 346 of 2009, whereby the Division Bench of the High Court of Judicature at Allahabad upheld the conviction of the appellant No. 1 under Section 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and of the appellant No. 2, under section 120B IPC.

3. The appellants are brothers and are residents of Mahal Village in Meerut District. The appellant No. 2 Ramveer was married on 13.5.1993 to Kamla Rani, whose parental home was in the neighboring village of Phlawada. On 8.8.1993 Kamla Rani, after spending some days with her parents was returning back on the scooter driven by her brother in law Surendra Kumar (appellant No. 1). Some minutes after they started the journey, two armed miscreants on the road between Phlawada and Bathnor ambushed the scooter near the forested area and took Kamla Rani to the roadside sugarcane field of

Quasim Ali and shot her from close range and robbed her of the gold and silver ornaments worn on her person. Surendra Kumar then rode the scooter to village Phlawada to inform Baldev, the father of Kamla Rani about the incident. The scooter was left behind with Kamla Rani's father and Surendra then returned to his own village and informed his brother and other family members in the matrimonial home of the deceased, at Village Mahal. Both brothers accompanied by their father, thereafter rushed to the police station. Around the same time, Dhan Singh (PW-1) and Karamveer (PW-2), who were near the site of incident, after hearing the sound of firing went towards the field and they noticed two miscreants (not appellants), removing ornaments from the body of Kamla Rani. The PW1 and PW2 accosted the looters but showing arms, both looters fled from the scene.

4. The FIR of the incident (which took place around 4.45 pm) was filed at 5.30 pm by Baldev Singh (father of the deceased Kamla Rani) at the Phlawada Police Station. Meanwhile, the appellants and their father Om Prakash also reached the Police Station. Since,

maltreatment of the deceased in the matrimonial home was alleged in the FIR, the appellants were detained in the police lock up and four days later, the police formally arrested all three, on charge of conspiracy and murder. In course of investigation, the police also arrested Rajveer and Shiv Kumar alias Pappu, suspecting them to be the two unknown robbers seen by PW1 and PW2, in the act of removing ornaments from the person of the deceased Kamla Rani.

5. The preliminary investigation was done by S.I Ramachandra Singh (PW5), who prepared the Panchnama (Exbt Ka-7) and sent the dead body for autopsy. Few jewellery items and the locked suitcase, found near the body were also seized by the PW-5. Next day i.e. 9.8.1993, the SHO Amrat Lal returned from leave and led the investigation. He seized the scooter from the residence of Baldev and the recovery memo of scooter (Exbt Ka-2) was prepared.

6. The autopsy of dead body of Kamla Rani was done by PW3 Dr. N.K Maheshwari on 9.08.1993 at 4.30 p.m. and he noted the following antemortem injuries on the body;

1 Firearm wounds of entry 2.0 cm X 2.5 cm on right side of neck blackening & tattooing 8.0 cm X 8.0 cm on upper side of wounds;

2 Firearm entry wound of 2.0 cm X 2.5 cm into muscle deep with blackening & tattooing around 2.0cm, mandible bone was also fractured.

3- Firearm wounds of exit 5.0 cm x 8.0 cm margin irregular at the left side of Upper face on external examination of dead body post mortem staining present on the back side rigour mortis was absent on upper side and present on lower side of the body.

Dr. N.K Maheshwari in his report opined that the cause of death was hemorrhage & shock as a result of ante-mortem injury.

7. As stated earlier, the investigation unearthed the names of Shiv Kumar and Rajveer (both acquitted by the High Court). On completion of investigation, the chargesheet (Exbt Ka3) was filed by the I.O. against 5 accused. The case was committed and charge was framed by Sessions Court against Shivkumar and Rajveer u/s.

302/394 of IPC; against Om Prakash and Ramveer u/s. 120B IPC and against Surendra Kumar u/s. 302/34 of I.P.C. All five accused were tried together but Om Prakash died during trial and the case against him was abated.

8. While there was no direct evidence implicating the appellants in the crime, on the basis of circumstantial evidence of the husband being unhappy with Kamla Rani, the alleged conspiracy hatched by him with his brother and father Om Prakash and the fact that the deceased was last seen in the company of appellant Surendra in whose scooter she was travelling back from her parental home, and the suspicious conduct of the appellants, the Trial Court convicted the appellant No. 1 Surendra Kumar, under Section 302 read with Section 34 IPC and the appellant No. 2 Ramveer, under Section 120B IPC. Accused Shiv Kumar and Rajveer were additionally held guilty under Section 394 and an appropriate sentence was imposed against all four accused, by the learned Additional Sessions Judge, Meerut.

9. In the appeal filed by the brothers, High Court confirmed the conviction of the appellants but relief was granted in the connected criminal appeal filed by Rajveer and Shiv Kumar and they were acquitted.

10. The High Court while affirming the conviction, accepted the conspiracy theory of the prosecution for the murder of Kamla Rani. The Court also accepted the last seen together evidence against appellant Surendra Kumar. Noting the absence of credible explanation from Surendra, on the circumstances of the incident, the appeal of the brothers Surendra and Ramveer was dismissed by the High Court, leading to present challenge.

11. As the case against the appellants is entirely based on circumstantial evidence, it is necessary to determine whether the available evidence lead only to the conclusion of guilt and exclude all contrary hypothesis. The enunciation on the law of circumstantial evidence stood the test of time since

*Hanumant Vs. State of Madhya Pradesh*¹ where Mahajan J., has written as under:-

"10.....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused....."

12. The nature, character and essential proof required in criminal cases was discussed in detail by Fazal Ali J in *Sharad Birdhichand Sarda vs. State of Maharashtra*² and the proposition of law culled out on circumstantial evidence was approved in many subsequent judgments and was recently reiterated by Krishna Murari J., writing the opinion for a three Judges Bench in *Shailendra*

¹ AIR 1952 SC 343

² (1984) 4 SCC 116

*Rajdev Pasvan & Ors. Vs. State of Gujarat & Ors.*³ where it was succinctly laid down as under:-

"17. It is well settled by now that in a case based on circumstantial evidence the courts ought to have a conscientious approach and conviction ought to be recorded only in case all the links of the chain are complete pointing to the guilt of the accused. Each link unless connected together to form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused."

13. Proceeding with the above proposition of law, let us now examine whether the circumstances here satisfactorily prove that Kamla Rani was murdered because her husband had an issue with her appearance. The unhappiness of the appellant No. 2 with his wife is projected by the testimony of Santari (PW-6) and Nain Singh (PW-7) and similar thing is also mentioned in the FIR written by Nain Singh (PW-7) as, dictated by Baldev Singh, the father of the deceased. The reliability of the evidence of PW6 and PW7 is however to be tested in the backdrop of the fact that PW7 Nain Singh and Shravan Kumar (husband of PW-6) were charged with the murder of their deceased sister's father-in-

law i.e. Om Prakash alias Mallu. Both were named in the FIR 157 of 2000 registered under Section 302 and 506 of the IPC and were detained in jail in the year 2000. The testimony of PW-6 and PW-7 was recorded in Court, much after Shravan Kumar (husband of PW-6) and Nain Singh (PW-7) were released from jail. As such it cannot be ruled out that PW-6 and PW-7 had strong reason for implicating the appellants. Therefore, the motive attributed to the appellants in the evidence of PW-6 and PW-7, would fail the test of legal scrutiny in the absence of any corroborative evidence.

14. The appellant Ramveer was married with Kamla Rani and no criminal act is attributed to him. His conviction is entirely based on the theory that he hatched a conspiracy with his brother and father to eliminate Kamla Rani as he was unhappy with her looks. This appears to be far fetched because prosecution failed to adduce any evidence to prove the meeting of minds of the two brother or with the other two accused Shiv Kumar and Rajveer to eliminate Kamla Rani. The unhappiness attributed to the husband cannot reasonably implicate his brother Surendra Kumar or the two

unrelated accused. In any event the additional charge against Shiv Kumar alias Pappu and Rajveer was under Section 394 IPC but no such charge of robbery is attributed to the present two appellants. Most significantly there is no common conspiracy theory connecting all the accused in the case. The prosecution as can be noted, failed to establish any criminal conspiracy between Surendra and Ramveer on one hand and the accused Shiv Kumar and Rajveer who additionally were charged with robbery, on the other hand. Therefore, the theory of common intention or meeting of mind between the appellants and the two acquitted accused Shiv Kumar and Rajveer, must be discarded as implausible.

15. In any case, even Ramveer's dissatisfaction with his wife may not provide an acceptable and strong enough motive for the husband to conspire and kill Kamla Rani. This is pertinent since no role whatsoever is attributed to the husband by the evidence on record. Ramveer may or may not be having a cordial relation with the deceased but it can't be said with certainty

that killing her was the only option available to him to avoid the company of the deceased.

16. Equally telling is the testimony of PW1 and PW2 who heard gun shots and soon thereafter saw the two acquitted accused Shiv Kumar and Rajveer removing ornaments from the dead body of the deceased. The witnesses confronted and followed both robbers for some distance. They were present at the spot and saw part of the crime but they never implicated the brother-in-law, who was last seen with the deceased. However, the Court refused to give credence to their testimony by describing them as chance witnesses. The PW-1 and PW-2 as the only ones present near the place of occurrence, do not implicate the appellant No. 1 with the crime. The courts below however, discarded the evidence of these two key witnesses who heard firing and also saw a part of the crime, by treating them as chance witnesses. The presence of PW1 and PW2 near the place of occurrence was natural and their testimony on the sequence of crime at the place of occurrence was cogent and consistent. Both had not only seen the robbery but also confronted the robbers and followed them for a

while. The Courts below in our view erred in not treating both as independent witnesses. Their testimony would be of value to show that the appellant Surendra Kumar had no connection with the two robbers and his innocence could then be inferred without much difficulty.

17. We may now examine the role and conduct of the appellant No. 1 Surendra Kumar who was escorting the deceased from her parental home on his scooter and is the last person seen in the company of the deceased. The Court below however has relied upon Section 106 of the Indian Evidence Act to connect him with the crime. This according to us was the incorrect approach inasmuch as the burden to prove the guilt is always on the prosecution and cannot be shifted to the accused by virtue of Section 106 of the Evidence Act. This proposition of law on criminal jurisprudence stood the test of time since *Emperor Vs. Santa Singh*⁴ where Din Mohammad J., observed as under:-

“28.Section 106 of the Evidence Act, cannot be used to strengthen the evidence for the prosecution. The

4 AIR 1944 Lahore 339 (FB)

prosecution must stand or fall on the evidence adduced by it and until a prima facie case is established by such evidence, the onus does not shift on to the accused. Mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish prima facie the guilt of any particular person or all of them jointly. That being so, they cannot be called upon after such evidence to establish their innocence. They can only be called upon to do that when the evidence has established a prima facie case against any one or more of them or all of them....."

In the present case, the prosecution failed to adduce acceptable evidence to prove the crime against the appellants and the Court according to us erred in shifting the burden of proving the innocence upon the accused, with the aid of Section 106 of the Evidence Act.

18. The next issue to be considered is whether there was any suspicious conduct of the appellant Surendra Kumar after the incident. Soon after the scooter was ambushed and Kamla Rani was shot dead, the appellant Surendra Kumar straight away rode the scooter to Phlawada village to inform Baldev, the father of the deceased. The post occurrence meeting between the

deceased's father Baldev and Surendra, can be gathered from the fact that in the FIR lodged within half an hour of the incident, Baldev had specifically mentioned about absence of injuries on Surendra. The question is whether failure of the brother-in-law to confront the armed attackers and not suffer any injury thereby, can be a circumstance to implicate him. The reaction of witnesses who see violent crime can vary from person to person and to expect a frightened witness to react in a particular manner would be wholly irrational. Equally dangerous would be the approach of the Courts to reach certain conclusion based on their understanding of how a person should react and to draw an adverse inference when the reaction is different from what the Court expected. Explaining the fallacy in such approach Chinnappa Reddy J speaking for the Bench in *Rana Pratap and others vs. State of Haryana*⁵ observed the following;

"6. Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was

5 (1983) 3 SCC 327

unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

Approving the above view, S.B. Sinha J., in *Dinesh Borthakur Vs. State of Assam*⁶ succinctly explained how guilt should not be inferred because of a particular type of reaction by an individual. The relevant parts are extracted below: -

"47. No hard-and-fast rule having any universal application with regard to the reaction of a person in a given circumstance can, thus, be laid down. One person may lose equilibrium and balance of mind, but, another may remain a silent spectator till he is able to reconcile himself and then react in his own way. Thus, merely because the appellant did not cry or weep on witnessing the dead bodies of his wife and daughter, cannot be made the basis for informing (sic inferring) his guilt."

6 (2008) 5 SCC 697

The above pronouncements in our view rightly prescribe that there can be no uniform or universal reaction for a crime witness and inferences must not be drawn on Court's assumption.

19. The fact that the appellant Surendra Kumar chose to first inform Baldev that his daughter was shot by miscreants instead of confronting the miscreants or informing the police, is not an unnatural reaction. Moreover, since Baldev on being informed had immediately registered the FIR at the Police Station, there was no occasion for either of the appellants to file a second FIR on the same crime. Therefore, the so called suspicious conduct after the incident, was wrongly inferred only because the appellant reacted in a particular manner. In the process, the Court failed to notice the vital fact that Baldev was informed of his daughter's killing by appellant Surendra. This conduct of the appellant makes it equally plausible that Surendra was innocent and had decided to act prudently instead of showing courage to the armed criminals.

20. We may also note here that the scooter in which Kamla Rani was travelling, was a dowry gift by her father and the appellant Surendra after informing the father about the incident, left the scooter in his custody. Only then, Surendra rushed back to his own village to inform about the incident to his brother and father. Next day, the same scooter was recovered by the police from the residence of Baldev. This would corroborate that Baldev learnt of the crime from the appellant Surendra. If Surendra was actually involved in the crime, would he have straight away proceeded to the village of the deceased to inform her father of the incident. The appellant may not have confronted the robbers nor suffered any injury. But this by itself cannot in our view lead to an inference that it was he, who murdered Kamla Rani.

21. Another key link in the chain of circumstances to connect Surendra with the murder was the fact that he was the last person to be seen alive with Kamla Rani and his alleged unnatural conduct after the incident. On being confronted with the armed miscreants, Surendra perhaps was too intimidated to offer any fight or

resistance. The accused did not try to do anything valiant at the place of occurrence and instead straight away drove down to inform the deceased's father, at his village. With this information, Baldev managed to lodge the FIR. The police seized the scooter the next day from Baldev's residence. The scooter was a dowry gift and following the death of the newly married Kamla Rani, Surendra might have considered it appropriate to entrust the scooter to the deceased's father. The FIR and the scooter seizure memo (Exbt Ka-2) clearly show that Surendra did not run away as it has been assumed by the courts below. Confronted by the armed robbers, Surendra may not have counter attacked to invite injury upon himself but this by itself can't be construed as suspicious conduct. Yet his post incident conduct was found to be suspicious enough by the courts below, to link him with the murder. In the present case, no criminal act is attributed to Surendra and conspiracy between him and the two armed miscreants is not shown. Therefore to link the appellant with the murder is nothing more than a matter of surmises and conjectures. In fact, the evidence on record is consistent with the

statement given by Surendra under Section 313 of the CrPC where he stated that near the forest area of Bathnor village, two armed miscreants stopped the scooter and shot his bhabhi and looted away the jewellery from her person. The appellant immediately informed about the incident to the father of the deceased. Thereafter he has also informed Ramveer (husband of the deceased). Then Surendra, Ramveer and their father Om Prakash reached the police station with the Gram Pradhan. But appellant Surendra, Om Prakash and Ramveer were detained on suspicion by police. Reading the evidence in the case, we feel that Surendra's explanation in his Section 313 statement is quite plausible but was not appropriately appreciated which has led to failure of justice against the accused.

22. Similarly for the husband Ramveer, there is no direct evidence to establish his role in the incident. As his conviction is entirely based on a conspiracy theory, it is essential to determine whether there was an agreement between the parties for doing an unlawful act and it must emerge clearly from evidence that there

was meeting of mind towards a common goal between Ramveer and his brother and also between Ramveer and the two armed robbers. The case evidence on record does not however establish any such agreement between Ramveer and the other accused. Conspiracy is a matter of inference and inference must be based on solid evidence. In case of any doubt the benefit must inevitably go to the accused. The 2nd appellant's conviction simply because of his dislike for the deceased, even if accepted to be correct, would not in our opinion be justified in the absence of any evidence either direct or of conspiracy, to link him with the crime.

23. The conspiracy theory to kill Kamla Rani, only because she was not liked by her husband is far too improbable to accept since the prosecution failed to present any evidence to show meeting of minds and common intention of all accused. Ramveer may not have been happy with his wife but this by itself does not establish that he hatched a conspiracy with his brother Surendra and his father Om Prakash (who died during trial), to kill Kamla Rani. The simple fact of being

unhappy with a person even if accepted, do not provide a strong enough motive to hatch a conspiracy to eliminate the person. But this aspect was ignored by the Court below to attribute motive for the murder. In our assessment the motive element in the chain of circumstances is not acceptable and the benefit of the broken link must be made available to the appellants.

24. In view of the foregoing, we are of the considered opinion that there are several missing components in the chain of circumstantial evidence and the High Court misdirected itself in finding support for conviction on such unclinching evidence. The innocence of the appellants is a distinct possibility in the present matter and when two views are possible the benefit must go to the accused. The impugned judgment is accordingly set aside with direction for immediate release of both appellants. It is ordered accordingly.

25. The appeal stands allowed with the above order.

.....J.
[ROHINTON FALI NARIMAN]

.....J.
B.R. GAVAI]

.....J.
HRISHIKESH ROY]

NEW DELHI
APRIL 20, 2021