

CASE NO.:
Appeal (crl.) 210 of 2007

PETITIONER:
Vinay D. Nagar

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 03/03/2008

BENCH:
P.P. NAOLEKAR & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO.210 OF 2007

P.P. NAOLEKAR, J.

1. This criminal appeal by special leave is directed against the judgment and order dated 23.11.2004 passed by the High Court of Rajasthan, Jaipur Bench in Criminal Appeal (DB) No. 990/2002, which upheld the conviction and sentence of the appellant under Sections 364, 450, 302, 201 of the Indian Penal Code, 1860 (for short "I.P.C.").

2. The relevant facts of the case as per the prosecution are that Kalu (the deceased) was Chowkidar in the office of Agriculture Extension Bundi and his duty was during the night in the office premises. He was found missing under mysterious circumstances on 15.07.2000, hence informant Ramesh Chand Jain, Assistant Director lodged a written report on 15.07.2000 at 7:30 am in the Police Station, Bundi. On the basis of the report, a case under Section 456/364 IPC was registered and investigation commenced. During the investigation, it was revealed that Kalu was a star witness in a criminal case registered against the appellant-Vinay D. Nagar and others under Sections 365, 364, 328, 342, 323 IPC. As per the prosecution case, the accused along with his other companions had abducted a child Sonu on 07.07.2000 and had brought Sonu in the office where Kalu was Chowkidar and kept him in the office for some time. The activities of the accused and his companions made Kalu suspicious. Since Kalu had seen the accused with Sonu and as the accused was a Clerk in the same office where Kalu was posted as a Chowkidar, the statement of Kalu was recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."). The Investigating Officer moved an application before the Magistrate on 12.07.2000 to record the statement of Kalu under Section 164 Cr.P.C. and Kalu was to be produced before the Magistrate on 17.07.2000, the date given by the Magistrate. But in the intervening period, his dead body was found in a tank on 19.07.2000. The post mortem report indicated that the death of the deceased was homicidal. The appellant-accused was arrested and put to trial. In his statement under Section 313 Cr.P.C., he stated that on the relevant date he had gone to Bombay, but the explanation was found false in view of the evidence led by the prosecution whereby it was found that he had gone to Ahmedabad and not to Bombay. The Session Court found the accused guilty and convicted him.

3. The accused preferred an appeal before the High Court which was dismissed holding that in the fact- situation the

deceased had seen the accused with Sonu and had named the accused as the main culprit. The statement of Kalu was recorded under Section 161 Cr.P.C. on 10.07.2000. On 09.07.2000, the accused absented himself from the office and disappeared without submitting any leave application. Later on, Kalu was found dead on 19.07.2000. It was held by the High Court that the evidence collected by the prosecution shows that the accused had a strong motive and the opportunity for committing a crime. The High Court further held that the accused was absconding and hence the disappearance of the accused after the occurrence was a relevant circumstance which in the absence of plausible rebuttal evidence can be taken into consideration. The High Court was of the view that from the aforesaid circumstances an inference can be drawn towards the appellant's guilt. All the aforementioned circumstances taken cumulatively have formed a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the appellant and none else. Hence, the appeal was dismissed by the High Court.

4. It is urged by Shri U.U. Lalit, learned senior counsel for the appellant that the appellant's conviction is based on circumstantial evidence. The prosecution has relied upon the statement made by the deceased Kalu under Section 161 Cr.P.C. to prove the motive for commission of the crime. As per the learned senior counsel, the statement of Kalu under Section 161 Cr.P.C. read with Section 32 of the Indian Evidence Act, 1872, is not admissible and thus the courts below have committed an error in relying on the statement made by the deceased Kalu under Section 161 Cr.P.C. for the alleged motive of the appellant to commit the crime. It is further urged that the prosecution has completely failed to prove the chain of circumstances which should point to the guilt of the accused and none else.

5. This Court in several cases has expounded principles for cases based on circumstantial evidence. In the case of C. Chenga Reddy & Ors. v. State of Andhra Pradesh, AIR 1996 SC 3390, this Court in para 20-A observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. \005"

Further, in Padala Veera Reddy v. State of Andhra Pradesh & Ors., 1989 (Supp) 2 SCC 706, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following 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 probability the crime was committed by the accused and none else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation

of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

The principle of law is well established that where the evidence is of a circumstantial nature, circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and the facts, so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and they should be such as to exclude hypothesis than the one proposed to be proved. In other words, there must be chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

6. The circumstances on which the reliance has been placed by the prosecution are that Kalu was the prime witness in Sonu's kidnapping case and had made Section 161 Cr.P.C. statement alleging that the accused was responsible for abduction of Sonu; that it was apprehended by the appellant that Kalu would make a statement before the Magistrate under Section 164 Cr.P.C. on 17.07.2000 indicting the appellant, hence the appellant-accused had strong motive to eliminate Kalu; that the accused absented himself from the office from 10.07.2000 without taking leave; and that in his Section 313 Cr.P.C. statement he stated that he had gone to Bombay but it was found out that he actually stayed in Ahmedabad under the fictitious name in a hotel from 11.07.2000 to 12.07.2000 and thereafter in another hotel till 14.07.2000; and that there was a possibility of the accused reaching Bundi from Ahmedabad on the date of the incident. The fact that he stayed in Ahmedabad under fictitious name has been relied upon by the prosecution to show that his conduct was suspicious. On 15.07.2000, Kalu was found missing under suspicious circumstances and his dead body was found on 19.07.2000.

7. In the statement recorded by the police under Section 161 Cr.P.C. in a case registered under FIR No. 290/2000, the deceased Kalu had stated that he was on duty from 5.00 in the evening till 10.00 in the morning of 8.7.2000. At about 8.30 p.m., two men came in a Maruti car and Vinay D. Nagar, Cashier in his Department came on a motorcycle. They sat in the officer's room and started making phone calls. On enquiry being made by him, the accused told him that he was calling some acquaintance. Thereafter, he went to take meals and when he returned after half an hour, all the three persons were still there and they left in the same car at 9.00 p.m. The motorcycle of the accused was left there. At 5.00 in the morning, Vinay climbed over the gate and entered the office. Vinay woke him up and took out the keys from the bag. He opened the main gate and brought the car inside. He opened the shutter in the verandah and the room. First he took keys and opened the computer room and then brought out one child from the rear seat of the Maruti van and put him in the computer room. That child was kept lying in the computer room for 10-15 minutes. Then after 10-15 minutes they came out of that room and all three of them put the child in the Maruti van and left. He stated that he had read the newspaper and learnt from others that last night one boy had been abducted. He stated that he could identify all four persons who had come to him.

8. It is urged by the learned senior counsel that the statement recorded by the police under Section 161 Cr.P.C. of the deceased in abduction case is not admissible under Section

162 Cr.P.C. and, therefore, the prosecution could not have relied upon the statement of the deceased Kalu recorded by the police.

9. The question is whether the statement recorded under Section 161 Cr.P.C. of the deceased Kalu in a case registered under FIR No. 290/2000 (abduction case) is admissible in the case registered under FIR No. 301/2000 (murder trial) in view of the provisions of Section 162 Cr.P.C. Section 162 Cr.P.C. reads as under:

"162. Statements to police not to be signed: Use of statements in evidence. \026 (1) No statement made by any person to a police officer in the course of an investigation under this chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872; and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872, or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

On account of Section 162 Cr.P.C., a statement made by any person to a police officer in the course of investigation under Chapter XII, if reduced into writing, will not be signed by the person making it, nor such statement recorded or any part thereof be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Such statement may be used by an accused and with the permission of the Court by the prosecution to contradict the witness whose statement was recorded by the police in the manner provided under Section 145 of the Indian Evidence Act and can also be used for re-examination of such witness for the purpose only of explaining any matter referred to in his cross-examination. Bar of Section 162 Cr.P.C. of proving the statement recorded by the police officer of any person during investigation however shall not apply to any statement falling within the provision of clause (1) of Section 32 of the Evidence Act, nor it shall affect Section 27 of the Evidence Act. Bar of Section 162 Cr.P.C. is in regard to the admissibility of the statement recorded of a person by the

police officer under Section 161 Cr.P.C. and by virtue of Section 162 Cr.P.C. would be applicable only where such statement is sought to be used at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

10. In the case of *Khatri and Others v. State of Bihar & Ors.*, AIR 1981 SC 1068, this Court has held that Section 162 Cr.P.C. bars the use of any statement made before the police officer in the course of an investigation under Chapter XII, whether recorded in the police diary or otherwise. However, by the express terms of Section, this bar is applicable only where such statement is sought to be used 'at any inquiry or trial' in respect of any offence under investigation at the time when such statement was made. If the statement made before a police officer in the course of an investigation under Chapter XII is sought to be used in any proceeding, inquiry or trial in respect of an offence other than which was under investigation at the time when such statement was made, the bar of Section 162 will not be attracted.

11. When the statement of Kalu was recorded by the police officers under Section 161 Cr.P.C. during the investigation of abduction case of a boy, Kalu was alive and thus that statement could be used in the subsequent investigation that was being made with respect to the alleged murder of Kalu.

12. It is then urged by the learned senior counsel that even on lifting of Section 162 bar, it by itself will not make the statement of Kalu recorded by the police admissible in evidence. Statement can be admitted in evidence only by virtue of any of the provisions contained in the Evidence Act. Therefore, even if the Section 162 bar would not apply to Kalu's 161 statement, would it be admissible in evidence. Then the next step would be to see as to under which provision of the Evidence Act, the same shall be admissible. According to the learned senior counsel, the statement of a person who is not alive for the purpose of cross-examination in case need arises, would be admissible only if it falls within the four corners of Section 32 of the Indian Evidence Act.

13. Section 32 of the Indian Evidence Act enumerates eight clauses in which the statements made by a dead person or a person who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured in court can be admitted in evidence. Clauses (2) to (8) of Section 32 are not material for the purpose of deciding the present case. The relevant provision reads as under:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death.- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time

when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

Clause (1) says that when a statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, such statement would be relevant. So the question is whether the statement made by deceased Kalu under Section 161 Cr.P.C. in previous investigation would be admissible as per the second part of Section 32(1) of the Evidence Act which says that the statement made by a person as to the 'circumstances of the transaction which resulted in his death' would be admissible and whether the deceased's statement under Section 161 Cr.P.C. falls under 'circumstances of the transaction which resulted in his death'.

14. In the case of *Pakala Narayana Swami v. Emperor*, AIR 1939 PC 47, it was held that a statement merely suggesting motive for a crime cannot be admitted in evidence unless it is so intimately connected with the transaction itself as to be a circumstance of the transaction. In the case of *Sharad Birdhichand Sarda v. State of Maharashtra*, AIR 1984 SC 1622, this Court in para 21 held as under:

"Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of S. 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend on vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under S. 32.

(3) The second part of Cl. (1) of S. 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is

strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

Further, in the case of Rattan Singh v. State of Himachal Pradesh, AIR 1997 SC 768, this Court has held as under: "Section 32(1) of the Evidence Act renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions: Either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death. The collocation of the words in Section 32(1) "circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death". There need not necessarily be a directed nexus between "circumstances" and "death". It is enough if the words spoken by the deceased have reference to any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death."

(Headnote-B)

In the case of Kans Raj v. State of Punjab & Ors., AIR 2000 SC 2324, a 3-Judge Bench of this Court dealt with Section 32(1) statement made by the deceased who had allegedly died due to dowry harassment and in para 10 held as under: "Section 32 of the Evidence Act is an exception to the general rule of exclusion of hearsay evidence and the statements of a person, written or verbal, of relevant facts, after his death are admissible in evidence if they refer to the cause of his death or to any circumstances of the transaction which resulted in his death. To attract the provisions of Section 32, for the purposes of admissibility of the statement of a deceased the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without an amount of delay or expense or he is incapable of giving evidence and that such statement had been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Act. Section 32 does not require that the statement sought to be admitted in evidence should have been made in imminent expectation of death. The words "as to any of the circumstances of the transaction which resulted in his death" appearing in Section 32 must have some proximate relation to the actual occurrence.

In other words, the statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement. \005"

15. We have analysed the statement of the deceased Kalu made to the police under Section 161 Cr.P.C. We do not find that the statement of the deceased was in regard to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. The statement is in regard to the accused's involvement in the abduction of a boy and has no remote connection or reference to the death of the deceased and thus would not be admissible under Section 32 of the Evidence Act. The statement recorded by the police although could be proved as there would not be any bar under Section 162 Cr.P.C. for proof of such statement, but it would not be admissible under Section 32 of the Evidence Act, and thus it could not have been relied upon by the prosecution to prove the motive for commission of the crime by the accused appellant.

16. We have gone through the evidence placed on record by the prosecution. None of the witnesses stated that at the relevant time and/or relevant date, they had seen the accused at Bundi. The witnesses examined by the prosecution have proved the fact that the accused stayed at some of the hotels in Ahmedabad, but there is no proof of the fact that he checked in the hotel(s) giving the fictitious name. There is no proof of the accused being last seen with the deceased. The prosecution has failed to prove the accused's presence on the date of the incident at Bundi. The evidence adduced by the prosecution does not point to the guilt of the accused. The circumstances on which the High Court has placed reliance do not establish the guilt of the accused, nor does it exclude every hypothesis but the one proposed to be proved by the prosecution. The prosecution has failed to prove the chain of evidence by which one could clearly and unequivocally reach to the conclusion of pointing the guilt of the accused-appellant for commission of the crime.

17. For the aforesaid reasons, the appeal is allowed. The judgment of the High Court and that of the Session Court are set aside. The accused-appellant is directed to be set at liberty if he is not required in any other case.