

CASE NO.:
Appeal (crl.) 378 of 2008

PETITIONER:
Liyakat

RESPONDENT:
State of Uttaranchal

DATE OF JUDGMENT: 25/02/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO 378 OF 2008
(Arising out of S.L.P (Crl.) No.3314 of 2006)
With
Criminal Appeal No.379 of 2008
(Arising out of SLP (Crl.) 3316 of 2006)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.
2. These two appeals are directed against the common judgment of the Uttranchal High Court.
3. Challenge in this appeal is to judgment of a Division Bench of the Uttaranchal High Court which disposed of Criminal Reference No. 2 of 2004 and two Criminal Appeal Nos. 45 and 46 of 2002. The two criminal appeals were filed by Liyakat the present appellant and co-accused Smt. Zahira. The reference was necessitated as the Learned Additional District and Sessions Judge, Ist Fast Track Court Hardwar has awarded death sentence to the accused Liyakat.

awarded death sentence to accused Liyakat. He had also awarded sentences of imprisonment for life to Zahira and the accused No. 3. Both of them were convicted for offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (in short the 'IPC'). The trial court, however had acquitted Accused Nos. 2 and 4 namely Riyasat and Jeewani.

4. Noor Alam was child of PW 1 Rashid and his wife PW 2 Nasreen. PW 1 Rashid and PW2 Nasreen used to reside in the neighbourhood of Jeewani, original accused No. 4. On the fateful day i.e. on 12th day of January, 1999, Nasreen was sitting alongwith her child in the courtyard of Gulami's house, who is husband of original accused no.4 Jeewani. At that time Zaheera, Jiwani, Liyakat and Riyasat were also there. Her husband Rashid, P.W. 1 came there and asked his wife to go with him to feed fertilizer to the standing crop in the field. However, Nasreen declined to go with him as there was nobody to lookafter Noor Alam. Hearing this, Jeewani and other accused persons told that they will look after the child and she could leave the child with them. P.W.3 Brahm Pal and one Rishipal were also there at that time. The child was left by Nasreen with the accused persons and she left the place alongwith her husband. When both of them returned at about 4 O'clock, they straightaway went to the house of Gulami and

enquired about Noor Alam. Accused told them that Noor Alam was playing in the vicinity only. However, they could not find the child. They searched for the child for the rest of the day and night and even on 13th of January, 1999, but to no effect. However, in the morning of 14th, when Rashid was searching for child alongwith Brahm Pal, Bhagwan and Yasin, they searched the house or hut of Liyakat and saw that in the northern corner of that hut, foot of small child was protruding out of the ground. Seeing this Rashid reached to the Police Station, Laksar and reported the matter.

5. A case was registered on that basis and the Incharge of the Police out-post (Chauki) was informed on wireless and received the message. O.P. Sisodia PW 8 with other officials reached the house of the accused and in presence of the witnesses, body of Noor Alam, which was buried in the pit in the northern corner of the hut was recovered. Panchnama and other formalities were completed and on that very day all the accused persons were arrested.

6. The prosecution relied on eight witnesses. They being the parents of the child PW 1 Rashid and PW 2 Nasreen and two other witnesses PW 3 Brahm Pal and PW 4 Rishipal. They all supported the prosecution story. Besides them, PW 6 Dr. R.K. Pande is the medical officer, who had conducted post mortem on the dead body and PW 7 Rishipal and PW 8. O.P. Sisodia are the police witnesses.

7. Case of the prosecution in short was that appellant Liyakat, Riyasat, Zahira and Jeewani committed murder of Noor Alam a child aged about 1½ years, the deceased and they buried to the body of the child with an idea of screening the act. The trial court accepted the prosecution version in part so far as the appellant and Zahira are concerned but directed acquittal of the co-accused. The trial court found that the evidence was clear and cogent and therefore the appellant Liyakat was given life sentence and Zahira was given death sentence. Since the sentence of death was awarded, the reference was made to the High Court for confirmation in terms of Section 367 of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.').

8. The High Court by the impugned judgment altered the death sentence awarded to appellant Liyakat life sentence. It however upheld the sentence of life imprisonment awarded to Zahira.

9. In support of the appeal learned counsel for the appellant submitted that the case based on circumstantial evidence and the circumstances highlighted by the trial court and the High Court do not warrant a conclusion that the appellants were responsible for the murder of the child.

10. With reference to the medical evidence, it was submitted that this was not a case of strangulation and therefore the conclusion of killing the child of suffocation cannot be maintained.

11. The circumstances which were highlighted against the appellant was the fact that the child was left in the custody of the appellants, the dead body was found buried in the premises of the appellants. No explanation by way of suggestion in cross examination or in the examination under Section 313 Cr.P.C. was offered as to how the dead body was found buried in the hut of the accused which was in his

exclusive use.

12. Following circumstances were highlighted by the prosecution to substantiate its accusations:

(1) That the child Noor Alam was handed over in the custody of the accused persons at about 10'clock by the parents;

(IA) That the child was either a toddler or a crawling boy;

(2) That the child was missing barely within three hours after he was given in the custody of the accused persons;

(3) That there was no explanation given by the accused for the missing of the boy to the parents and they only casually replied that the child must have been playing somewhere else;

(4) That the dead-body of the child was found buried in the hut, which was in the use and occupation of the accused persons;

(5) That there is no explanation whatsoever as to how his body came to be buried in the hut of these accused persons;

(6) That the unsubstantiated defence raised by the appellant no.2 Zaheera suggesting the alibi, which could not be proved at all and has been rightly disbelieved by the trial Court;

(7) That the child died unnatural and homicidal death due to suffocation and that the child had died even before it was buried.

13. Before analysing the factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

14. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan* (1977)2 SCC 99), *Eradu v. State of Hyderabad* (AIR 1956 SC 316), *Earabhadrapa v. State of Karnataka* [(1983) 2 SCC 330], *State of U.P. v. Sukhiasi* [AIR 1985 SC 1224], *Balwinder Singh v. State of Punjab* [AIR 1987 SC 350] and *Ashok Kumar*

Chatterjee v. State of M.P. [AIR 1989 SC 1890]. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab [AIR 1954 SC 621] it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

15. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. [1996 (10) SCC 193] wherein it has been observed thus: (SCC pp. 206-07, para 21)

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

16. In Padala Veera Reddy v. State of A.P. [AIR 1990 SC 79] it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

17. In State of U.P. v. Ashok Kumar Srivastava [1992(2) SCC 86] it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

18. Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

"(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond

reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."

19. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

20. In Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343] it was observed thus: (AIR pp. 345-46, para 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."

21. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra [AIR 1984 SC 1622]. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- (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.

22. The above position was highlighted in State of Rajasthan v. Raja Ram [2003(8) SCC 180].

23. It has been rightly noted by the trial court and the High Court that the accused persons were absolutely silent and no explanation was offered as to how the body came to be buried in their hut which was in their exclusive user.

24. Similarly the non-explanation of this vital circumstance adds to the chain of circumstances. It is now settled law that if the deceased was in the custody or in the company of the accused, then the accused must supply some explanation regarding the disappearance of the deceased.

25. In the factual background, it is considered in the light of the decisions referred to above, the inevitable conclusion is that the appeals are sans merit, deserve dismissal which we direct. We record our appreciation for the able manner in which Mr. Y.P. Singh, learned Amicus Curiae assisted the case.