

2009(6) SCR 4

**STATE OF UTTAR PRADESH
v.
SHYAM BEHARI & ANR.
(Criminal Appeal No. 501 of 2004)**

MARCH 31, 2009

**[DR. ARIJIT PASAYAT, D.K. JAIN AND DR. MUKUNDKAM
SHARMA, JJ.]**

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the order of acquittal recorded by a Division Bench of the Allahabad High Court. The respondents faced trial for alleged commission of offence punishable under Section 302 read with Section 34 and 201 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC'). Learned IVth Additional District and Sessions Judge, Kanpur found the respondents guilty and sentenced them to undergo imprisonment for life and two years rigorous imprisonment respectively for the aforesaid two offences. In appeal, the High Court reversed the judgment of conviction and directed acquittal.

2. In support of the appeal learned counsel for the appellant-State submitted that the circumstances which were highlighted by the trial court to record conviction have been without any basis reversed by the High Court. Learned counsel for the respondent supported the judgment of acquittal.

3. The prosecution version rested on circumstantial evidence. The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial

evidence, such evidence must satisfy three tests: (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 probabilities the crime was committed by the accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any order hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *v. State of Maharashtra*, AIR 1982 SC, 1157)

In his case, the prosecution relied on following circumstances:

(1) The deceased Veer Singh Gautam was posted as Supervisor of Kray Vikray Samiti, Reona at the time of occurrence and the accused Udai Narain was Adhyaksha/ Supervisor of that Society.

(2) Veer Singh Gautam was on friendly terms with accused Udai Narain and Shyam Behari and was doing grain business in their partnership.

(3) The deceased Veer Singh Gautam went to his house on the occasion of Raksha Bandhan (3.8.1979) and brought Rs. 25,000/- for investing in the aforesaid business.

(4) Accused Shyam Behari and Udai Narain had gone to the house of deceased in village Hardauli and deceased Veer Singh Gautam asked them to render

account of levy and asked them to either give money in cash or grain to make up the account.

(5) Veer Singh Gautam after returning from his house left Reona for Daheli.

(6) Veer Singh Gautam left Rathgaaon on 13.8.1979 on a truck going towards Nauranga and got down from that truck when he reached near the culvert of village Daheli.

(7) The deceased was seen going in the company of accused Shyam Behari and Udai Narain towards their house on the outskirts of village Daheli.

(8) (Deceased) Veer Singh Gautam was last seen at about 10.30 P.M. on 13.8.1979 in the company of all the four accused at the door of the house of accused Shyam Behari and Udai Narain and that all of them including the accused went up stairs.

(9) Shrieks were heard in the night from the upper story of the house of accused Udai Narain and Shyam Behari.

(10) All the four accused were seen moving towards village Daheli at about 2 1.m. in the night of 13/14-8-1979 and accused Munni Lal was carrying a gunny bag on his head and in enquiry by Ram Asrey (PW3) he told that they were carrying manure for their field.

(11) The recovery of the dead body of (deceased) Veer Singh Gautam was made on 23.8.1979 on the pointing out of appellant Shyam Behari.

5. The trial court held that the circumstances 1,3,8 and 11 were proved and presented a complete chain of circumstances which established the guilt of the accused. The High Court found that circumstances 8 and 11 have not been

established by cogent evidence. So far as the alleged last scene is concerned, the High Court found that the circumstances of last scene together do not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There must be cases where on account of close proximity of place and time between the event of accused having been last seen with the accused and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

6. This Court in *Bodhraj @ Bodha and others v. State of Jammu and Kashmir*, 2002 (8) SCC 45 held as follows:

“The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult to some cases, to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other person coming in between exists. in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases”

7. The High Court in the instant case found that evidence of PW4 does not inspire confidence. If he knew around 10 A.M. that no fertiliser was available, there was no reason as to why he would remain at Moosa Nagar up to 9-10 A.M. Additionally, if found that there was no probable occasion for the witness to go to

Moosa Nagar for several days when he knew that fertiliser was either not available or he had purchased fertiliser from the dealer at Rathgaon. So far as the alleged recovery of weapon is concerned, the High Court noted that PW12 who interrogated accused had not recorded his disclosure statement. PW7 who is supposed to have accompanied I.O. and the accused was found to be not believable.

8. Above being the situation, the impugned judgment of the High Court does not suffer from any deficiency to warrant interference. The appeal is dismissed. The bailable warrants executed pursuant to order dated 19.4.2004 stand discharged.

