

CASE NO.:
Appeal (crl.) 409-410 of 1996

PETITIONER:
State of U.P.

RESPONDENT:
Arun Kumar Gupta

DATE OF JUDGMENT: 08/01/2003

BENCH:
N. Santosh Hegde & B.P. Singh.

JUDGMENT:

J U D G M E N T

SANTOSH HEGDE, J.

The above appeals are filed against the judgment of the High Court of judicature at Allahabad, Lucknow Bench, whereby the High Court allowed the Criminal Appeal filed by the respondent against his conviction and dismissed the Criminal Reference made by the third Additional Sessions Judge Unnao for confirmation of death sentence awarded to the respondent.

The respondent herein and five others were charged for offences punishable under Sections 302 and 364 IPC before the said Trial Court at Unnao for having caused the death of one Rakesh Kalra on 27th of May, 1988. The learned Sessions Judge while acquitting five of the accused persons found the respondent herein guilty of offence punishable under Section 302 for which he was awarded death penalty. The respondent was found guilty of offence under Section 364 IPC for which he was awarded life imprisonment. As stated above the appeal filed by the respondent was allowed by the High Court, while the reference made by the Sessions Judge was rejected consequently, the judgment and conviction recorded by the Trial Court came to be set aside.

The prosecution case in brief is that deceased, Rakesh was a good friend of respondent and he had lent a sum of Rs. 10,000/- to the respondent, which the respondent was avoiding to pay in spite of the repeated request from the deceased. It is the case of the prosecution on 27th of May, 1988 when the deceased had gone to the shop of PW-2 Chandraprakash, to solicit insurance policies, the respondent came to the shop of PW-2 at about 2.30 P.M. on his scooter UGO 6070 and told the deceased that he has made arrangement for repaying his loan. Therefore, he should come with him to collect the money. The further case of the prosecution is that the deceased accompanied the respondent on his scooter and went towards the refugee colony. Thereafter, the whereabouts of the deceased was not known. Therefore, at about 6.30 P.M. in the evening, PW-1, Satyapal, father of the deceased being worried about the welfare of his son came to the shop of PW-2 inquiring about the whereabouts of the deceased. Then PW-2 supposed to have told PW-1 about the respondent coming and taking the deceased from his shop in the afternoon therefore, both PW-1 and PW-2 went to the house of the respondent, where from a distance they saw the front door of the house of the respondent was locked. These witnesses then returned to their respective homes. The further case of the prosecution is on the next day i.e. on 28th of May, 1988 at about 7.30 P.M. PW-1 went to the house of PW-2 and told him that there was no news of his

son or of the respondent. Therefore, he decided to lodge a police complaint which was dictated by PW-1 to PW-2, and the same was lodged with the police on that evening.

The prosecution further states that about 10 P.M. the police went to the house of the respondent and tried to break open the lock of the house. When this news of police having gone to the house of the respondent was heard by PW-2, who incidentally, resides close by, he went to the house of the respondent and witnessed the lock of the house being broken. On entering the house the police recovered a body, packed in a sack in the gallery of the house of the respondent which when opened was found to be the body of Rakesh. On search of the dead body they found a sum of Rs. 566.50 from the inner pocket of the pant of the deceased which was blood stained. Same was recovered under panchnama exhibit-2. The prosecution further states at the time of the inquest held by the PW-9 that they found a blood stained knife which was also seized and they also collected blood stained earth from the house of the respondent under different panchnamas.

The prosecution further states that when the police searched for the respondent, he was not available hence he was declared as an absconder by the competent court. Prosecution states later he was arrested on 4th of June, 1988 from Pillibhit. During the course of further investigation, the prosecution came to know that PW-3, Lilalddhar who was also residing near the house of the respondent in Punjabi colony had seen the deceased and respondent entering the house of the respondent at about 3.00 or 3.15 P.M. on 27th of May, 1988. It is the case of the prosecution that thereafter, the deceased was not seen alive.

The prosecution further states that the respondent with the help of the other accused persons had abducted the deceased because the respondent was offended by the constant demand made by the deceased for the return of the money which according to the prosecution had defamed the respondent.

On the basis of the above prosecution case, the Trial Court came to the conclusion that prosecution has established beyond all reasonable doubt that the respondent was responsible for the abduction and murder of the deceased. It however held that the prosecution has failed to establish the same as against other accused persons, consequently it acquitted the said accused persons while it convicted the respondent of offences punishable under Sections 302 and 364 IPC and having come to the conclusion that the offence was one of the rarest of the rare cases calling for capital punishment decided to impose that punishment on the respondent, hence made the reference to the High Court as stated above. The trial court also found the respondent guilty of the offences punishable under Section 364 IPC for which a sentence of life imprisonment was awarded to the respondent.

While coming to the said conclusion, the trial court noticing the fact that the prosecution case was based on circumstantial evidence, came to the conclusion that following circumstances were clearly established by the prosecution against the respondent. They are;

- a) Deceased Rakesh and respondent, A.K. Gupta were good friends.
- b) That the respondent was in need of money and had borrowed a sum of Rs. 10,000/- from the deceased which the latter was repeatedly demanding to be repaid.
- c) On 27.5.1988 the respondent had come to the shop of PW-2 when the deceased was there and told him in the presence of PW-2 that he had made arrangement for the repayment of money, therefore, the deceased should come and collect the same from his house.
- d) Deceased went along with the respondent on his scooter.
- e) The deceased was seen entering the house of the

respondent accompanied with respondent at about 3.00 to 3.15 p.m. by PW-3.

f) Even though the respondent was residing in the house in question, the house was found locked on the evening of 27.5.1988 when PW-1 and PW-2 went to inquire about the deceased.

g) Dead body of the deceased was recovered from the house of the respondent on the night of 28.5.1988 along with a blood stained knife and blood stained earth.

h) The respondent was absconding and was arrested only on 4th of June, 1988. The Scooter belonging to the respondent bearing Number UGO 6070 was recovered at the instance of one of the accused persons.

From the above circumstances, the learned Sessions Judge came to the conclusion that all the links necessary to form a complete chain of circumstances has been proved beyond reasonable doubt against the respondent and on that basis it convicted the respondent.

The High Court per contra on re-appreciation of the evidence, came to the conclusion that though some of the links in the chain of circumstances like;

i) Respondent and deceased were friends and used to visit each other;

Deceased had advanced money to the respondent; Still it came to the conclusion that the prosecution has not established the fact that deceased was last seen with the respondent, the body of the deceased was found in the house of the respondent or the knife and blood stained earth was recovered from the house of the respondent. According to the High Court these facts being important links in chain of circumstantial evidence the same having not being established, it held it not safe to base a conclusion.

In these appeals, the learned counsel for the state contended that the high court having accepted the finding of the learned Sessions Judge in regard to some of the circumstances relied on by the prosecution erred in rejecting some other circumstances without properly appreciating the evidence in that regard. It is contended that from the evidence of PWs. 2 and 3 it is very clear that the deceased was taken by the respondent to his house and thereafter he was not seen alive and the prosecution has established the fact that the dead body of the deceased was found from the house of the respondent, wherein he was staying with his family. The learned counsel also pointed out that the fact that the respondent was missing from the afternoon of 27th May, 1988 which also indicates the guilt of the accused person. He also argued that the prosecution has established the motive for the murder.

On the contrary, on behalf of the respondent, it is contended that the High Court was justified in disbelieving the evidence of PWs.2 and 3, who speak about the meeting of the accused with the deceased on the afternoon of 27th May, 1988, as also both of them entering the house of respondent around 3.00 or 3.15 P.M. on 27th May, 1988. In regard to the evidence of PW-2, the learned counsel contended that he belongs to the same biradari of PW-1, the father of the deceased and had taken an extraordinary interest in the investigation of this case. Therefore, his evidence should be very cautiously considered. We will be discussing the evidence of PW-2 separately when we take up for consideration the discoveries made during the course of the investigation. Suffice it to note at this stage that the High Court has cast very serious doubt on the veracity of the evidence of this witness.

In regard to PW-3, the learned counsel contended that if we carefully consider the sequence of events as narrated by

this witness, it is clear that this witness could never have seen the deceased and the respondent near the house of respondent at about 3.30 P.M. on that date. He drew our attention to that part of the evidence of PW-3 wherein he had stated that after lunch he had left his house around 2 P.M. and his house is about 30 to 35 meters from the respondent's house. If that be so, this witness having left his house at 2 p.m. he could not have been near the house of the respondent at about 3.30 P.M. Learned counsel also pointed out the discrepancy in the evidence of this witness as to when he informed of this fact to PW-1 and also as to the delay in informing the I.O., PW-9 this factum of he having seen deceased and the respondent on that afternoon. The learned counsel also pointed out that even according to the prosecution, the respondent was staying in the house in question with his wife and young children, if that be so, it is highly improbable that any reasonable person would take the deceased to that house where the family is living to commit such a ghastly crime, hence the recovery of the dead body, knife and bloodstained earth is a concocted story. He also pointed out that the high court was justified in rejecting the recovery of the bloodstained knife and earth from the house of the respondent because the prosecution did not send those blood stained knife and the blood stained earth to the serologist for examination, failure to do so according to the learned counsel throws very serious doubt on this point of the prosecution case. In support of this contention the learned counsel relied upon the judgment of this court in the case of Laxmi Singh Vs. State of Bihar (AIR 1976 SC 2263). The learned counsel then pointed out though PW-1 and 2 knew about the incidence in the shop of PW-2 on the afternoon of 27th May, 1988 and that they had suspected the respondent of having abducted the deceased on that very day itself, inspite of the same no complaint was lodged till late evening of 28th May, 1988, which also shows that entire prosecution case was built up after the dead body of the deceased was found somewhere. He further pointed out from the topography of the area where the dead body of the deceased was found that it was a crowded locality with number of houses and shops still none of the independent witnesses like the immediate neighbour or others who reside in that locality or those who had assembled at the time of the alleged recovery of the dead body have been examined and for reason better known only a few selected persons were involved in the investigation and examined as witness by the prosecution. In this regard he pointed that PW-4, though not on immediate neighbour of the house of respondent, he was summoned from his house to witness the recoveries. Learned counsel points out that this witnesses happened to be a member of the biradari of the PW-1 and resides behind the house of the I.O., PW-9. Elaborating this point the learned counsel argued when there were so many independent people available at the spot, the prosecution has not explained why particular persons had to be summoned from places away from the house where the search was taking place. He also pointed out that this very witness has been made the panch for all the recoveries made by the prosecution which also speaks about the credibility of this witness. Learned counsel then pointed out the various contradictions in the evidence of the prosecution witnesses as to the breaking open of the lock of the respondents' house, switching on of the light in that house and in regard to the presence of PW-9, the I.O. at the time of the search. The learned counsel pointed out from the evidence of PW-9 himself it is seen that he was there only till 11.30 P.M. in the night when the inquest and seizure were going on in the house. While from the evidence of PW-7, the other police officer he pointed out that this witness, PW-9 was

present through out the night till next morning when the search memos were prepared. He then pointed out from the recovery punchnama that the same have come into existence on the morning of 29th of May, 1988 therefore, he contended that it is possible that almost all these recoveries including that the dead body was made only on 29th of May, 1988 and thereafter the complaint as presently found on record was lodged. We have heard the learned counsel and perused the records of the case and we are inclined to concur with the judgement of the high court. As pointed out by the high court that the prosecution though has been able to establish some of the links in the chain of circumstances, it has failed to establish some of the vital links beyond all reasonable doubts. Therefore, the high court was justified in coming to the conclusion that the chain of circumstances in this case is not complete. On examining the evidence of Liladhar, (PW-3), who allegedly saw the deceased with respondent entering the house of the respondent on 27th of May, 1988 at about 3.00 to 3.30 P.M. we notice that even in his examination in chief had admitted that he did not inform this fact to the father of the deceased, who at that point of time was searching for the deceased. Though, in the cross-examination, he has tried to fill in this omission, we think this circumstance is of such importance and if really he had noticed the deceased entering the house of the respondent on that afternoon, he would not have failed to mention this in his examination in chief itself, which omission should be taken note of while appreciating his evidence. Then we notice that this witness also belongs to the same biradari of PW-1 and was on visiting terms with him. Thus he is also an interested witness. He also stated in his evidence that factum of seeing the deceased entering the house of the respondent was mentioned by him for the first time to the investigating officer when his statement was recorded even though ample opportunity was there to mention the same earlier. This coupled with the fact that the explanation given by him as to his presence near the house of the respondent on the afternoon being doubtful we think the high court was justified in coming to the conclusion that the evidence of this witness is not wholly reliable. We will next discuss the probability of the recovery of the dead body from the house of respondent. In this regard, we have already noted the argument of the learned counsel for the respondent. Even according to the prosecution, the house in question belongs to the respondent and he was staying in that house with his family consisting of his wife and young children. The house is situated in a crowded locality and large number of other houses and shops are in the close vicinity. We agree with the learned counsel for the respondent that no reasonable person would commit a ghastly murder like the one with which we are concerned by taking the victim to such a house where his family was residing. Prosecution has not produced any material to show either the presence or absence of the family members of the respondent at the time of the murder in the house. That apart it is highly unlikely that neighbours and passersby would not have been attracted if really the deceased, who suffered as many as 30 injuries was murdered in that house. Therefore, in all probability, the murder of the deceased was not committed in the house of the respondent.

We will now consider the recovery of the dead body, the bloodstained knife, the bloodstained earth and such other things from the house of the respondent.

In this regard, the prosecution relies on the evidence of PW-4. We have earlier noticed PW-4 is not a resident in the immediate proximity of the house of the respondent. He belongs to the same biradari of the complainant and lives behind the house of the Investigating Officer, PW-9. We find no

reasonable explanation why such a person was called to be a witness to the recovery when there were any number of people available and who are residents of the houses in the immediate proximity of the house of the respondent. We also notice from the records that large number of people were present at the time of the recovery, therefore, prosecution should have come forward with some explanation why PW-4 was so selectively chosen to be the witness for the recoveries. We also notice, though the preparation of memos of the recoveries took a long time still for all the recoveries PW-4 is a common witness. There is also considerable discrepancy in regard to the manner in which PW-4 came to be a witness to the recoveries. From the evidence on record, it is seen that at one place it is stated that PW-4 had come to the house of respondent on hearing the commotion that took place because of the breaking open of the lock of the house. At another place, we find that I.O. PW-9 had summoned PW-4 from his house to be a witness for the recovery. This discrepancy also adds to the doubt in regard to the evidence of PW-4, therefore, in our opinion as held by the High Court it is not safe to rely on the evidence of this witness. PWs-7 and 9 who were police officers are also witnesses, who speak about the recoveries made from the house of the respondent. PW-9 at one point says that all the recoveries in question, were made by him and he left the house of the respondent around 11.00 or 11.30 P.M. in the night of 28th of May, 1988. While PW-7 who also present at that point of time says that PW-9 was there throughout the night of 28th of May, 1988 till the morning of 29th of May, 1988 when the recoveries were completed. Thus we find a material contradiction in the evidence of these two witnesses. From the records, we see that the recoveries of the bloodstained knife, the bloodstained earth was made on 29th of May, 1988. And according to the PW-9 he had made the recoveries and he had left the place by about 11.30 P.M. in the night. It is not possible to reconcile these two facts if actually PW-9 was the person responsible for preparing the recovery memos then, the date 29th May does not fit into prosecution case since according to this witness himself he left about 11.30 in the night of 28th of May, 1988. Therefore, there is force in the arguments of the learned counsel for the respondent that these recoveries can not be believed more so in the background of the fact that the bloodstained knife, the bloodstained earth was not sent to the serologist. This court in the case of Laxmi Singh Vs. State of Bihar (supra) has stated that :-

"To add to this another important circumstance is the omission on the part of the prosecution to send the bloodstained earth found at the place of occurrence for chemical examination which could have fixed the situs of the assault. In almost all criminal cases, the bloodstained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report along with the earth is produced in the court, and yet this is one exceptional case where this procedure was departed from for reasons best known to the prosecution. This also, therefore, shows that the defence version may be true. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version."

From the above decision of this Court it is clear that in such circumstances when the prosecution fails to send the blood stained material to the chemical examiner a reasonable doubt arises as to the genuineness of the prosecution case in regard to the recovery of such material. It is also relevant to notice at this stage the factum of recovery of the bloodstained earth was not put to the respondent when his statement was recorded under Section 313 Cr.P.C.

From the above discrepancies noticed by us in the evidence of PWs 7 and 9 and also from the omission on the part of the prosecution in sending bloodstained material to the serologist we are constrained to doubt the prosecution case in regard to the recovery.

Coming to the evidence of PW-2, who says that he had seen the respondent take the deceased from his shop on 27th May, 1988, it should be noticed that this person is of the same biradari as of the deceased and was a close friend of the father of the deceased for over 20 years. The defence has suggested that he is actually the brother-in-law of PW-1, but the same is denied. The facts remains that this witness is an interested witness.

From the material produced by the prosecution, it shows that this witness was taking extraordinary interest in the investigation and was present at practically every important place and time in the course of the investigation. The High Court has very elaborately discussed the evidence of this witness and has rejected the same for good reasons with which we agree. In our opinion, the evidence of this witness does not inspire much confidence.

From the above discussion, in our opinion that the prosecution has been able to establish only a motive as against the respondent for committing the murder, while most of the circumstances which are otherwise important to be proved in this case have not been established. We are of the opinion, the High Court was justified in interfering with the judgment of the Sessions Judge and allowing the appeal.

For the reasons stated above, these appeals fail and the same are dismissed.