CASE NO.:
Appeal (crl.) 1658 of 1996

PETITIONER:
Babudas

RESPONDENT:
State of M.P.

DATE OF JUDGMENT: 29/04/2003

BENCH:
N.Santosh Hegde, Ashok Bhan & B.P.Singh.

JUDGMENT:

J U D G M E N T

SANTOSH HEGDE, J.

The appellant and another person by name Gowardhan were charged for offences punishable under Section 302 read with Section 34 and Section 201 read with Section 34 IPC for having committed the murder of one Abhai Kumar on 21.5.1988 and for having destroyed the evidence by throwing the dead body of said Abhai Kumar in a lake. The learned Sessions Judge, Mandsaur, Madhya Pradesh, who tried the accused for the above charges, imposed a sentence of imprisonment for life on both the accused for an offence punishable under section 302 read with 34 and a further RI for a period of 3 years under section 201 read with Section 34. In an appeal filed by the convicted accused which included the appellant before us, the High Court of Madhya Pradesh, Jabalpur, Bench at Indore allowed the appeal of Gowardhan and acquitted him of all charges while the appeal filed by the appellant herein Babudas was dismissed, confirming his conviction and sentence under Sections 302 and 201 IPC. It is against this judgment of the High Court that the appellant is before us in this appeal.

Brief facts necessary for disposal of the appeal are that the first accused (since acquitted) and deceased Abhai Kumar were classmates during their school-days. The deceased had done his Ayurved Ratna and had started medical practice. He was also studying M.Sc. On 21.5.1988 said deceased told his father Babu Lal Jain that he was going to Indore for a day or two on some work and left Mandsaur at about 7/7.30 p.m. on that day. After some days since the deceased did not return, his father made a frantic search for him but all in vain. On 25.5.1988 the villagers spotted a dead body floating in Laduna lake and informed the village Chowkidar who, in turn, went to the Police Station Sitamau and lodged a report. Based on the said report, a crime came to be registered and the SHO Rajendra Singh Jhala arranged to fish the body out of the lake. The body had by then putrified and was unidentifiable. It is the case of the prosecution that from the clothes found on the body as also a key-bunch inside the pocket of the pant, the dead body was identified by the father, the younger brother, a friend and a former teacher of the deceased as that of Abhai Kumar. On post mortem the doctor opined that the deceased had died due to stab injuries on his chest. During the course of

investigation it was found that on 18.5.1988 when the deceased and his friend Nilkanth PW-7 had gone to a pan shop when the first accused Gowardhan met him there and took the deceased away from PW-7 but PW-7 could hear that conversation between A-1 and the deceased. During the said conversation, PW-7 states that A-1 asked the deceased for a loan of Rs.30,000 but the deceased told A-1 that he had only Rs.25,000/- in his bank account which he would lend to him. It is the case of the prosecution that during the course of investigation, PW-10 Dinesh Shukla remembered that on 21.5.1988 he had actually seen the deceased in the company of both the accused near the lake which he informed the investigating officer after about a week because he had then left for his village. The accused persons were then arrested on 27.5.1988 and A-1 allegedly told the I.O. that out of Rs.25,000 taken by him from the deceased, a sum of Rs.20,000 was given to the sister of A-2 for safe keeping and Rs.4,900 were given to A-2 while the balance was pocketed by A-1 himself. The prosecution then also alleges that on the same day, A-2 told the I.O. that he had hidden a knife which was used in the murder of the deceased in a pond near the lake and that he would take the Police to the said place for recovery of the said knife. He is also supposed to have told the Police that he had hidden the money given to him by A-1 after spending a part thereof under some red stones on the way leading to Dammakheri. Even in this regard A-2 is supposed to have offered the Police to lead them to the place for recovery of the said money. A-2 also allegedly told the Police that he had kept hidden a watch taken from the deceased under the earth in a corner of a wall of the temple near the pond. These statements according to the prosecution, were made to the Police in the presence of PWs.17 and 19 and pursuant thereto, the accused persons took these witnesses along with the Police to various places mentioned by him and facilitated the Police to recover the knife, the money and the watch. Prosecution through various witnesses examined in the trial, have contended that the watch in question actually belonged to a friend of the deceased who had kept the same with him for safe custody which the deceased had worn at the time when he allegedly left for Indore. The prosecution through the evidence of the Bank Manager had also tried to establish the fact that the deceased on 21.5.1988 had withdrawn a sum of Rs.25,000 in the denomination of 100 rupee notes. It is based on the above evidence that the trial court found both A-1 and A-2 guilty of the offence charged but the High Court while allowing the appeal of A-1, has convicted A-2.

We have heard Ms. Rachna Gupta, learned counsel fort he appellant; and Ms. Vibha Datta Makhija, learned counsel for the respondent-State. It is contended on behalf of the appellant that the only evidence that has been accepted as against this appellant by the High Court is that of the recovery which part of the prosecution evidence has not been accepted by the said court in regard to the first accused who even according to the prosecution, was the person who had taken the loan of Rs.25,000, still the High Court erroneously accepted this part of the prosecution case to confirm the conviction as against the appellant which ought not to have been done. That apart, it is contended that the story of recovery of knife, watch and the money is so artificial that the same cannot be accepted by any prudent person. It was also pointed out that out of the 2 witnesses who were Panchayatdars for all these recoveries, PW-17 is a stock recovery witness for the Police in a large number of cases and his evidence in the court in this case shows that in reality the recoveries were not made at the behest of A-2 or from the place as alleged by the prosecution. Learned counsel

for the respondent-State, per contra, has contended that the mere fact that PW-17 was a witness for recovery in many earlier cases, ipso facto does not make the recovery bad in the eye of law. That apart, it is not only PW-17 who has been a witness to the recoveries, there was PW-19 also who cannot be termed as a stock witness therefore the argument that the recoveries should not be believed, has no merit. She contended that a recent and unexplained possession of properties of the deceased by the accused justifies the presumption that it was the said accused and no one else had committed the murder which according to learned counsel, is permissible under Section 114(a) of the Evidence Act. In support of this contention of hers, learned counsel relied on a judgment of this Court in Baiju alias Bharosa v. State of Madhya Pradesh (1978 1 SCC 588). She further pointed out from the material on record that the appellant herein had taken a specific stand that on the date of the incident, he was not in Mandsaur but was away from there. He had set up a plea of alibi which has been found to be not true by both the courts below therefore setting up of a false alibi in a case involving only circumstantial evidence would also be a circumstance to be taken note of as a link indicating the guilt of the accused. In support of this proposition, she relied on a judgment of this Court in Mani Kumar Thapa v. State of Sikkim (2002 (7) SCC 157).

As could be seen from the prosecution case itself the motive for the murder seems to be the receipt of Rs.25,000 by A-1 from the deceased. We really do not find from the facts of this case how that could be a motive; be it for A-1 or A-2 to do away with the deceased. It is the prosecution case itself that the deceased and A-1 were good friends and when he asked for a loan of Rs.30,000 the deceased willingly agreed to give him Rs.25,000/- which he had. If that be so, we do not find any reason whatsoever for any one of these accused to kill the deceased after having received the said amount. We also do not see the reasoning behind the prosecution case that A-1 having received a sum of Rs.25,000 why he would give the money to the sister of A-2 and a part of it to A-2 himself without retaining any substantial part with him. From the evidence on record we notice that it was PW-7 who has spoken in regard to this monetary transaction which from his own evidence we find difficult to believe. It is his case that on 18.5.1988, i.e. 3 days prior to the alleged murder, A-1 met the deceased at the pan shop where deceased and PW-7 had gone and A-1 had taken the deceased away from PW-7 which distance according to the evidence of PW-7 himself is about 500-700 meters. If that be so, we fail to understand how PW-7 could have really overheard the conversation between the deceased and A-1. At any rate, we notice that the High Court has not accepted this part of the prosecution case in regard to A-1. Then the learned counsel appearing for the appellant had very seriously contended that the evidence led by the prosecution in regard to recovery of knife, money and wrist-watch is so artificial that the same cannot be accepted by any reasonable person. Having perused the evidence of PW-17, one of the Panchayatdars for recovery and the Investigating officer, PW-20, we find sufficient force in this argument of learned counsel for the appellant. It is seen that the shop of PW-17 is about 1 kms. away from the Police Station in question, there were many other shops and houses in-between, still the I.O. decided to specifically look for and get PW-17 as a Panchayatdar for the recovery. From the evidence of PW-17, we notice that undoubtedly, he is a stock witness who has been appearing as a witness for recovery on behalf of the prosecution even as far back as the year 1965, therefore, we will have to be very

cautious in accepting his evidence. The manner in which the alleged recovery is made also creates a lot of doubt in our mind. It is seen from the evidence led by the prosecution that at every place where the accused took the Panchayatdars and the Police, according to the prosecution witnesses themselves, there were thousands of people present witnessing the recovery. We find it extremely difficult that such a large gathering would be present at the recovery unless people in the village had already come to know that there is going to be such a recovery. Then the manner in which the currency notes were allegedly kept in a damp area under a rock also creates doubt in our mind since no prudent man would conceal currency notes in such a place. Then there is a very serious doubt about the recovery of the wrist watch. It is stated that on 28.5.1988 the wrist watch in question was recovered from the place where it was hidden and was seized and sealed in an envelope to which PWs.10, 17 and 19 appended their signatures. But surprisingly, when the sealed packet was opened in the court, it was found that the watch was wrapped in a newspaper dated 3.6.1988 a newspaper published about 6 days after the date of seizure. PW-10 who is the I.O. when confronted with this contradiction, has pleaded his inability to given any explanation in regard to this. However, the prosecution through the evidence of PW-11 has made an effort to explain away this serious infirmity in the recovery of the wrist watch. This witness says that the sealed packet which contained the wrist watch was opened in his presence on 15.6.1988 on which date he was posted as a Naib Tehsildar in the Tehsil office for the purpose of getting the watch identified by PW-10, Dinesh Shukla. But for this opening of the packet which was sealed on 28.5.1988, PWs.17 and 19 who had put their signatures were not parties nor are they parties for resealing of this watch in the newspaper of 3.6.1988. If that be so, we fail to understand what evidentiary value can be attached to the recovery of the wrist watch. The very purpose for which the wrist watch was packed and sealed with signatures of PWs.17 and 19 on 28.5.1988 is lost by the opening of the packet in their absence. The prosecution cannot prove that the wrist watch recovered on 28.5.1988 at the instance of A-2 is the same watch which was produced in court during the trial. Our suspicion in regard to the genuineness of the recoveries gets compounded by this factum of opening of the sealed articles in the absence of original Panchayatdars. In the present case, the inability of the I.O. to explain the change in packaging makes the seizure further doubtful. This serious error in the background of the fact that even though many independent witnesses were available as Panchayatdars for the recovery, the prosecution's act of using an admittedly stock witness like PW-17 and the manner and the place in which these recovered objects were allegedly concealed, throws great suspicion in the alleged recoveries which is the foundation of the prosecution case against the appellant. The argument of learned counsel for the respondent in regard to the presumption that could be drawn from the alleged recovery as to the crime committed by the person from whom such recovery is made or his false alibi as supported by the decisions relied on by her, will be of no assistance to the prosecution case. A presumption under Section 114(a) could be drawn only if the factum of recovery is proved beyond reasonable doubt which in this case we have held is not done because the recoveries are highly doubtful. Therefore, on such doubtful recoveries, a presumption as to the guilt of the accused cannot be drawn. We agree with the learned counsel for the respondent-State that in a case of circumstantial evidence, a false alibi set up by the accused would be a link in the chain of circumstances as held by this Court in the case of Mani Kumar Thapa (supra) but then

it cannot be the sole link or the sole circumstance based on which a conviction could be passed. In the instant case we have held that a substantial part of the prosecution case which involves both A-1 and A-2 has been disbelieved by the High Court so far as A-1 is concerned and the conviction was confirmed as against A-2 by the High Court based on the recoveries made and the said recovery having been disbelieved by us, the sole circumstance against the appellant remains to be his alibi which in our opinion, is not sufficient for basing a conviction. We are of the considered opinion that the prosecution has failed to prove beyond reasonable doubt that this appellant is responsible for the murder of the deceased, and for throwing his body in the lake, consequently, the charge under Section 201 should also fail.

For the reasons stated above, this appeal is allowed. The judgment, the conviction and sentence imposed on the appellant herein are set aside. The appellant shall be released forthwith, if not wanted in any other case.

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