

PETITIONER:
DWARKADAS GEHANMAL

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT: 20/11/1998

BENCH:
M.K.MUKHERJEE, G.B.PATTANAIK, S.P.KURDUKAR.

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T
S.P. Kurdukar, J.

The appellant accused after obtaining special leave has filed this Criminal Appeal Challenging the legality and correctness of the judgement and order dated December, 1996 passed by the appellant for the offences punishable under Section 302 and 201 Indian Penal Code has been confirmed. 2.The prosecution case as disclosed during the trial is as under :-

Noorbhai since deceased was working as a Watchman with Allana Mill at Veraval. This mill was closed down some ten years back prior to 1988 and Noorbhai was to look after the property and machinery that was lying at Allana Mill. He was residing inside the compound of Allana Mill. According to the prosecution, Noorbhai on 12.2.88 was on duty from 9.00 A.M. to 12 Noon and from 4.00 P.M. to 7.00 P.M. Usually, Noorbhai used to return from his work at about 7.00 P.M. Since he did not return, Mohd. Hussain (P.W.2) went in search of him and after making enquiries he learnt that Noorbhai had left the mill premises at about 7.00 P.M. Till late in the evening the whereabouts of Noorbhai were not known nor he returned on the following day. Mohd.Hussain (P.W.2), therefore, started making further enquiries with his relatives but he could not get any useful information. Haji Noorbhai (P.W.3) who happen to be another son of Noorbhai then went to Junagarh and Rajkot in search of his father but he could not get any useful information. Haji Noorbhai (P.W.3) who happen to be another son of Noorbhai then went to Junagarh and Rajkot in search of his father but he was not found there. For nearly three days the family members of Noorbhai could not get any information about the whereabouts of Noorbhai. On 15.2.88 it was learnt that a dead body was floating in the pond situated near the Allana Mill compound on the back side. The sons of Noorbhai then went to the pond and it was found that the dead body was of Noorbhai. Immediately a message was sent to Veraval Police Station and the police party arrived at the scene. The dead body of Noorbhai was taken out of the Pond with the held of fire brigade. The inquest Panchnama was then carried out wherein several injuries on

the person of Noorbhai were recorded. An iron strip was also found to have been inserted in the mouth. The dead body was then sent to the hospital at Veraval. Dr. Jairajbhai (P.W.1) held the autoosy on 16.2.1988 at about 10.30. A.M. and noted as many as six injuries. Dr. Jairajbhai (P.W.1) opined that the cause of death was "haemorrhage shock due to major vessels injury over the front of the neck". Injury No.1 was sufficient in the ordinary course of nature to cause death. During investigation it was suspected that the appellant who was also working as a Watchman in the mill would know something about the incident. During inerrigation he made a statement which led to the discovery of certain incriminating article. On 16th February, 1988 Deva Rama (P.W.4) during investigation stated that the appellant on 12.2.88 had confessed before him at about 7.30 p.m. that he had committed the murder of Noorbhai and requested him to help him in this behalf. The prosecution sought to rely upon this extra judicial confession alleged to have been made by the appellant to Deva Rama (P.W.4). The Investigating Officer, thereafter, arrested the appellant and during interrogation he made a statement which led to the discovery of certain clothes of the deceased and hoe which were buried near the pond. These articles were seized under various Panchnamas. The clothes of the deceased and other articles were sent to Chemical Analyzer for examination. After completing the investigation, the appellant was put up for trial for offences punishable under Section 302 and 201 Indian Penal Code and under Section 135 of Bombay Police Act. The appellant denied the charge and claimed to be tried. According to him, he is innocent and has been falsely implicated in the present crime.

3.At the outset it may be stated that it is a case of circumstantial evidence and the courts below relied upon only two circumstances which according to them were proved by the prosecution and both these circumstances are pointer to the guilt of the accused. The two circumstances relied upon by the courts below were :-

1)extra judicial confession made by the appellant to Deva Rama (P.W.4) and

(2)recovery of certain incriminating articles at the instance of the appellant pursuant to the statement made by him under Section 27 of the Evidence Act.

4.The prosecution examined as many as 15 witnesses at the trial of whom Deva Ram (P.W.4), Ramesh Bhojabhai (PW.9) and Jagmal Arjan (P.W.12) are the material witnesses to prove the above two circumstances. Rest of the evidence is consisted of the witnesses including two sons of Noorbhai, inquest Panch witness, Medical Officer Dr. Jairajbhai H.Patel (P.W.1) and the Investigating Officer Manmchan Tarachand (P.W.15).

5.The learned Additional Sessions Judge, Junagarh, by his judgment and order dated 26.12.98 held that the above two circumstances were conclusively established by the prosecution and these two circumstances complete the chain of circumstantial evidence and are sufficient to prove the guilt of the accused for offences punishable under Section 302 and 201 of Indian Penal Code. Consequently, the learned trial Judge convicted the appellant for the said offences and sentenced him to suffer imprisonment for life and a fine of Rs. 500/- for an offence punishable under Section 302 I.P.C. and rigorous imprisonment for three years and a fine of Rs. 500/- for an offence punishable under Section 201 IPC and in default of payment of fine on both counts to undergo further rigorous imprisonment for three months.

Both the sentences were ordered to run concurrently.

6.The appellant aggrieved by the said judgment and order of conviction passed by the trial court preferred an appeal to the High Court. The High Court, however, on reappraisal of evidence on record, by its Judgment and order dated 6.12.96, dismissed the appeal and confirmed the conviction and sentence of the appellant. The appellant now seeks to challenge the legality and correctness of the judgments of the courts below.

7.With the assistance of the learned counsel for the parties, we have gone through the oral and documentary evidence on record and in our considered view the impugned judgment and order of conviction is unsustainable for the reasons set out hereinafter :-

8.As stated earlier. Only two circumstances were relied upon by the trial court and the High Court to convict the appellant for the offences indicated above. The reasoning of the trial court is based on mere conjectures and various erroneous assumptions without any foundation. The High Court in a very slipshod manner affirmed the findings of the trial court.

9.It is not and cannot be disputed that the deceased Noorbhai died a homicidal death. There is no challenge to the medical evidence of Dr. Jairajbhai (P.W.1) who in his post mortem report has opined that the cause of death of Noorbhai was hemorrhage and shock due to cutting of the major vessels on the front side of the neck. Injury No.1 could be caused by a weapon like article 31. Injury Nos. 2 to 5 could be caused by blunt side of hoe. Injury No.1 was sufficient in the ordinary course of nature to cause death. In view of this positive medical evidence, we see no hesitation in confirming the finding of the courts below that Noorbhai met with a homicidal death.

10.Before we deal with the evidence relating to the two circumstances as set out hereinabove, we must indicate the reasons given by the High Court in its judgment while upholding the conviction of the appellant. The High Court while dealing with the alleged extra judicial confession of the appellant held :-

"No doubt, Deva Rama has been cross-examined at length and obliquely it was hinted that he was unhappy with his wife. But beyond that, no suggestion is put to him that either the accused was in relation with or had an eye on the wife of this witness and, therefore, he is falsely implicated. No reason whatsoever is suggested in the cross-examination of Deva Rama as to why, if at all he does so, he has falsely implicated the accused."

11.After accepting the evidence of Deva Rama (P.W.2) as credible to prove the extra judicial confession, the High Court sought to complete the chain by relying upon the circumstance of recovery of certain incriminating articles. The High Court held :-

"Coupled with this is the fact that the discovery led to finding of axe, which according to the F.S.L. report, Ex.29/3 was found containing blood and so was the Lungi and other clothes. The link is important from the prosecution point of view because after doing away with the deceased, putting his dead body in it, it was dragged to the said pond where the dead body remained until it came out and

started floating."

12.The High Court, in our opinion, has failed to appreciate the evidence of the prosecution witnesses in proper perspective and as a result, therefore, has recorded total unsustainable findings on these two circumstances.

13.Coming to the first circumstance, namely, the extra judicial confession made by the appellant to Deva Rama (P.W.4), it is noticed from his evidence that the appellant met him at about 7.30 P.M. on 12.2.88 (date of occurrence). The appellant called him and told :-

"I and Noorbhai had a quarrel in the evening and I had hit hoe on Noorbhai. He asked me to help him."

The witness told him -

"He would not help him in this behalf"

and thereafter the appellant told him -

:It does not matter if you do not help me but do not speak about this to anybody."

14.The witness then stated that the very same evening he had gone to his father-in-law's place to attend the marriage and returned to Veraval after a week. He further admitted that for the first time he told about the extra judicial confession made by the appellant to the Investigating Officer on 16.2.88. He admitted during the cross-examination that he did not disclose about the confessional statement to his wife as well to his relatives and relatives of Noorbhai. The witness further admitted that way leading to the bus stand passes by the police station which is at a distance of few yards from Allana Mill. The conduct of this witness in our opinion, is inconsistent with the conduct of an ordinary human being. Moreover, the witness who was suspecting that his wife was having illicit relations with the appellant and since he had disclosed this to Noorbhai, it would be highly improbable that the appellant would take this witness into confidence to disclose about such a heinous crime if committed by him. In addition to this, Deva Rama (P.W.4) would not have waited for five days to disclose the alleged confession made by the appellant to him but on the contrary he would have either on the same evening gone to the police station to lodge a complaint on the basis of the confessional statement of the appellant and/or would have gone to the house of Noorbhai to inform the family members about the confessional statement of the appellant. The entire evidence of Deva Rama (P.W.4) appears to us totally artificial. The trial court and the high Court have totally ignored these inherent improbabilities in the evidence of Dava Rama ((P.W.4)) and have erroneously accepted his evidence as credible one. It is because of this erroneous approach the courts below have held that the prosecution has proved the alleged below have held that the prosecution has proved the alleged extra judicial confession made by the appellant to Deva Rama ((P.W.4)). In view of these circumstances, we are unable to agree with the finding of the courts below that the appellant had made any confessional statement before Deva Rama ((P.W.4)).

15.Coming to the next circumstance, namely, recovery of certain incriminating articles pursuant to statement made by the appellant under Section 27 of the Evidence Act. the accused was arrested on 16.2.88 and during his interrogation, he made a statement in the presence of Panchas which led to the discovery of an axe, hoe, lungi and other clothes of the deceased. We have gone through the evidences of Panch witnesses, Ramesh Bhojabhai (P.W.9), Dana Rama (P.W.11) and Jagmal Arjan (P.W.12). Assuming that the

clothes of the deceased were recovered pursuant to the statement of the appellant from the pond but there is no evidence on the record to show that these clothes were belonging to Noorbhai since deceased. It is because of this lacuna in the prosecution case, we are unable to hold that these clothes have any nexus with the present crime. As regards the axe and the hoe which were recovered at the instance of the appellant, those could not be connected with the crime in question. in these circumstances. we are unable to hold that the prosecution has conclusively established any nexus of these recovered articles with the present crime.

16. For the aforesaid conclusions, we are unable to uphold the conviction of the appellant for the offences punishable under Section 302, 201 I.P.C. In the result, the Criminal Appeal No. 743 of 1997 is allowed. The order of conviction and sentence passed by the learned Additional Sessions Judge, Junagarh on 26.12.1988 and on appeal confirmed by the High Court vide its judgment and order dated 6.2.1996 in Criminal Appeal No. 45 of 1989 are quashed and set aside and the appellant is acquitted of all the charges. The appellant who is in jail be released forthwith if not required in any other case.