

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL Nos. 94-95 of 2011

Sanaullah Khan Appellant

Versus

State of Bihar
Respondent

.....

J U D G M E N T

A. K. PATNAIK, J.

This is an appeal against the judgment dated 16.12.2009 of the Patna High Court in Death Reference Case No. 1 of 2007 and Criminal Appeal (DB) No. 379 of 2007.

FACTS:

2. The facts very briefly are that a *fardbeyan* was lodged on 17.12.2002 by one Sanju Kumar (hereinafter referred to as Informant), resident of Village Mathura, P.S.

Bidupur, District Vaishali. In the *fardbeyan*, it was stated: Father of the informant, namely Ravindra Prasad, was running a tea stall near the Eastern gate of the GPO. For the tea stall he required about 25 Litres of milk everyday and this milk was being supplied by Sanaullah Khan, the appellant herein, for about a month. Sanaullah Khan started mixing water with the milk and the customers of the tea stall started making complaints about the quality of tea. On 02.12.2002 at about 2.00 p.m. Sanaullah Khan along with Md. Hamid and Arvind came to the tea stall and demanded the dues for the supply of milk. After calculation it was found that the dues amounted to Rs. 1,000/- and Ravindra Prasad gave Sanaullah Khan Rs. 500/- and told him that the rest of the amount will be paid later. Ravindra Prasad, however, informed Sanaullah Khan that the milk supplied by him was not up to the mark and therefore he will no longer purchase milk from his Khatal. Sanaullah Khan got annoyed and told him that he will not allow him to run the tea stall. Ravindra Prasad retorted that he had seen many persons like him at his tea stall. Sanaullah Khan said that he will have to face serious

consequences and that he will teach him a lesson within two to four days. Thereafter, Sanaullah Khan, Hamid and Arvind went away. On 16.12.2002 at about 8.00 p.m. Arvind, who was working with Sanaullah Khan came and told Ravindra Prasad that his master was calling him for some urgent work and Ravindra Prasad went along with Arvind and did not return for an hour. Arvind again came and told his brother Sunny Kumar, who was in the tea stall, that his master was calling him and that Ravindra Prasad was in the Khatal. Sunny Kumar also accompanied Arvind. Ravindra Prasad and Sunny Kumar, however, did not return till the next morning. The Informant became suspicious and started searching for his father and his brother. He went to the Khatal of the appellant, but found it to be closed. He suspected that the appellant, Hamid and Arvind had kidnapped his father and younger brother.

3. The *fardbeyan* given by the Informant was registered as FIR No.451 of 2002 at Kotwali, P.S. for the offence of kidnapping under Section 364 read with Section 34 of the Indian Penal Code, 1860, (for short 'the IPC'). When investigation was done by the police, three dead bodies

were found concealed in husk in a room on the eastern verandah of Pearl Cinema and the dead bodies were seized and a seizure list was prepared in which Parimal Kumar and Baleshwar Ram signed as witnesses. Two of the dead bodies were identified by the informant as those of Ravindra Prasad and Sunny Kumar. Inquest reports and postmortem reports of the dead bodies were prepared. Later the third body was identified to be that of Arvind by Ramanand Ram, father of Arvind. The appellant was arrested and pursuant to the confession of the appellant, the shoes, sandal and gamchha of the three deceased persons, a rope, a small plastic bag and a knife were recovered from the garbage situated in north-east of Khatal and were seized and Parimal Kumar and Baleshwar Ram signed the seizure list. Offences under Sections 302, 120B and 201 IPC were added and a charge-sheet was filed against the appellant and Hamid and the case was committed to the Court of Sessions.

4. At the trial, altogether eight witnesses were examined. The Trial Court held that the chain of circumstances is complete and does not leave any

reasonable ground for conclusion consistent with the innocence of the appellant and it goes to show that in all human probabilities, the offences must have been committed by the appellant. The trial court, however, acquitted Hamid of the charges. After hearing on the question of sentence, the trial court took the view that the appellant should be hanged by the neck till death as he had killed three helpless persons brutally after premeditation and if he is allowed to continue to live in the present society, he will be a threat to his co-human beings and this was one of those rarest of rare cases in which the appellant deserves the capital punishment of death. The trial court accordingly referred the sentence of death to the High Court.

5. The appellant also filed a criminal appeal against the judgment of the trial court. On 03.07.2006, the High Court directed recording of additional evidence on two points in exercise of its powers under Section 391 of the Criminal Procedure Code, 1973 (for short 'the Cr.P.C.'). Pursuant to the direction of the High Court the confessional statement of the appellant was marked as an exhibit through the

investigating officer (PW-8) after his recall by the trial court and the knife which was seized and listed as item 10 in the seizure list was also marked as an exhibit. Thereafter, the High Court heard the appeal and held that the prosecution has been able to bring home the guilt of the appellant with regard to the murder of the 3 deceased persons by exhibiting four circumstances and these are (i) that the appellant was selling milk to the deceased Ravindra Prasad and Ravindra Prasad stopped buying the milk (ii) the appellant summoned the deceased Ravindra Prasad and deceased Sunny Kumar through the deceased Arvind who was working with the appellant (iii) the dead bodies of the three deceased persons were recovered from the room belonging to the appellant and (iv) the weapons used in the murder of three deceased persons were recovered pursuant to the confession of the appellant. The High Court also confirmed the death sentence of the appellant saying that the tests laid down by this Court in *Macchhi Singh vs. State of Punjab* [(1983) 3 SCC 470] regarding the cases in which death penalty should be imposed were present in the facts and

circumstances of the present case. Aggrieved by the judgment of the High Court, the appellant has filed this appeal.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PARTIES:

6. Mr. Amarendra Sharan, learned senior counsel appearing for the appellant, submitted that there is no eye witness to the murder of the three deceased persons and the finding of the High Court that the prosecution has been able to establish the guilt of the appellant beyond reasonable doubt are based on 4 circumstances is not correct.

7. Mr. Sharan relied on the evidence of PW-3 to the effect that Arvind had a dairy (khatal) at Old Bakri Bazar and also on the evidence of PW-4 that the appellant never had any business of milk but had a business of bakri (goat). He submitted that the first circumstance which was the motive for the appellant to kill the deceased Ravindra Prasad and Sunny Kumar is itself not established in this case.

8. Mr. Sharan submitted that there is absolutely no evidence to establish the second circumstance that the appellant summoned the deceased persons Ravindra Prasad and Sunny Kumar. He submitted that the trial court and the High Court has relied on the evidence of PW-6 to hold that the appellant summoned the deceased persons Ravindra Prasad and Sunny Kumar through his servant Arvind but PW-6 was not present at the tea stall. He submitted that the evidence of PW-7 would show that PW-6 was in the house of PW-7 on 16.12.2002 and remained there till the morning of 17.12.2002 and thus PW-6 was not present at the tea stall on 16.12.2002 when Arvind is alleged to have told Ravindra Prasad and Sunny Kumar that they have been summoned by the appellant.

9. Mr. Sharan next submitted that the third circumstance that dead bodies were recovered from the room belonging to the appellant is also not proved in as much as PW-7 has said in his evidence that the dead bodies were in fact recovered in front of the Pearl Cinema. He submitted that the two seizure witnesses PW-1 and PW-2 have clearly said that recovery of the dead bodies

and the weapon with which the offence was committed and other incriminating materials were not made in their presence. He argued that Rajender Tiwari, the officer who made the recoveries has also not been examined. He submitted that the recoveries were made from the pile of the garbage and not from the drain by the side of Sona Medical Hall as is alleged to have been stated by the appellant in his confession. He submitted that, therefore, the fourth circumstance that the incriminating materials were recovered pursuant to the confession of the appellant is also not established.

10. Mr. Sharan relied on *Sharad Birdhichand Sarda vs. State of Maharashtra* [(1984) 4 SCC 116] in which this Court has laid down the tests to be satisfied before the court convicts an accused on the basis of only circumstantial evidence. He argued that in this case these tests are not satisfied and therefore the conviction of the appellant by the trial court as maintained by the High Court should be set aside. He also cited the decision of this Court in *Javed Masood and Another vs. State of Rajasthan* [(2010) 3 SCC 538] to argue that the evidence

of prosecution witnesses was binding on the prosecution. He submitted that the evidence of PW3, PW4 and PW7 relied upon by the appellant to establish his innocence, therefore, is binding on the prosecution.

11. Mr. Samir Ali Khan, learned counsel appearing for the State, on the other hand, submitted that the evidence of PW-6 is consistent and if the evidence of PW-6 is considered along with the recovery of the dead bodies from the room belonging to the appellant as well as the recovery of the weapons and other incriminating materials pursuant to the confessional statement of the appellant marked Ex.1, the Court will arrive at the only conclusion that it is the appellant who has committed the murder of three deceased persons. He submitted that though the appellant retracted his confession before the trial court when his statement under Section 313 of the Cr.P.C. was recorded, the appellant has not led any evidence to establish his innocence. He submitted that the trial court and the High Court, therefore, have rightly held that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt.

FINDINGS OF THE COURT:

12. The evidence of PW-6 on which both the trial court and the High Court have relied on is clear that on 16.12.2002 at about 8.00 p.m. when he was present at the tea stall, Arvind, servant of the appellant came and called Ravindra Prasad saying that the appellant wanted to talk to him on certain issues and that Ravindra Prasad left with Arvind. PW-6 has also stated in his evidence that after about an hour Arvind came again and told that the appellant was calling Sunny also and Sunny went along with Arvind and thereafter PW-6 closed the shop and went to his house. No suggestion has also been made to PW-6 in his cross-examination by the defence that PW-6 was not present at the tea stall on 16.12.2002. Mr. Sharan, however, referred to the evidence of PW-7 that PW-6 has come to his house on 16.12.2002 and stayed at his house at Patna itself in the night and left in the morning but PW-7 has not stated the time when PW-6 had come to his house on 16.12.2002. Hence, the evidence of PW-7 does not contradict the evidence of PW-6 that he was at the tea stall at 8.00 p.m. on 16.12.2002 when Arvind told

Ravindra Prasad and Sunny Kumar that they were being called by the appellant.

13. There is also evidence to show that the dead bodies of Ravindra Prasad, Sunny Kumar and Arvind were recovered from the Khatal of the appellant. Though, the seizure witnesses PW-1 and PW-2 stated that nothing was seized in their presence, PW-6 has stated that when the Khatal (cattle shed) of the appellant was opened, he saw some splashes of blood and the dead bodies were found in another room and these dead bodies were of Ravindra Prasad, Sunny Kumar and Arvind. He has also stated that the inquest reports of all the three dead bodies were prepared at the place of occurrence itself and he put his signature on it and all the three signatures are his and these have been marked as Ex.1/5, 1/6 and 1/7. In cross examination by the defence, PW-6 has denied the suggestion that the dead bodies had not been recovered in his presence and that the inquest reports were not prepared in his presence and that he had not put his signatures on the inquest reports.

14. Mr. Sharan relied on the evidence of PW-7 to submit that the three dead bodies were not recovered from the Khatal but we find that PW-7 has also stated that the three dead bodies were recovered from the room of Pearl Cinema where the Khataals of the appellant were situated. PW-7 has, however, admitted in cross-examination on behalf of the defence that he had not seen with his own eyes as to from which place the dead bodies were recovered. Thus the evidence of PW-7 may not establish the place from which the dead bodies were recovered but the evidence of PW-6 clearly proves that the bodies were recovered from a room in the verandah of Pearl Cinema, which was in occupation of the appellant and this evidence of PW-6 has not been contradicted by the evidence of PW-7.

15. PW-8, the I.O. who inspected the place of occurrence has stated in his deposition that Pearl Cinema is situated to the east of the tea stall in Budh Marg and was closed for a long period and there is a verandah to the east of the cinema hall which is divided into many rooms and the rooms situated to the north is in possession of the

appellant. He has further stated in his evidence that in the western portion of the floor of this room, blood was found in huge quantity which had already clotted and the stains of blood were found on the western wall also. PW-8 has further stated that to the north of this room and near the door there is a vacant place which is fitted with the grill gate and to the north of this place there is another room in which there is heap of straw and the three dead bodies were found concealed in this very heap of husk which were recovered and the husk was found sticking to the injuries on the dead bodies of the deceased persons. PW-8 has further stated that the three dead bodies were recovered from the place of occurrence itself. He has also stated that Rajender Tiwari, the SI of Police prepared the inquest reports of all the three dead bodies and he put his signatures on all the three inquest reports which have been marked as Ex.5, 5/1 and 5/2 respectively.

16. PW-8 has also stated in his evidence that in course of investigation, after the appellant had surrendered in court, he took him on police remand and in course of investigation he gave his confessional statement, and

pursuant to information the appellant divulged, he seized two pair of blood stained plastic shoes, a blood stained white gamcha (towel of Indian type), a blood stained chequerred gamcha, a plastic rope of green colour, a blood stained piece of plastic, a blood stained old sack, a small sack of blood, a blood stained green small plastic sack, a blood stained small container made of plastic, a knife of 16 inches used for slaughtering goat. PW-8 has also stated that a seizure list of all these articles which were recovered were prepared by Rajender Tiwari and he had identified the writing and signature of Rajender Tiwari and the seizure list is marked as Ex.6/1. Section 27 of the Indian Evidence Act, 1872, states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Hence, the information received from the appellant pursuant to which the aforesaid incriminating materials

were recovered is not only admissible but also has been proved.

17. Thus, three circumstances have been established by the prosecution. The first circumstance established by the prosecution is that Arvind came to the tea stall on 16.12.2002 at about 8.00 p.m. and told Ravindra Prasad that he was being called by the appellant and Ravindra Prasad went with Arvind and within an hour thereafter Arvind again came to the tea stall and told Sunny Kumar that he was being called by the appellant and Sunny Kumar went along with Arvind. The second circumstance that has been established by the prosecution is that on 17.12.2002 the dead bodies of Ravindra Prasad, Sunny Kumar and Arvind were recovered from a room in occupation of the appellant in the verandah of Pearl Cinema. The third circumstance which has been established by the prosecution is that pursuant to the information divulged by the appellant the incriminating materials were recovered by the I.O. These three chain of circumstances establish beyond reasonable doubt that it

was the appellant who had eliminated the three deceased persons.

18. In *Sharad Birdhichand Sarda vs. State of Maharashtra* (supra), cited by Mr. Sharan, the following 5 golden principles were laid down for a proof of guilt on the basis of circumstantial evidence (i) the circumstance from which the conclusion of the guilt is to be drawn should be fully established; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused; (iii) the circumstances should be of a conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved, and (v) 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. Considering the chain of three circumstances which have been fully established by the prosecution, the 5 golden principles laid down in *Sharad Birdhichand Sarda vs. State of Maharashtra* (supra) apply in this case and the only hypothesis that we can conclude from the chain of

three circumstances is that it is the appellant who has committed the murder of the three deceased persons.

19. In *Javed Masood and Another vs. State of Rajasthan* (supra) cited by Mr. Sharan, this Court relying on its earlier decision in *Mukhtiar Ahmed Ansari vs. State* [(2005) 5 SCC 258] has held that it was open to the defence to rely on the evidence led by the prosecution. In this case, we have found that the evidence of PW-7 does not contradict the evidence of PW-6 and does not support the defence. It, however, appears from the evidence of PW-3 that it was Arvind who had a Khatal at Old Bakri Bazar. We have perused the evidence of PW-3 and we do not find that PW-3 has stated that the appellant did not have a Khatal on the verandah of the Pearl Cinema. Of course, PW4 has stated that the appellant runs business of bakri (sheep goat) and never ran milk business but in the evidence of PW-4 there is nothing to show that the room on the verandah of Pearl Cinema was not in the occupation of the appellant. At best the defence can rely on PW-4 to argue that the appellant did not carry on milk business and therefore the motive for committing the offence did not

exist. The evidence of PW4 may thus create some doubt with regard to the motive of the appellant to kill Ravindra Prasad and Sunny Kumar. Where other circumstances lead to the only hypothesis that the accused has committed the offence, the Court cannot acquit the accused of the offence merely because the motive for committing the offence has not been established in the case. In *Ujjagar Singh v. State of Punjab* [(2007) 13 SCC 90, this Court has held:

“It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy”.

SENTENCE:

20. On the question of sentence, the trial court has recorded special reasons under Section 354(3) Cr.P.C. for awarding death sentence to the appellant. The trial court has held that the appellant has killed Ravindra Prasad and

Sunny Kumar on an issue of petty amount and the appellant has also not spared his servant, Arvind. The trial court has also found from the *post mortem* reports of the three deceased persons that they have been brutally murdered after premeditation. The trial court has further held that if the appellant is allowed to continue to live in society, he will be a great threat to his co-human beings. For the aforesaid reasons, the trial court took the view that the appellant should be awarded the death sentence.

21. While confirming the death sentence, the High Court has held in the impugned judgment that the present case clearly falls under the yardstick laid down in *Machhi Singh & Ors. v. State of Punjab* [AIR 1983 SC 957]. The reasons, which weighed with the High Court in confirming the death sentence, are that the appellant did not hesitate to take away three lives for petty monetary gain; the tender age of Sunny was of no concern to him; either Ravindra or Sunny had to undergo the trauma of watching the father or the son being killed first in front of the other and their hands and feet were tied and a butchering knife was used to cause multiple murders and the nature of the

assault upon the deceased Arvind to do away with all evidence whatsoever was dastardly.

22. We have, however, noticed that the motive for the appellant to commit the murder of three persons has not been established in this case. Hence, one of the reasons given by the trial court and the High Court that the murders were committed for petty monetary gain is not substantiated by evidence. We have also found that there is no eyewitness to the manner in which the appellant committed the murder of three persons and the culpability of the appellant has been established only by a chain of three circumstances established by the prosecution. The finding of the High Court, therefore, that either Ravindra or Sunny had to undergo the trauma of watching the father or the son being killed first in front of the other is a pure surmise. Similarly, the finding of the High Court that the hands and feet were tied and a butchering knife was used to cause multiple murders is an inference drawn by the High Court from the *post mortem* report. What exactly happened leading to the murder of three persons by the appellant is not known, but what appears from the *post*

mortem reports is that the three deceased persons were brutally killed by the appellant. It has, however, been held by this Court in *Subhash Ramkumar Bind @ Vakil & Anr. v. State of Maharashtra* [AIR 2003 SC 269] that brutality would be a relevant factor but how the same did take place is also a relevant and necessary material to be considered while deciding whether to award life imprisonment or death for the offence of murder. Moreover, in *Panchhi & Ors. v. State of U.P.* [AIR 1998 SC 2726] a three-Judge Bench of this Court has held:

“Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the “rarest of rare cases” as indicated in, *Bachan Singh’s* case, (AIR 1980 SC 898), in a way every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder.”

23. The trial court, however, has held that as the appellant has eliminated the three deceased, if the appellant is allowed to continue to live in society, he will be a great threat to his co-human beings. This reason for awarding the extreme penalty of death is based on an

apprehension and may not be enough to impose the extreme penalty of death. As has been held by the majority of four Judges in *Bachan Singh's* case (supra), the extreme penalty of death can be inflicted only in gravest cases of extreme culpability and in making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. In the present case, we do not find evidence to establish the gravest case of extreme culpability of the appellant and we do not also have evidence to establish the circumstances of the appellant.

24. We have, however, sufficient evidence to establish the culpability of the appellant for three offences of murder as defined in Section 300, IPC, and for each of the three offences of murder, the appellant is liable under Section 302, IPC for imprisonment for life if not the extreme penalty of death. Section 31(1) of the Cr.P.C. provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code, sentence him for such offences, to the several

punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. Thus, Section 31(1) of the Cr. P.C. empowers the Court to inflict sentences of imprisonment for more than one offence to run either consecutively or concurrently. In *Kamalanantha & Ors. vs. State of T.N.* [(2005) 5 SCC 194], this Court has held that the term “imprisonment” in Section 31 of the Cr. P.C. includes the sentence for imprisonment for life. Considering the facts of this case, we are of the opinion that the appellant is liable under Section 302, IPC for imprisonment for life for each of three offences of murder under Section 300, IPC and the imprisonments for life should not run concurrently but consecutively and such punishment of consecutive sentence of imprisonment for the triple murder committed by the appellant will serve the interest of justice.

25. In the result, we maintain the conviction of the appellant for three offences of murder under section 302,

IPC, but convert the sentence from death to sentence for rigorous imprisonment for life for each of the three offences of murder and direct that the sentences of imprisonment for life for the three offences will run consecutively and not concurrently. Thus, the appeals are allowed only on the question of sentence, and dismissed as regards conviction.

.....J.
(A. K. Patnaik)

.....J.
(Madan B. Lokur)

New Delhi,
February 15, 2013.

JUDGMENT