

Before Rajeev Sharma & Harinder Singh Sidhu, JJ.

NAWAL KISHORE ALIAS KALA—Appellant

versus

STATE OF HARYANA—Respondent

CRA-D No.432-DB of 2005

November 17, 2018

A) Indian Penal Code, 1860—S.302—Murder—Evidence Act, 1872—Case based on circumstantial evidence—As per prosecution, there was enmity between accused and deceased—However, no evidence to prove animosity—Held, motive plays an important role in case based upon circumstantial evidence—No motive attributed to accused except animosity which could not be proved—Appeal allowed.

Held, that there is no eye witness in this case. Tilak Raj PW-3 has been produced to prove the last seen circumstance. According to him, on 15.06.2004 at about 7.30 p.m. he was going on bicycle from Sunaria Chowk to Bhiwani Chowk via circular road. He met the accused. He asked about their presence at the spot. The accused told that they were searching for pig. He stayed overnight in the house of his maternal uncle. However, he deposed that it has not come in his statement recorded under Section 161 Cr.P.C. that he stayed overnight in his maternal uncle's home.

(Para 24)

B) Indian Penal Code, 1860—S.302—Evidence Act, 1872—Extra judicial confession—Case of prosecution that appellants made extra judicial confession before PW-2 Satpal—Held, he was not holding any authority—Extra judicial confession weak kind of evidence and can be used only as corroboration—When witnesses were informed about incident by accused himself they did not immediately inform police but went on to search for dead body of deceased—Conduct of witnesses unusual and unnatural—Prosecution failed to prove case beyond reasonable doubt—Order of conviction and sentence set aside.

Held, that according to PW-1 Shiv Kumar, Shekhu @ Abhishek had come to his house at 6 p.m. on 15.06.2004. The case of prosecution is that there was enmity between the appellants and Monti. However there is no evidence on record to prove that there was animosity

between Monti and the appellants. In case there was any enmity or animosity between Monti and the appellants, there was no occasion for him to go with Shekhu and even the father would not have permitted Monti to go with him. It is strange that the appellants have informed about the incident to PW-2 Satpal instead of PW-1 Shiv Kumar.

(Para 25)

Further held, that even assuming PW-2 Satpal was informed about the incident, they should have immediately informed the police or arranged the ambulance. They neither informed the police nor tried to get the ambulance, instead they went to search the dead body of Monti. It has come in the evidence that police station was between the residence of PW-1 and sugar mill. They had also not informed the CIA staff. The conduct of PW-1 Shiv Kumar and PW-2 Satpal is unusual and unnatural. Statement of PW-3 Tilak Raj does not inspire confidence because he has not stated to the police under Section 161 Cr.P.C. that he had stayed overnight with his maternal uncle. The case of the prosecution is that the appellants have also made extra judicial confession before PW-2 Satpal. He is not a person holding any authority. It is settled law that extra judicial confession is a weak kind of evidence and it, at the most, can be used as corroboration. The case of the prosecution is based on circumstantial evidence. In the present case the chain is not complete. The motive plays important role in the case based upon circumstantial evidence. In the instant case it is reiterated that the prosecution has not attributed any specific motive to the appellants except that there was some animosity between the parties. However the details of the same have not been given. It is also not believable why the persons who had killed a person would inform the family members.

(Para 26)

N.C. Kinra, Advocate in CRA-D-432-DB-2005; Sanjay Verma, Advocate in CRA-D-799-DB-2005; *for the appellant*.

Vishal Garg, Addl.A.G. Haryana.

RAJEEV SHARMA, J.

(1) Since common question of law and facts are involved in the aforesaid appeals, therefore these are taken up together and disposed off by a common judgment.

(2) These two appeals are instituted against the judgment dated 30.04.2005 rendered by the Additional Sessions Judge, Rohtak in Sessions case no.4 of 2005.

(3) The appellants were charged with and tried for offence under Section 302 read with Section 34 of the Indian Penal Code (in short 'IPC'). Vide judgment and order dated 30.04.2005, the appellants were convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- each and in default of payment of fine, they were ordered to further undergo rigorous imprisonment for a period of 3 years for offence under Section 302 read with Section 34 IPC.

(4) The case of the prosecution in a nutshell is that on 16.06.2004 at about 11.15 a.m. Complainant Shiv Kumar PW-1 came to the Police Post, New Grain Market, Rohtak. He recorded his statement Ex.P1 to the effect that he was working as a Sweeper in All India Radio Station, Rohtak. On 15.06.2004, at about 6 p.m. he and his son Rohan @ Monti (since deceased) were present in his house. One of the accused Abhishekh @ Shekhu came to his house and took away Monti with him. At about 9 or 9.30 p.m. a telephonic message was received by his brother Satpal PW-2 in his house from the accused that after giving knife injuries to Monti, he was thrown by them near dirty drain of Sugar Mill, Rohtak and they may take care of him. PW-1 Shiv Kumr along with his brother PW-2 Satpal and brother's son Harminder Singh went towards Sugar Mill and searched for Monti but he could not be traced. In morning of 16.06.2004 they again went in search of Monti. They found his naked dead body lying on the berm of dirty drain of Sugar Mill, Rohtak, having many stabs wound injuries. Thereafter he deputed his brother Satpal and brother's son Harminder Singh to guard the body. He reported the matter to the police. Police reached the spot. FIR was registered. The dead body was sent for post mortem examination. The matter was investigated and challan was put in the Court after completing all the formalities.

(5) Prosecution examined number of witnesses. The statement of appellants were also recorded under Section 313 Cr.P.C. They have denied the case of the prosecution. The appellants were convicted and sentenced as noticed hereinabove. Hence this appeal.

(6) Learned counsel appearing for the appellants have vehemently argued that the prosecution has failed to prove the case against the appellants.

(7) Learned counsel appearing on behalf of the State has supported the judgment dated 30.04.2005.

(8) We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

(9) PW-1 Shiv Kumar has testified that he was working as Sweeper in All India Radio Station, Rohtak. On 15.06.2004 at about 6 p.m., he and his son Monti @ Rohan were present at his house. Shekhu @ Abhishek son of Pardeep came to his house and took away his son with him. At 9.30 p.m. Satpal his brother came to his house and told him that he had received telephonic message that Rohan is lying in injured condition near *Ganda Nala* of Sugar Mill, Rohtak. Thereafter he along with his brother and brother's son went towards Sugar Mill. He tried to trace out his son. It was only in morning of 16.06.2004, they found the dead body of Rohan near Sugar Mill. He deputed Satpal and Harminder to guard the body. He went to the Police Station and lodged the FIR.

(10) In his cross-examination he deposed that he has no telephone connection. He has categorically admitted that he has never informed the police in the night of 15/16.06.2004. Even after the information received by his brother on 15.06.2004, they did not lodge the report even in the morning on 16.06.2004.

(11) PW-2 Satpal is another material witness. He testified that on 15.06.2004 at about 9/ 9.30 p.m. he received telephonic call from the accused that they have killed Monti by giving knife blows. The body was lying near *Ganda Nala*, Sugar Mill, Rohtak. Thereafter phone call was disconnected. He immediately went to the house of his brother to inform him. His brother told him that Monti had gone with Shekhu at about 6 p.m. Thereafter he along with his brother and nephew Harminder went in search of Monti. They did not find the body of Monti. However in the morning of 15.06.2004 at about 5.30 a.m. they again left to trace the body of Monti. They found the naked dead body of his nephew Monti in pool of blood. According to him on 16.06.2004 at about 2 / 2.30 p.m. accused had come to him. Their faces were muffled. They made an extra judicial confession before him that they have killed Monti. He admitted in his cross-examination that old *sabzi mandi* police post is nearer to their *mohalla*. It was situated at a distance of 1 / 1½ km. from their house. Police Station City Rohtak falls in the way when they go to Sugar Mills, Rohtak. Volunteered that they had gone to sugar mill via *Mata Darwaja*. They have also not informed the CIA staff.

(12)PW-3 Tilak Raj testified that on 15.06.2004 at about 7.30 p.m. he was going on bicycle from Sunaria Chowk to Bhiwani Chowk, via circular road. He reached near *Ganda Nala*. He saw Banti, Monti, Shekhu, Mandip and Lala there. He asked them about their presence. They replied that they were searching for the pig. In his cross-examination he has admitted that he had left his office at 5 p.m. on 15.06.2004. In his cross-examination, he has admitted that he had not told the police that he stayed overnight in the house of his maternal uncle.

(13)PW-4, PW-5, PW-6 are formal witnesses.

(14)PW-7 Surinder Kumar deposed that he was deputed to go to the Sugar Mill, *Ganda Nala*, Rohtak. He reached there. He took three snaps of the dead body from different angles.

(15)PW-8 Pawan Kumar stated that he was posted as Patwari. He prepared the Aks shajra of the place.

(16)PW-9 is Dr.Deepa Jakhar. She had conducted the post mortem examination. She had noticed the following injuries:

“1. Incised wound on front of chest on right 7th inter costal space, 2 inch from midline, size 2x1 cm., clotted blood was present. Depth into muscle.

2. Incised wound of size 2x1 cm. on front of chest in left 7th inter costal space, 2 inch from midline, clotted blood was present. Depth into muscle.

3. Incised wound of size 2 x 1 cm. on front of chest in left 9th inter costal space, 2 inches from midline, clotted blood was present, depth into abdominal cavity.

4. Incised wound of 2x1 cm. on anterior abdominal wall on left side, 7 cm. below injury no.3, clotted blood was present.

5.Incised wound of 2x1 cm. on anterior abdominal wall 5 cm., above umblicus half inch lateral to midline to left. Depth in to abdominal cavity.

6. Incised wound of size 2x1 cm. on anterior abdominal wall 4 cm. above umblicus on right side, clotted blood was present. Extending into abdominal cavity.

5. Incised wound 2 x 1 cm. on anterior abdominal wall on right side just below rib cage, 11 cm. from umbilicus, clotted blood was present, extending into abdominal cavity.

6. Incised wound of size 2 x 1 cm. in neck at level of thyroid cartilage anteriorly, with clotted blood.

7. Incised wound of 2x1 cm. in neck, one inch above injury no.8 with clotted blood.”

(17) According to her, the cause of death was shock and hemorrhage as a result of injuries described by her in the post-mortem report. The same were ante mortem in nature and sufficient to cause death in ordinary course of nature.

(18) PW-10 Ram Dayal has identified the dead body on 16.06.2004.

(19) PW-11 ASI Balwan Singh is formal witness.

(20) PW-12 Anil Kumar has made deposition about the recovery of weapon of offence.

(21) PW-13 Inspector/SHO Inder Singh stated that he recorded statement of Satpal. He interrogated the accused. Accused had disclosed about the concealment of the knife.

(22) PW-14 ASI Ramphal had inspected the dead body and had prepared rough site plan. He prepared the inquest report. He collected the blood stained earth and clothes of deceased.

(23) What emerges from the statements discussed herein above is that Shekhu @ Abhishek had come to the house of PW-1 Shiv Kumar. He had taken away Monti with him. Thereafter brother of PW-1 Shiv Kumar (PW-2 Satpal) received a telephonic message that Monti was killed and his body was lying near *Ganda Nala*, Sugar Mill. The complainant, i.e. PW-1 and PW-2 along with Harminder went to the spot. They could not trace the body. The body was traced in the morning of 16.06.2004. It was sent for post-mortem examination.

(24) There is no eye witness in this case. Tilak Raj PW-3 has been produced to prove the last seen circumstance. According to him, on 15.06.2004 at about 7.30 p.m. he was going on bicycle from Sunaria Chowk to Bhiwani Chowk via circular road. He met the accused. He asked about their presence at the spot. The accused told that they were searching for pig. He stayed overnight in the house of his maternal uncle. However, he deposed that it has not come in his statement

recorded under Section 161 Cr.P.C. that he stayed overnight in his maternal uncle's home.

(25) According to PW-1 Shiv Kumar, Shekhu @ Abhishek had come to his house at 6 p.m. on 15.06.2004. The case of prosecution is that there was enmity between the appellants and Monti. However there is no evidence on record to prove that there was animosity between Monti and the appellants. In case there was any enmity or animosity between Monti and the appellants, there was no occasion for him to go with Shekhu and even the father would not have permitted Monti to go with him. It is strange that the appellants have informed about the incident to PW-2 Satpal instead of PW-1 Shiv Kumar.

(26) Even assuming PW-2 Satpal was informed about the incident, they should have immediately informed the police or arranged the ambulance. They neither informed the police nor tried to get the ambulance, instead they went to search the dead body of Monti. It has come in the evidence that police station was between the residence of PW-1 and sugar mill. They had also not informed the CIA staff. The conduct of PW-1 Shiv Kumar and PW-2 Satpal is unusual and unnatural. Statement of PW-3 Tilak Raj does not inspire confidence because he has not stated to the police under Section 161 Cr.P.C. that he had stayed overnight with his maternal uncle. The case of the prosecution is that the appellants have also made extra judicial confession before PW-2 Satpal. He is not a person holding any authority. It is settled law that extra judicial confession is a weak kind of evidence and it, at the most, can be used as corroboration. The case of the prosecution is based on circumstantial evidence. In the present case the chain is not complete. The motive plays important role in the case based upon circumstantial evidence. In the instant case it is reiterated that the prosecution has not attributed any specific motive to the appellants except that there was some animosity between the parties. However the details of the same have not been given. It is also not believable why the persons who had killed a person would inform the family members.

(27) Their Lordships of the Hon'ble Supreme Court in *Shivasharanappa and others versus State of Karnataka*¹ have held that the court cannot be oblivious to the conduct that is too unnatural even taking into account unpredictability of human conduct and lack of uniformity in human reaction. Court must determine whether in

¹ (2013) 5 SCC 705

circumstances of case, behavior of witnesses concerned is acceptably natural allowing for variations and if behavior is absolutely unnatural, testimony of witness may not deserve credence and acceptability. Their Lordship have held as under.

“19. In *Gopal Singh and others v. State of Madhya Pradesh*, this Court did not agree with the High Court which had accepted the statement of an alleged eye witness as his conduct was unnatural and while so holding, it observed as follows: -

We also find that the High Court has accepted the statement of Feran Singh, PW 5 as the eye witness of the incident ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the suspicious and unacceptable plea that he feared for his own safety.

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22. Thus, the behaviour of witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behaviour is acceptably natural allowing the variations. If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance.”

(28) Their Lordships of the Hon'ble Supreme Court in *Lahu Kamlakar Patil and another versus State of Maharashtra*² have held that though there cannot be uniformity in human reaction, it is also to be borne in mind that if conduct of witness is so unnatural and is not in accordance with acceptable human behaviour even allowing for variations, then his testimony becomes questionable and is likely to be discarded. Their Lordships have held as under:

“22. The attack is based on the grounds, namely, that the said witness ran away from the spot; that he did not intimate

² (2013) 6 SCC 417

the police about the incident but, on the contrary, hid himself behind the pipes near a canal till early morning of the next day; that though he claimed to be eye witness, yet he did not come to the spot when the police arrived and was there for more than three hours; that contrary to normal human behaviour he went to Pune without informing about the incident to his wife and stayed for one day; that though the police station was hardly one furlong away yet he did not approach the police; that he chose not even to inform the police on the telephone though he arrived at home; that after he came from Pune and learnt from his wife that the police had come on 21.2.1988, he went to the police station; and that in the backdrop of such conduct, his version does not inspire confidence and deserves to be ignored in toto.

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26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individual to individual. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accordance with acceptable human behaviour allowing of variations, then his testimony becomes questionable and is likely to be discarded.

27. Keeping in mind the aforesaid, we shall proceed to scrutinize the evidence of PW-2. As is evincible from his deposition, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune. He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to

contact the police from his residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed that the police had come and that Bhau, who had accompanied him, was dead. It is interesting to note that in the statement under Section 161 of the Code, he had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that Bhau was dead was also not mentioned. One thing is clear from his testimony that seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any family member and leaving for Pune and not telling anyone there defies normal human behavior. He has also not stated anywhere that he was so scared that even after he reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion Bhau had died, he went to the police station. We are not oblivious of the fact that certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed. But in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. The learned trial court as well as the High Court has made an endeavour to connect the links and inject theories like fear, behavioural pattern, tallying of injuries inflicted on the deceased with the Post Mortem report and convicted the appellants. In the absence of any kind of clinching evidence to connect the appellants

with the crime, we are disposed to think that it would not be appropriate to sustain the conviction.”

(29) Their Lordships of Hon’ble Supreme Court in ***Dandu Jaggaraju versus State of Andhra Pradesh***³ have held that in a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution. Their Lordships have held as under:-

“9. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story.”

(30) Their Lordships of Hon’ble Supreme Court in ***Pudha Raja and another versus State, represented by Inspector of Police***⁴ have held that the motive assumes great significance and importance in case of circumstantial evidence and absence of motive puts court on its guard and causes it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. Their Lordships have held as under:-

“16. Furthermore, in such a case, motive assumes great significance and importance, as the absence of motive puts the court on its guard and causes it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not take the place of proof. The evidence regarding existence of motive which operates in the minds of assailants is very often, not known to any other person. The motive may not even be known, under certain circumstances, to the victim of the crime. It may be known

³ (2011) 14 SCC 674

⁴ (2012) 11 S.C. C 196

only to the accused and to none other. It is therefore, only the perpetrator of the crime alone, who knows as to what circumstances prompted him to adopt a certain course of action, leading to the commission of the crime.”

(31) Their Lordships of Hon’ble Supreme Court in *Rishi Pal* versus *State of Uttarakhand*,⁵ have held that while motive does not have a major role to play in cases based on eye witness account of incident, it assumes importance in cases that rest entirely on circumstantial evidence. Their Lordships have further held that essence of requirements that must be satisfied in cases resting on circumstantial evidence is that not only should circumstances sought to be proved against the accused be established beyond reasonable doubt, but also that such circumstances form so complete a chain, as leaves no option for court, except to hold that accused is guilty of offences with which he is charged. Their Lordships have held as under:-

“14. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased, for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en

⁵ (2013) 12 SCC 551

route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See *Sukhram v. State of Maharashtra* (2007) 7 SCC 502, *Sunil Clifford Daniel (Dr.) v. State of Punjab* (2012) 8 SCALE 670, *Pannayar v. State of Tamil Nadu by Inspector of Police* (2009) 9 SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.

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19. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so, the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a

fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered.”

(32) The prosecution has failed to prove the case against the accused beyond reasonable doubt.

(33) Accordingly the appeals are allowed. The judgment and order dated 30.04.2005 are set aside. The appellants are on bail. Their bail bonds and surety bonds are discharged.

Angel Sharma