

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NOS. 1693-1694 OF 2005

State of U.P.

...Appellant

Versus

Mohd Iqram & Anr.

...Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. These appeals have been preferred by the State of U.P. against the judgment and order dated 25.04.2003 passed by the High Court of Judicature at Allahabad in Criminal Appeal Nos. 14 and 60 of 1981, reversing the judgment and order of the Sessions Court dated 20.12.1980 in Session Trial No. 382 of 1980 passed by the learned District Judge, Saharanpur, by which both the respondents stood convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter called as 'IPC') and had been awarded life imprisonment.

2. The brief resume of the facts as emerging from the FIR and the evidence adduced by the parties is set forth:

(A) One Rashmi, deceased, aged about 30 years had been married to Suresh Kumar (accused, acquitted by the Sessions Court), but her relations with him and her mother in law always remained strained. They had no child. Suresh Kumar obtained a decree of divorce on 30.01.1980 under Section 13 of the Hindu Marriage Act, 1955 and as per the decree, Rashmi, deceased, was permitted to reside in a room with an enclosed open area towards its West, apart from the rest of the house, and she was granted maintenance @ Rs.150/- per month till her life time or remarriage, whichever was earlier. Being aggrieved, Rashmi, deceased, had preferred an appeal against the said decree of divorce dated 30.01.1980 and the same was pending before the District Judge, Saharanpur.

(B) On 15.0.5.1980 at about 9.00 P.M., S.I. Brahm Pal Singh (PW.6) of Police Station Sadar Bazar accompanied by Head Constable Balvir Singh (PW.7) and other two constables was on a routine check-up and general patrolling. On reaching the West of Adarsh School in the close vicinity of the house of Rashmi, deceased, he and his companions heard shrieks emanating from the house of Suresh Kumar accused

known as “Jagadhari Walon Ki Kothi”. The police party saw three persons scaling down the wall of the Sahan towards West of the room under the occupation of Rashmi, deceased.

(C) On being challenged and flashing of torch light, two of them ran towards North West and the third towards South. On a chase, the present two respondents who were running towards North West, were caught hold by Samay Singh (PW.8) and one Sharif who was present there. The other accused who ran towards South, managed to escape. He was named as Suresh Kumar by the present two respondents after they had been apprehended. The respondents led the police party inside the Sahan of the said house. The lock inside the door opening in the Sahan was broken by S.I. Brahm Pal Singh (PW.6) and a woman was seen lying unconscious on the floor in the room on a cot. In the meanwhile, Mahesh Kumar (PW.3), (brother of Suresh Kumar), also came down from the upper storey besides other persons. Mahesh Kumar (PW.3) took Rashmi, deceased, by car to S.B.D. Hospital, Saharanpur. The respondents had been taken to the police station Sadar Bazar where FIR was lodged by S.I. Brahm Pal Singh (PW.6). However, on receiving the information of death of Rashmi, deceased,

at about 11.00 P.M. from Mahesh Kumar (PW.3), the case was converted under Section 302 IPC and investigation ensued.

(D) The post-mortem of the dead body was conducted by Dr. G.R. Sharma (PW.1) on 16.05.1980, according to which the deceased was about 30 years of age and had died about 18 hours from the time of conducting post-mortem. The doctor found the following ante-mortem injuries on her person:

- (1) Lacerated wound $1\frac{1}{2}$ cm x $1\frac{1}{2}$ cm x $\frac{1}{4}$ cm on left eyelid with contusion 7.5 x 2 cm extending from left eyelid to left temple region.
- (2) Abrasion 4 x $\frac{1}{2}$ cm on left cheek.
- (3) Abrasion $1\frac{1}{2}$ cm x $\frac{3}{4}$ cm on left side neck, 2 cm below angle of mandible.
- (4) Abrasion $\frac{1}{2}$ cm x $\frac{1}{2}$ cm with contusion $1\frac{1}{2}$ cm x 1 cm on the right side of neck, 4 cm below angle of mandible.
- (5) Abrasion $1\frac{1}{2}$ cm x 1 cm on back of left shoulder joint top.
- (6) Abrasion 1 cm x 1 cm on back of left elbow joint.
- (7) Contusion 5 cm x 3 cm on right forearm upper $\frac{1}{3}$ rd medial side.
- (8) Contusion 4 cm x 2 cm on back of inner angle of scapula.

(E) Suresh Kumar was also arrested on 23.05.1980 and he was kept bapurdah. He was subjected to test identification parade on 6.6.1980 and was identified by S.I. Brahm Pal Singh (PW.6), Head Constable Balvir Singh (PW.7) and Samay Singh (PW.8) besides Babu Ram and

Surendra Pal. As all the three accused pleaded not guilty, they were put to trial. The prosecution, in all, examined 13 witnesses. The respondent Mohd. Iqram also examined one Bhugan (DW.1), the Pradhan of village Taharpur in his defence.

(F) On consideration of the evidence on record, the learned trial court convicted and sentenced the two respondents as mentioned hereinabove, but acquitted Suresh Kumar (husband of deceased Rashmi) giving him benefit of doubt entirely on the premise that he might have been known to the identifying witnesses from before, and he was shown to the witnesses before being put to test identification.

(G) Being aggrieved, the two respondents filed Criminal Appeal Nos. 14 and 60 of 1981 before the Allahabad High court which have been allowed by the judgment and order dated 25.04.2003. Hence, these appeals.

3. Shri R.K. Gupta, learned counsel appearing on behalf of the State of U.P., has submitted that the High Court committed an error in acquitting the respondents without appreciating the facts on record. The trial court had convicted the respondents on circumstantial evidence making clear cut observations that the chain of

circumstances was complete; the said respondents had been arrested from the place of occurrence; their presence was not likely to be there as they were not the residents of the area; there had been no theft or dacoity in the area. Rashmi, deceased, was strangled with hands without the aid of any weapon. The High Court ordered acquittal on the basis that no weapon had been recovered and probably Suresh Kumar, who had been acquitted by the trial court had committed the murder after committing rape on the deceased, though the trial court had recorded a finding that there had been no violence with the body of the deceased even prior to her strangulation. The High Court has placed reliance on inadmissible evidence which is not permissible in law. The judgment and order of the High Court is liable to be set aside and the appeals deserve to be allowed.

4. On the contrary, Smt. K. Sarada, learned amicus curiae, has vehemently opposed the appeals contending that the High Court had given cogent reasons while acquitting the respondents. This Court should not interfere with the said order as it is based on proper appreciation of evidence. No motive could be established against the respondents, thus, appeals are liable to be dismissed.

5. We have considered the rival submissions made by both the learned counsel for the parties and perused the record.

6. As it is a case of acquittal, this Court has to be slow in interfering with the impugned judgment and order and it is permissible to reverse the judgment of acquittal only on settled principles of law. This Court will have to record conclusions that the findings of fact recorded by the High Court are perverse and, for that purpose, it is necessary for us to make reference to the evidence on record very briefly.

7. Mahesh Kumar (PW.3) is the brother of accused Suresh Kumar, husband of Rashmi, deceased. He had deposed that on 15.5.1980 at about 9.00 P.M., he was on the roof of his house alongwith his another brother. He heard shrieks from the room of Rashmi, deceased. He flashed the light of torch towards the same and found that 2-3 persons were running away from there. He immediately came down stairs and found that some persons had already gathered there. He found that these two respondents had been apprehended by the police and local persons present there. He had gone alongwith these respondents and police to the room of the deceased and found her lying on the cot. Mukesh Kumar (PW.3) took her to the hospital

where she was declared dead. S.I. Brahm Pal Singh (PW.6) has supported the prosecution case by stating that when he was on patrol duty on 15.5.1980 and reached near the place of occurrence, he heard some noise from the residence of Rashmi, deceased. He immediately went towards the said house and found that three persons were scaling down the Western wall of the building. The police party chased them alongwith other persons and apprehended them. Samay Singh (PW.8) and Sharif had also reached there. One person escaped. Constable Balvir Singh (PW.7) who had accompanied S.I. Brahm Pal Singh (PW.6) deposed that they found three persons scaling down the Western wall of the house and police alongwith other persons chased them and apprehended two persons while one escaped. Samay Singh (PW.8) has also made a similar statement supporting the case of the prosecution. Om Prakash Chaudhry, a practicing advocate, had deposed about the strained relationship between accused Suresh Kumar and deceased Rashmi and further deposed that Rashmi, deceased, had told him 2-3 times that she had an apprehension of being killed by Suresh Kumar, accused and his mother in law. The prosecution case stands further supported by Dr. G.R. Sharma (PW.1), who had conducted the post-mortem examination and in the report opined that injuries on the person of Rashmi, deceased, could be

caused by strangulation and use of force.

8. After appreciating the aforesaid evidence including the deposition of Bhugan (DW.1), the trial court came to the conclusion that Suresh Kumar, accused, had no motive and his identification was also not reliable and acquitted him by giving the benefit of doubt.

9. The respondents were convicted by giving cogent reasons on the basis of the following grounds:

- None of the accused persons belonged to the locality or even to the city.
- No suggestion came to be made from their side as to what could have brought them to the spot at the moment.
- They were utter strangers to the area operating under cover of darkness and seen scaling down the wall in a bid to run away.
- Upon being taken into custody they took the police party inside the western Sahan and then to the apartment occupied by the deceased.
- The medical evidence did not suggest that there was rape or anything of the kind attempted on Smt. Rashmi. Nor did the investigation reveal any case of theft.
- The purse of the deceased was found intact in the room besides the sum of Rs.107/- and odd. None of the articles was shown to have been taken away. The object behind those who operated inside the room, therefore, could not have other than to kill Smt. Rashmi.

- Death was possible in the medical opinion also, to be caused by strangulation with the hands without the application of any other instrument or weapon.

10. The High Court after appreciating the evidence acquitted the respondents on the basis of the following findings:

(I) The simple fact of their running in the lane at that moment could not be sufficient to fasten the guilt on their heads. There is no corroboration of any independent witness that the accused had scaled down the Western wall of the house.

(II) The deceased was a continuous source of trouble to her husband Suresh Kumar. She was not reconciled to the divorce granted in favour of her husband and she had challenged the same before the appellate court and her husband had also been burdened with the liability to pay maintenance to her till her life time. Further observations made by the Court read as under:

“The post-mortem report shows that seminal fluid was found in her vaginal part and several ante-mortem injuries had also been inflicted on her. The autopsy indicated as if she was subject to forcible intercourse also before her death. The greater possibility is that it was her husband who cut short her life after inflicting several injuries on her and strangulating her, but before doing that he even had forcible sexual intercourse with her exhibiting sadistic tendency. He did her to death this way, removing the thorn from his way for all times to come. After committing the crime, he managed the vanishing trick from the scene. The said feature is that the case was given a different profile relating to him, not coming up to the standard required to find him guilty.”

(III) There was no electric supply at the relevant time. Thus, identification of the accused while scaling down the wall becomes doubtful.

(IV) The weapon used in the offence had not been recovered.

11. In the aforesaid fact-situation, the case requires very close scrutiny.

Dr. G.R. Sharma (PW.1) had deposed that the injuries could be caused by strangulation by hands. Thus, the question of recovering any weapon as mentioned by the High Court, is totally unwarranted and uncalled for. More so, nature of the injuries itself reveal that for causing such injuries, no weapon was required. Non-use of weapon cannot be illogical, keeping in view the findings recorded in the post mortem report.

12. So far as the issue of rape of the deceased prior to her murder by Suresh Kumar, accused, her ex-husband, is concerned, the trial court has recorded findings of fact on this aspect in the negative. Undoubtedly, post-mortem report contains such observations, but Dr. G.R. Sharma (PW.1) has not made any such reference either in his examination-in-chief or cross-examination. Nor this aspect had ever been put to either of the three accused in their statements recorded

under Section 313 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). We fail to understand as under what circumstances it was permissible for the High Court to make such observations about the post-mortem report. Accused Suresh Kumar has been acquitted by the trial court. The State, for reasons best known to it, did not prefer any appeal against the said order of acquittal. We are of the considered opinion that it was not permissible for the High Court to castigate the accused Suresh Kumar with such observations holding him guilty of committing rape and subsequently murder of his ex-wife Rashmi. Undoubtedly, the post-mortem report had been proved but that does not mean that each and every content thereof is stood proved or can be held to be admissible. Such observations cannot be termed to be a substantive piece of evidence. Dr. G.R. Sharma (PW.1) did not even whisper about the same in his statement made in the court which is the only substantive piece of evidence in law. The court cannot place reliance on incriminating material against the accused, unless it is put to him during his examination under Section 313 Cr.P.C. Thus, the High Court committed an error by taking into consideration the inadmissible evidence for the purpose of deciding the criminal appeals and holding the person guilty who had already been acquitted by the trial court. The post-mortem report had been examined at the time of

framing of the charges. The trial court did not frame any charge under Section 376 IPC or Section 376 read with Section 511 IPC. More so, no witness had ever mentioned anything in this respect. Thus, it is beyond any stretch of imagination of any person, how such observations could be made by the High Court.

13. No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material that has surfaced against him. Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and have to be excluded from consideration. (Vide:

Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622; **State of Maharashtra v. Sukhdeo Singh & Anr.**, AIR 1992 SC 2100; and **Paramjeet Singh @ Pamma v. State of Uttarakhand**, AIR 2011 SC 200)

14. In **State of Bihar and Ors. v. Radha Krishna Singh & Ors.**, AIR 1983 SC 684, this Court dealt with the issue of prohibitive value of the contents of an admitted document and held as under :-

"Admissibility of a document is one thing and its probative value quite another-these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil....."

(See also: **Madan Mohan Singh v. Rajni Kant**, AIR 2010 SC 2933)

Thus, even if the post mortem report revealed any sexual assault on the deceased victim, such contents are not admissible, in spite of the fact that the post mortem report had been exhibited and proved by Dr. G.R. Sharma (PW.1), in view of the facts mentioned hereinabove.

15. So far as the question of the source of light and identification of the accused are concerned, the depositions of Mahesh Kumar (PW.3), brother of Suresh Kumar-accused, Brahm Pal Singh, S.I. (PW.6), Balvir Singh (PW.7) and Samay Singh (PW.8) reveal that there were

minimum three torches which had been flashed simultaneously on the persons who were scaling down the wall and were being chased by the police as well as by the local residents including Samay Singh (PW.8). In such a fact-situation, failure of electric supply does not become fatal.

Brahm Pal Singh (PW.6) and Balvir Singh (PW.7) have identified the respondents being the persons who were scaling down the wall and had been apprehended upon an immediate chase. Therefore, the High Court erred in recording the finding that identification was doubtful.

Once the prosecution had brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought forth suggestions as to what could have brought them to the spot at that dead of night. The accused were apprehended and therefore, they were under an obligation to rebut this burden discharged by the prosecution, and having failed to do so, the trial court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden.

Thus, the judgment proceeds on a surmise that renders it unsustainable.

The trial court did not find evidence of Bhugan (DW.1), examined by Mohd. Iqram, one of the respondents , worth acceptance.

16. The High Court did not even make any reference to him. It is a settled legal proposition that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse i.e. the conclusions of the courts below are contrary to the evidence on record or its entire approach in dealing with the evidence is patently illegal, leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case, the appellate court should interfere with the order of acquittal. While doing so, the appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the courts below bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

(See : **Babu v. State of Kerala**, (2010) (9) SCC 189; **Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra**, (2010) 13 SCC 657; **Brahm Swaroop & Anr. v. State of U.P.**, AIR 2011 SC 280; **S. Ganesan v. Rama Raghuraman & Ors.**, (2011) 2 SCC 83; **V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.**,

(2011) 3 SCC 317; **State of M.P. v. Ramesh & Anr.**, (2011) 4 SCC 786; **Abrar v. State of U.P.**, (2011) 2 SCC 750; and **Rukia Begum & Ors. v. State of Karnataka**, (2011) 4 SCC 779).

17. In the instant case, the circumstantial evidence is so strong that it points unmistakably to the guilt of the respondents and is incapable of explanation of any other hypothesis than that of their guilt. Therefore, findings of fact recorded by the High Court are perverse, being based on irrelevant considerations and inadmissible material.

18. In view of the above, the appeals succeed and are allowed. The judgment and order of the High Court dated 25.04.2003 is hereby set aside. The judgment and order of the trial court dated 20.12.1980 in Sessions Trial No.382 of 1980 is restored. A copy of the order be sent to the Chief Judicial Magistrate, Saharanpur to ensure that the respondents be apprehended and sent to jail for serving out the unserved part of the sentence awarded by the trial court.

.....J.
(Dr. B.S. CHAUHAN)

J.

.....
(SWATANTER KUMAR)

New Delhi,
June 13, 2011

