

CASE NO.:
Special Leave Petition (crl.) 4772 of 2003

PETITIONER:
Akhlaq

RESPONDENT:
State of U.P.

DATE OF JUDGMENT: 19/03/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:
J U D G M E N T
CRIMINAL APPEAL NO. OF 2007
(Arising out of S.L.P.(Crl.) No.4772 of 2003)

KAPADIA, J.

Leave granted.

This criminal appeal is directed against the impugned judgment and order dated 14.7.06 passed by the High Court of Judicature at Allahabad in Criminal Appeal No.1783 of 1981 against the judgment and order dated 10.8.81 passed by the Additional Sessions Judge, Bulandshahr in Sessions Trial No.143 of 1980 convicting Akhlaq (accused no.1 - appellant herein) under Section 302 read with Section 34 Indian Penal Code ('IPC' for short). Appellant has been sentenced to undergo rigorous imprisonment for life.

In short, the prosecution case was as under. A written report (Exhibit Ka.1) was submitted at the Police Station Kotwali. This was on 31.7.79 at 6.10 pm. The written report was submitted by the complainant, Samay Singh (PW.1). In the report it was stated that when the complainant returned home in village Tatarpur from his duty, he enquired from his younger daughter about the whereabouts of his elder daughter Asha (since deceased). The complainant was informed that Asha had gone to answer nature's call. The complainant also enquired from his wife, Brahma Devi (PW.2), about Asha. He was told by his wife that Asha had gone to answer nature's call. However, Asha did not return for considerable time. The complainant became suspicious. He proceeded to search out his daughter Asha at 5 pm. When the complainant reached the maize field of Kanchi he saw a chappal belonging to Asha lying near the boundary of the field. The complainant entered into the field. He found the dead body of his daughter Asha inside the field. A Dhoti was tied around her neck and another chappal was found lying near the dead body of Asha. Her clothes were blood stained. The complainant further found that the golden ear-rings of Asha were missing from her body. Asha was around 20 years old. On the basis of Ex. Ka.1 the Head Constable prepared the F.I.R. The case was registered. The entry was made in G.D. report. The I.O. recorded the statement of the complainant at the police station. He then proceeded to the site of occurrence. On reaching the field of Kanchi the I.O. found the dead body of Asha lying in the field with a Dhoti tied around her

neck. The I.O. prepared the inquest report (Ex. Ka.5). He prepared the naqsha (Ex.Ka.7). The I.O., after completing the formalities, handed over the dead body of Asha to constables Bhojvir Singh and Rajvir Singh for post mortem at the district hospital, Bulandshahr. The possession of the chappal was also taken vide Ex.Ka.9. The I.O. inspected the spot on 1.8.79. He prepared the site plan. On 21.8.79 on interrogation Jamil (accused no.2) confessed his guilt. He also promised to get the golden ear-rings recovered from the shop of sarraf. He took the I.O. to the shop of the sarraf. The ear-rings were mortgaged with the sarraf. The name of sarraf was Ram Kishan (PW. 9). After going through the register Ram Kishan took the ear-rings. The ear-rings were taken into custody vide Ex.Ka.4. They were sealed in the presence of Jai Prakash Sharma (PW.10). The necessary formalities were thereafter completed. The ear-rings recovered from the shop were identified on 28.9.79. On 1.8.79 the post mortem was conducted. According to Dr. Surendra Pal Singh, Medical Superintendent (PW.14), the death was caused by strangulation. The doctor found whitish substance near vulva of the deceased. He prepared a slide and forwarded it to the pathologist. The doctor opined that Asha was possibly raped. After completing due investigation, the I.O. submitted the charge-sheet. The three accused \026 Akhlaq (Accused-1), Jamil (Accused-2) and Imtiyaz (Accused-3) denied the charges. They pleaded non-guilty. The prosecution examined 19 witnesses.

In the present case the complainant (PW.1) has proved that he was the father of Asha. He was an employee in the Civil Hospital Bulandshahr. His duty hours were between 8 a.m. and 3 pm. This witness has established that on the fateful day he returned from the Civil Hospital at 3.30 pm; he enquired about Asha when he was told that Asha had gone to answer nature's call around 1.30 pm. This led PW.1 to search out the deceased. The evidence of PW.1 has established that around 5 pm he reached the field of Kanchi, he entered the field and found the dead body of Asha with the golden ear-rings missing and her chappal lying near her body. He also identified the ear-rings later on. The evidence of PW.1 is corroborated by his wife Brahma Devi (PW.2). Bal Kishan (PW.4) stated that he was from the same village that he was in his field on the fateful day. At 1.30 pm he was returning from his field when he saw Asha going towards a pond (pokhar). He saw Asha being followed by Akhlaq (appellant herein). PW.4 further deposed that in fact Akhlaq (A-1) greeted PW.4. According to PW.4, Asha was followed by Akhlaq (A-1) and Akhlaq was in turn followed by Babu (Accused-4), Jamil (A-2) and Imtiyaz (A-3). At 5.30 pm, Bal Kishan (PW.4) was told about the demise of Asha. Mahesh Chandra (PW.6) deposed that on the fateful day at 8.30 pm when he was near a chabutra he saw Babu and Akhlaq. Babu was also an accused (since deceased). Mahesh Chandra was a friend of Babu. By 8.30 pm the entire village had known that the body of Asha was found in the field of Kanchi. PW.6 was told by Babu in presence of Akhlaq (appellant herein) that about three months prior to the incident Asha had abused him. Babu stated that Asha and Akhlaq had illicit relationship. Babu told PW.6, in presence of Akhlaq, that on the date when Asha was murdered Jamil (A-2) had

gone to borrow some money from Babu (A-4). Imtiyaz (A-3) was present at the house of Babu at that time. Babu, Imtiyaz and Jamil saw Asha going towards the field of Kanchi followed by Akhlaq. They followed Akhlaq. Akhlaq and Asha entered into the maize field. Babu, Imtiyaz and Jamil followed Akhlaq. They saw Akhlaq having sexual intercourse with Asha. Babu, Jamil and Imtiyaz demanded sexual intercourse which Asha refused. Thereafter, Babu and Jamil forcibly had sexual intercourse with Asha. Asha threatened to expose the misdeeds of Babu and Jamil. Babu, therefore, took the Dhoti of Asha tied it around her neck. The three accused - Jamil, Imtiyaz and Akhlaq caught hold of Asha. She was strangled. She died. Jamil removed the ear-rings. Akhlaq was present. This was the extra judicial confession made by Babu (A-4), one of the accused, to Mahesh Chandra (PW.6) in the presence of Akhlaq (appellant herein). This extra judicial confession is the subject-matter of controversy.

Jairam Singh (PW.11) deposed that on the fateful day he saw Asha going towards the field of Kanchi. She was followed by Akhlaq (appellant herein). The distance between the two was about 25 steps. He further deposed that Akhlaq was in turn followed by Imtiyaz (A-3), Jamil (A-2) and Babu (A-4). Dr. Surendra Pal Singh (PW.14), Medical Superintendent at the Civil Hospital Bulandshahr has deposed that he did a post mortem on 1.8.79. There were 18 injuries on the body of Asha. These injuries consisted of abrasions and contusions on the chin, lips, cheek, nose, forehead, elbows, chest and neck. He also found a whitish substance in the form of discharge on the vagina. He also found blood on the thighs. He prepared a slide and forwarded it to Dr. P.C. Agarwal, Pathologist. According to PW.14 the cause of death of Asha was asphyxia owing to strangulation. Injury nos.12 and 13 on the body of Asha was on account of strangulation by Dhoti.

On the above evidence, the trial court observed that the present case was based on circumstantial evidence. It was also based on extra judicial confession made by Babu (A-4), one of the accused, in presence of Akhlaq (appellant herein). The trial court observed that in the present case the recovery of the ear-rings at the instance of Jamil (A-2) from the shop of Ram Kishan (PW.9) were put for test identification parade when they were correctly identified by the witnesses. On the evidence of doctor (PW.14), the trial court held that Asha was raped and strangled. On the basis of the following circumstances which was duly proved, the trial court found Akhlaq (appellant herein) guilty of offence punishable under Section 302 read with Section 34 IPC. In this connection, trial court relied upon the statement of PW.1 and PW.2 that Asha had gone to answer nature's call at 1.30 pm. In this connection, the trial court also relied upon the evidence of PW.4, Bal Kishan who, as stated above, deposed that he had seen Asha going towards pokhar (pond). Therefore, the trial court came to the conclusion that Asha was last seen at 1.30 pm when she had gone to answer nature's call in the field of Kanchi. This was the first circumstance which took proved before the trial court. The second circumstance proved before the trial court was that Asha was followed by Akhlaq (appellant herein) who in turn was followed by

Babu (A-4), Jamil (A-2) and Imtiyaz (A-3). The trial court relied upon the evidence of PW.11 in this connection. Both PW.11 and PW.4 had deposed that they had seen the accused going towards the field of Kanchi. It was contended before the trial court that the evidence of PW.11 was not reliable since he had denied of having gone to the police station. In this connection, the trial court observed that PW.13 had proved the G.D. entry about the registration of the case in which it is mentioned that PW.11 had come to the police station and, therefore, the trial court saw no reason to discard the evidence of PW.11. The next circumstance on which the trial court placed reliance was the finding of the dead body of Asha in the field of Kanchi. Moreover, the trial court also relied on the recovery of the golden ear-rings at the instance of Jamil (A-2). On the evidence of extra judicial confession, the trial court held the evidence of Mahesh Chandra (PW.6) was fully reliable as far as Akhlaq (appellant herein) is concerned. According to the trial court, Babu (A-4) had confessed of having committed the offence. He implicated Akhlaq. According to the trial court, the extra judicial confession was made by Babu (A-4) in the presence of Akhlaq (A-1) and which extra judicial confession indicated that Babu had confessed his guilt, he had given a detailed narration of the facts as to how he reached into the field of Kanchi, as to how he followed Akhlaq and Asha and he also referred to illicit relationship between Akhlaq and Asha. In the said confession, on which reliance has been placed by the trial court, Babu has stated in the presence of Akhlaq that initially Akhlaq had sexual intercourse with Asha which was seen by Babu, Jamil and Imtiyaz who showed their intention to have sexual intercourse with Asha which Asha refused and then thereafter Jamil and Babu had intercourse with Asha against her consent. When Asha threatened to expose them in the village, Babu tied her Dhoti around her neck and others caught hold of her hands and feet. This was the confession made by Babu (A-4) to Mahesh Chandra (PW.6) in the presence of Akhlaq (appellant herein). The trial court found that PW.6, Mahesh Chandra, was a close friend of Babu. One of the arguments advanced before the trial court was that the evidence of the extra judicial confession cannot be said to be reliable; that it was highly unnatural for Babu (A-4) to disclose the above story in confidence to Mahesh Chandra (PW.6). The trial court found that there was no merit in this argument. According to the trial court, Babu was a good friend of Mahesh Chandra (PW.6); the confession was made after three days. It was immediately recorded on the next day, that is, on 4.8.79. The trial court observed that although PW.6 was cross-examined at length all suggestions made to PW.6 were denied. According to the trial court, the extra judicial confession was made by Babu (A-4) in presence of Akhlaq (appellant herein) and Akhlaq did not object. The trial court, further found that the extra judicial confession made by accused Babu stood corroborated by the medical report. The injuries noted by Dr. Surendra Pal Singh (PW.14) also corroborated the statements contained in the extra judicial confession. The various injuries on the lips, nose, cheek, forehead and elbows indicated that the sexual intercourse was without the consent of Asha. The contents of the extra judicial confession, therefore, stood corroborated. Similarly, the physical evidence of the recovery of the dead body from

the field of Kanchi, the recovery of chappal of Asha (deceased) lying near her body and scattering of the maize plants near her body \026 all corroborated the extra judicial confession made by Babu (A-4) to Mahesh Chandra (PW.6). In the circumstances, the trial court came to the conclusion that Jamil (A-2), Imtiaz (A-3) and Babu (A-4) had seen Akhlaq (appellant herein) following Asha into the field of Kanchi. They followed Akhlaq. They saw Akhlaq having sex with Asha in the field. They expressed their desire to have sexual intercourse. Asha refused. Babu and Jamil had sexual intercourse against her consent. Asha threatened to expose them. In the circumstances, the accused committed murder of Asha, as described above. In the circumstances, the trial court held that the prosecution had proved its case. The trial court held that the evidence of extra judicial confession was reliable. The evidence of Dr. Surendra Pal Singh (PW.14) corroborated the version of the prosecution to the effect that Asha was strangled after sexual intercourse. In the circumstances, the trial court held that Jamil (A-2) and Babu (A-4) were guilty of offence under Section 376 IPC; that Akhlaq had illicit relationship with Asha and he had sexual intercourse with her by her consent hence no offence under Section 376 IPC stood made out against Akhlaq (appellant herein). However, the trial court held that Babu (A-4) was guilty of offence punishable under Section 302 and 376 IPC; that Jamil (A-2) was guilty of offences under Section 302 read with Section 34 and also under Section 376 IPC; that Akhlaq (A-1), appellant herein, and Imtiyaz (A-3) were found guilty of offences punishable under Section 302 read with Section 34 IPC.

At this stage, we may point that Babu (Accused-4) since died. Akhlaq (Accused-1), Jamil (Accused-2) and Imtiyaz (Accused-3) carried the matter in appeal to the High Court. By the impugned judgment the High Court has confirmed the conviction, referred to above. Hence this criminal appeal. However, the criminal appeal is preferred only by Akhlaq (A-1), appellant herein, and not by other two co-accused.

At this stage, we may clarify that we are concerned in this criminal appeal only with the case of Accused no.1 (appellant). Shri P.S. Mishra, learned senior counsel appearing on behalf of appellant (A-1), submitted that the judgments of the courts below were mainly based on the extra judicial confession made by the co-accused Babu (since deceased) to Mahesh Chandra (PW.6). He submitted that extra judicial confession is no evidence. It is corroborative in nature. It was urged that there was no evidence except extra judicial confession to show that Akhlaq (appellant) had followed Asha into the field of Kanchi. It was urged that except the extra judicial confession there was no evidence to implicate the Akhlaq (appellant) in the murder of Asha. It was further submitted that the judgment of this Court in Kashmira Singh v. State of M.P. \026 1952 SCR 526, has no application to the present case. It was urged that in the present case there was no evidence against Akhlaq (appellant). He urged that whatever evidence is on record is only against Babu (A-4) and Jamil (A-2). Learned counsel urged that merely because Akhlaq (appellant) followed Asha into the field of Kanchi, he cannot be implicated for murder of Asha. Learned counsel also

submitted that there was no evidence of Akhlaq (appellant) attacking Asha or causing any injury to her. Learned counsel urged that there was no evidence of Akhlaq (appellant) coming back from the field of Kanchi. He submitted that the High Court has disbelieved Kallo (PW.3) in that regard. In the circumstances, learned counsel submitted that the conviction of Akhlaq (appellant) needs to be set aside.

We do not find any merit in the above contention. Akhlaq (appellant) stands convicted with the aid of Section 34. This case concerns circumstantial evidence. PW.1 and PW.2 have proved beyond shadow of doubt that Asha had gone to answer nature's call on the fateful day at 1.30 pm. On return from duty her father went in search of his daughter, Asha. On the boundary of the field of Kanchi he detected one of the chappals of Asha. Thereupon, he entered the field of Kanchi. Inside the field he found the dead body of Asha. Near the dead body the other chappal was recovered. The second circumstance which is relevant is that Akhlaq (appellant) was seen by Jairam Singh (PW.11). Jairam Singh (PW.11) saw Akhlaq (appellant) following Asha. He also saw Babu (A-4), Jamil (A-2) and Imtiyaz (A-3) in turn following Akhlaq (appellant). There is no reason to disbelieve PW.11. Further the evidence of PW.11 is further corroborated by PW.4. Both these witnesses had seen Akhlaq (appellant) following Asha into the field of Kanchi. The third circumstance was the recovery of the dead body of Asha in the field of Kanchi. The position of the dead body indicated rape and strangulation. The fourth important circumstance is the injuries noted by Dr. Surendra Pal Singh (PW.14). The said injuries were present on the lips, cheek, nose, forehead and elbows of Asha. These injuries show that Asha was assaulted and that she was forcibly raped. Lastly, each of the above circumstances finds place in the contents of the extra judicial confession made by Babu (A-4) to Mahesh Chandra (PW.6) in the presence of Akhlaq (appellant).

As stated above Akhlaq (appellant) has been convicted with the aid of Section 34 IPC. Section 34 gives statutory recognition to the principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. When a criminal act is committed by several persons in furtherance of the common intention, each of such several persons is liable. The crucial test as to applicability of constructive liability is found in the phrase "in furtherance of the common intention of all". The criminal act for which all the conspirators are sought to be made liable must be connected with the common intention; that criminal act must be while executing or carrying out the common intention. To apply Section 34 IPC, two factors must be established \026 (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but if no overt act is attributed to the individual accused, Section 34 will be attracted as it involves vicarious liability. It is not possible to have direct evidence of common intention in every matter. It has to be inferred in appropriate cases from the facts and circumstances of each case [See: Jai Bhagwan and others v. State of Haryana - AIR 1999 SC 1083]. In the present case, the evidence of PW.11 and PW.4, apart from extra judicial

confession, indicates presence of Akhlaq (appellant) in the field of Kanchi. Akhlaq (appellant) was seen following Asha. In turn, the other co-accused followed Akhlaq (appellant). The circumstance of Asha being followed by Akhlaq (appellant) and Akhlaq (appellant) being followed by the co-accused into the field, is corroborated by the contents of the extra judicial confession made by the Babu (A-4) to Mahesh Chandra (PW.6) in presence of Akhlaq (appellant).

In the case of *Sivarajan v. State* - 1959 KLT 167, it has been held that under Explanation 2 to Section 8 of the Evidence Act if a man is accused of a crime and he remains silent, his conduct is, coupled with the statement, in the nature of an admission and, therefore, it will constitute evidence against himself.

In the case of *Haroom Haji Abdulla v. State of Maharashtra* \026 AIR 1968 SC 832, this Court held that a confession intended to be used against a co-accused stands on a lower level than the evidence of accomplice because the latter is tested by cross-examination whilst the former is not. The confession of a co-accused is not an evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending assurance to the verdict. It was further held that although the confession may be taken into consideration against a co-accused by virtue of Section 30 of the Evidence Act its value is extremely weak and there could be no conviction without corroboration on material particulars. In the present case, the extra judicial confession was made in the presence of Akhlaq (appellant). The conduct of Akhlaq (appellant) comes within Explanation 2 to Section 8 of the Evidence Act. Under that Explanation, statements made in the presence of Akhlaq (appellant) are admissible as the ground work of his conduct. It is a general rule that statements made in the presence of the accused, which he might have contracted, if untrue, are evidence against him. This is illustrated by Illustration (f) and (g) to Section 8 of the Evidence Act. In the present case, the extra judicial confession made by the co-accused Babu clearly indicates that Asha was followed by Akhlaq (appellant) who in turn was followed by the other co-accused. The said extra judicial confession indicates the entry of all accused including Akhlaq (appellant) into the field of Kanchi. They were seen by Jairam Singh (PW.11). The evidence of PW.11 stood corroborated by the evidence of PW.4 to that extent. The extra judicial confession shows that Asha was raped forcibly and then strangled. The injuries on the different parts of her body indicates that she was raped forcibly. This is clear from the testimony of Dr. Surendra Pal Singh (PW.14). The location of the body in the scattered field also shows that she was forcibly raped. The strangulation by Dhوتي is also one more circumstance showing how she was murdered. Therefore, each and every statement made in the extra judicial confession corroborates the evidence of PW.1, PW.11, PW.4 and PW.14. Moreover, Akhlaq (appellant) remained silent when confession was made by co-accused Babu to Mahesh Chandra (PW.6). In the said confession, Babu implicated himself. This conduct of Akhlaq (appellant) has been noticed by the trial court.

The trial court has correctly invoked Section 8 of the Evidence Act while evaluating the extra judicial confession.

Before concluding we may point out that in the present case the courts below have not relied only upon extra judicial confession as submitted on behalf of the appellant. In the present case, the extra judicial confession is made in the presence of Akhlaq (appellant). In the present case the confession is not behind Akhlaq (appellant). Therefore, the judgments cited on behalf of the appellant has no application to the facts of the present case.

For the above reasons, we do not find any merit in this criminal appeal and the same is accordingly dismissed.