2024 INSC 907

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1902 OF 2013

SURESH CHANDRA TIWARI & ANR.
...APPELLANT(S)

VERSUS

STATE OF UTTARAKHAND ...RESPONDENT(S)

J U D G M E N T

MANOJ MISRA, J.

1. This criminal appeal impugns the judgment and order of the High Court of Uttarakhand at Nainital[1] dated 24.5.2012 passed in Criminal Appeal No. 82 of 2003, whereby the appeal of the appellants against the judgment and order of the Sessions Judge, Pithoragarh passed in Session Trial No. 36 of 1997 was partly allowed and the conviction of the appellants was altered from Section 302/34 of the Indian Penal Code, 1860[2] to

[1] The High Court
[2] IPC

Section 304 Part I of IPC, and the sentence, *inter alia*, was reduced from imprisonment for life to 7 years R.I[3].

FACTUAL MATRIX

2. On 3.2.1997, at about 10 AM, PW-7, a cousin of the deceased, lodged a first information report[4] (Exb. Ka-2) at PS[5] Lohaghat, District Pithoragarh, *inter alia,* alleging that on 3.2.1997, at about 9.30 AM, he came to know that dead body of the deceased was lying in the verandah of Mohan Singh's shop. Pursuant to the aforesaid report, the police proceeded to the spot, carried out inquest and prepared an inquest report (Exb. Ka-8). It also lifted blood-stained and plain earth/ floor from the spot and prepared a seizure memo (Exb. Ka-4) thereof. Belongings of the deceased lying near the spot were also seized and a seizure memo (Exb. Ka-5) was prepared. Besides that, a black polythene bag containing goat meat was also recovered from near the spot and another seizure memo (Exb. Ka-3) was prepared.

3. Autopsy of the cadaver was conducted by PW-1 on 3.2.1997 at about 2.45 PM. Autopsy report (Exb. Ka-1) indicated that the deceased died due to shock because of head injury. The estimated time of death, as per autopsy report, was about a day before autopsy. Ante-mortem injuries noticed at the time of autopsy were:

[3] Rigorous Imprisonment
[4] FIR
[5] Police Station

> "1. Incised wound on head on occipital region 4 x 1 cm, margins of wound clear cut and bleeding from the wound, direction of the wound was oblique.
>
> 2. Incised wound 2-1/2 x 1 cm x bone deep in occipital area, 6 cm back of the right ear, direction of wound was slanting and clear-cut margins. Bleeding from wound.
>
> 3. Contusion on left region of the forehead, 1-1/2 cm x 1 cm, size of wound was unclear. Colour of the wound brown and was above 1 cm from left eyelashes.
>
> 4. Contusion with abrasion, from right shoulder to elbow, in about 15 x 3 cm area, colour of the wound was brown.
>
> 5. Contusion on the joints of both the wrists.
>
> 6. Contusion 4 cm x 1-1/2 cm at right knee, colour of the wound was brown.
>
> 7. Contusion 3 cm x 1 cm on the left knee, colour of the wound was brown.
>
> 8. Contusion 2 cm x 1 cm below 10 cm from the knee on left leg.
>
> 9. Abrasion on the right hip 3 cm x 2 cm.
>
> 10. Abrasion 4 cm x 1-1/2 cm on the left hip.
>
> Internal examination disclosed fracture of occipital bone"

4. On 6.2.1997, the police arrested the appellants on suspicion and, according to the police, at the pointing out of the appellants, the place where the deceased was allegedly assaulted was discovered. From that place, allegedly, some bloodstained stones and mud were lifted and a seizure memo (Exb. Ka-6) was prepared.

5. During investigation, *inter alia*, statements of witnesses who had seen the deceased in the company of the accused on 2.2.1997 during daytime and who had seen the two accused in the company of each other, late in the night of 2.2.1997, on the pathway, near the place

from where the dead body of the deceased was recovered were recorded. Based on that, a charge sheet was submitted against the appellants.

6. After taking cognizance on the charge sheet, the case was committed to the Court of Session. The Sessions Court framed charges against the appellants for offences punishable under Sections 302 /201 read with Section 34 IPC. The accused appellants denied the charges and claimed for trial.

PROSECUTION EVIDENCE

7. As the prosecution case rests on circumstantial evidence, to test the correctness of the findings, a scrutiny of the evidence would be apposite. We would, therefore, notice the prosecution evidence in some detail.

8. Prosecution had examined 10 witnesses:

(a) PW-1 (the autopsy surgeon) proved the autopsy report. He accepted the possibility of: (a) head injuries being caused by a sharp-edged stone or a sharp-edged weapon; (b) death having occurred a day before i.e., on 2.2.1997 around 5.30 PM.

(b) PW-2 – Hayat Singh – He had his shop about 30 yards away from Mohan Singh's shop (i.e., from where the dead body was recovered on 3.2.1997). According to him, on 2.2.1997, at about 7 PM, while he was sitting at his shop, next to a fire-place to ward off cold winter night, he saw three persons coming from near Mohan Singh's shop. Those three

were Jagdish Punetha and the two accused. Later, that night, between 10 PM and 11 PM, while he was returning to his shop to fetch his purse, in torch light, he saw the two accused going together on the same path towards village Bhumlai.

During cross-examination, PW-2 stated (a) that his statement was recorded by the investigating officer on 9.2.1997; (b) prior to that, he made no disclosure about it to any one; (c) that night, it was drizzling; (d) that from his shop, Mohan Singh's shop is 30-35 yards away and in between his shop and Mohan Singh's shop there are shrubs, therefore, it is difficult to notice as to who is doing what there, from his shop; (e) that in 1995 he had a fight with accused Bhuwan (appellant no.2), which was compromised on payment of Rs.3000 by him.

(c) PW-3 – Mohan Singh (i.e., the shop-owner from whose shop's verandah, dead body was recovered) stated that on 2.2.1997, at about 6 PM, the two accused had come to his shop at Tolan and had asked for milk. After having milk, they asked each other about the deceased. He heard them saying that the deceased has not been seen. Shortly thereafter, they left his shop with Jagdish Punetha, who was present at the shop from before. Thereafter, PW-3 left his shop. Next day, at about 8.30 AM, when PW-3 returned to his shop, he noticed the

dead body of the deceased in the verandah of his shop.

During cross-examination, PW-3 stated that on 2.2.1997 it was very cold and there was a slight drizzle. PW-3 stated that he left his shop at about 8 PM on 2.2.1997.

(d) PW-4 – Shankar Dutt Upreti – He stated that on 2.2.1997, at about 4.30 PM, while he was coming to Lohaghat, he met accused appellants near Degree College, Gadhera. Deceased was also with them. Then he clarified that the deceased was with Suresh Chandra Tiwari (i.e., appellant no.1) whereas Bhuwan (appellant no.2) was 50-60 paces behind them.

During cross-examination, PW-4 admitted that after the death of the deceased, he had observed rituals as are to be observed when death occurs in the family. However, he denied belonging to the family of the deceased.

(e) PW-5- Mahesh Upreti- He stated that the accused appellants are very close friends of each other. In 1996 panchayat elections, the deceased, who is PW-5's cousin, supported PW-5's candidature whereas accused supported a rival candidate, who was nephew of Suresh Chandra (appellant no.1). During elections, Suresh Chandra had extended death-threats. Later, when PW-5

contested election for the office of Pradhan, Suresh Chandra supported a rival candidate. In the first meeting of Gram Panchayat, held on 19.1.1997, Suresh Chandra extended death threat to the deceased.

During cross-examination, he admitted that he made no report about extension of threats. However, he denied making false accusations because deceased was his cousin.

(f) PW-6 – Jahangir- He stated that he is a meat vendor. On 2.2.1997, at about 3.30 PM, Suresh Chandra had purchased a kilogram of meat from his shop.

During cross-examination, PW-6 stated that there are 2 or 3 other meat vendors at Lohaghat.

(g) PW-7 – Harish Chandra Upreti- He stated that the deceased was his first cousin. On receipt of information about his death, he lodged the report (Exb. Ka-2).

(h) PW-8 – Jeevan Chandra Upreti – He stated that on 3.2.1997 upon receiving information about deceased's death, he went to the spot. That day itself, three seizure memos (Exb. Ka-3, 4 and 5) were prepared, which bear his signature. These memos related to: (i) seizure of a black polythene bag containing meat from open field near the spot; (ii) lifting of blood-stained floor and plain floor from the

spot; and (iii) seizure of blood-stained clothes and a pair of Lakhani half-shoes of the deceased from open field near the spot. He added that on 6.2.1997, at the pointing of the accused, in the presence of Investigating Officer, a blood-stained stone, a blood-stained *Patti* and plain earth was seized from Madhkhetla and a seizure memo (Exb. Ka-6) was prepared, which bears his signature. He also stated that on 9.2.1997 Hayat Singh handed over his torch to the investigating officer and a seizure memo (Exb. Ka-7) was prepared, which bears his signature.

During cross examination, PW-8 stated that he did not accompany the police on those three dates but was present there. In respect of seizure made on 6.2.1997 he stated that he did not go with the police. Rather, he was present at the village. Police had reached between 11 and 12. Accused were arrested in the evening of 6.2.1997. He stated that Madhkhetla is about 2 km away from his village. He, however, denied the suggestion that all papers were prepared at one go, while sitting at the police station, and that nothing was recovered.

(i) PW-9- Anand Lal- the first investigating officer - He stated that on 3.2.1997 he was posted as Sub-inspector at PS Lohaghat when the FIR was lodged. He conducted initial stages of investigation such as making GD entry of the report, conducting inquest,

sending the dead body for autopsy and lifting of: (i) blood-stained floor/plain floor from the spot; and (ii) clothes, half-shoes of deceased and black polythene bag containing meat from Madhkhetla. He also stated that the seized articles were deposited at the *Maalkhana.* Thereafter, investigation was carried out by PW-10. He had produced material exhibits during trial.

During cross-examination, PW-9 admitted that PW-8 is relative of the deceased. He also admitted that at the time of inquest, Hayat Singh (PW-2) and Mohan Singh (PW-3) were present. He then clarified that distance between Tolan and Madhketla is about 80 yards.

(j) PW-10 – Kundan Singh - the second investigating officer - He stated that he took over investigation of the case on 4.2.1997. On 5.2.1997 he conducted spot inspection of the place where deceased's belongings such as clothes etc. were found and prepared site plan (Exb. Ka-16). On 5.2.1997 itself, he inspected place from where dead body was recovered and prepared site plan (Exb. Ka-17). On 6.2.1997 he arrested the accused appellants and interrogated them at the police station, of which GD entry no.27 (Exb. Ka-18) was prepared at 19:20 hrs. On the same day, based on disclosure made by the accused, blood-stained stone and plain stone as

well as earth were seized, of which seizure memo is Exb. Ka-6. According to him, complicity of the accused in the crime had come to light before 6.2.1997. However, on 6.2.1997, he visited, separately, the house of the two accused and arrested them. On interrogation they accepted their guilt and showed him the place where the deceased was assaulted. From there, he recovered blood-stained stone, etc. Thereafter, the accused appellants were lodged in the lock-up where their statements were recorded. On 9.2.1997, the statement of Hayat Singh was recorded, and his torch was recovered. Based on his statement, a site plan (Exb. Ka-20), showing the place from where Hayat Singh saw the accused appellants on 2.2.1997, was prepared. On 9.2.1997, site plan (Exb. Ka-21) of the place from where stone etc. had been recovered was prepared. He stated that seized case property was sent for forensic examination *vide* letter (Exb. Ka-22), and on completion of investigation, charge sheet (Exb. Ka-23) was submitted against the accused on 18.3.1997. PW-10 also produced the stones which were recovered from the place pointed out by the accused.

During cross-examination, he admitted that in the site plan prepared by him, he had not mentioned the distances. He also admitted that the accused were

produced before the remand magistrate on 8.2.1997 and not on 7.2.1997. He, however, denied the suggestion that all investigative steps were bogus and completed while sitting at the police station.

STATEMENT UNDER SECTION 313 Cr.PC

9. In his statement under Section 313 of the Code of Criminal Procedure, 1973[6], Suresh Chandra Tiwari (appellant no.1) either denied, or feigned ignorance of, the incriminating circumstances put to him. But admitted (a) that the body of the deceased was found in front of the shop of Mohan Singh; (b) that the autopsy report was prepared by PW-1; (c) that panchayat elections were held in the year 1996; and (d) that he was interrogated on 6.2.1997, though he disclosed nothing incriminating. Notably, the incriminating circumstance *qua* discovery of blood-stained stone, etc. at his instance on 6.2.1997, *vide* seizure memo Exb. Ka-6, was not put to him. At last, he stated that owing to enmity he has been falsely implicated.

10. Identical is the statement of Bhuwan Chandra Punetha (appellant no.2). Notably, the incriminating circumstance of recovery of blood-stained stone etc. on 6.2.1997, of which seizure memo Exb. Ka-6 was prepared, was not put to him.

[6] CrPC

TRIAL COURT FINDINGS

11. Trial court found the following circumstances proved: (i) the deceased was last seen alive in the company of the accused on 2.2.1997 at about 4.30 PM; (ii) the accused, in the night of 2.2.1997, were seen on the pathway going towards Madhkhetla (where articles of the deceased were found) and were also noticed coming back from the same route on which shop of Mohan Singh falls; (iii) Suresh Chandra Tiwari had purchased a kilogram of meat on 2.2.1997 from PW-6, and there was recovery of a polythene bag, containing meat, from the place where other articles of the deceased were found; (iv) the accused were looking for Suresh Upreti (the deceased) in the evening of 2.2.1997, as was evident from their talks, while they were present at the shop of Mohan Singh (PW-3); (v) autopsy report and medical evidence confirmed a homicidal death of the deceased as also the fact that ante-mortem head injury could have been caused by a sharp-edged stone; (vi) blood-stained stone was found at the place pointed out by the accused appellants, and forensic report confirmed presence of human blood on it, therefore, the chain of circumstances stood complete, which pointed that sometime in the night of 2.2.1997 the accused appellants killed the deceased due to past enmity and kept his body in front of Mohan Singh's shop.

Consequently, the trial court convicted the accused-appellants for offences punishable under Sections 302/34 and 201/34 of IPC.

HIGH COURT FINDINGS

12. Aggrieved by the judgment and order of the trial court, the appellants filed an appeal before the High Court. The High Court affirmed the findings of the trial court on strength of the circumstances narrated above and held that recovery of blood-stained stone(s) at the instance of the accused, of which seizure memo (Exb. Ka-6) was prepared, corroborated the prosecution case to dispel any doubt about their guilt. In addition, the High Court relied on the disclosure statement (Exb. Ka-18) which, according to the High Court, led to discovery of the place and consequential recovery. However, the High Court, upon finding that the accused had no previous criminal record and except injuries 1 and 2 none were dangerous to life and those two could be a result of a solitary blow, thought fit to alter the conviction from offence of murder, punishable under Section 302 of IPC, to offence of culpable homicide not amounting to murder, punishable under Section 304 Part I of IPC, and thereby reduced the sentence, accordingly.

13. Aggrieved by their conviction, the appellants are before us.

14. We have heard the learned counsel for the parties and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

15. On behalf of the appellants, it was submitted:

(i) The circumstances relied upon were not proved beyond reasonable doubt.

(ii) The last seen circumstance narrated by PW-2 is not conclusive as there is no proximity between the place where the deceased was last seen alive in the company of the accused and the place from where the body of the deceased was recovered. Further, the time gap between the time when the deceased was last seen alive with the accused and the time when dead body was recovered is so large that intervening circumstances cannot be ruled out. Moreover, the circumstance of walking side by side on a pathway by itself is not an incriminating circumstance.

(iii) The incriminating circumstance of discovery /recovery at the instance of the accused has not been put to either of the two accused while recording their statements under Section 313 of CrPC, therefore the same cannot be relied upon.

(iv) The disclosure statement was inadmissible as it did not lead to discovery because, according to PW-10, recovery was made from the place pointed out by the accused-appellants even before their disclosure

statement was recorded at the police station. Otherwise also, it is not clear from the evidence as to which of the two accused pointed out the place first, to effectuate the recovery. Hence, recovery cannot be imputed to any of the two accused.

(v) Assuming that recovery of stone is imputable to the accused, it is not proved that it carried blood of the deceased or that it could have caused such injuries as were found on deceased's body. Thus, the recovered article was not connected to the crime.

(vi) PW-2's narration about seeing accused-appellants walking on the path in front of Mohan Singh's shop is inconsequential as anyone could walk on a public path. Moreover, testimony of PW-2 does not inspire confidence because, despite being present at the time of inquest on 3.2.1997, he remained silent till 9.2.1997.

(vii) The recovery of a polythene bag containing meat from the spot, coupled with the testimony of meat vendor, is not an incriminating circumstance because, firstly, the meat vendor admitted that there are many other meat vendors in the area and, secondly, there is no evidence that the bag recovered was the one which he sold to the accused.

(viii) Neither the trial court nor the High Court tested the evidence to ascertain (a) whether circumstances were proved beyond reasonable doubt; and (b)

whether they constituted a chain so complete as to rule out all other hypotheses save the one consistent with the guilt of the accused.

SUBMISSIONS ON BEHALF OF THE STATE

16. Per contra, on behalf of the State, it was submitted that each of the incriminating circumstances were proved beyond doubt; the chain of circumstances stood complete; and it pointed towards the guilt of the appellants by ruling out all hypotheses consistent with their innocence. The matter is concluded by concurrent findings of fact, therefore, there is no merit in the appeal.

ANALYSIS

17. We have considered the rival submissions and have perused the materials on record.

18. At the outset, we may put on record that if finding of guilt is returned without properly evaluating and testing the evidence by applying the requisite legal principles, it can always be corrected by this Court in exercise of its powers under Article 136 of the Constitution of India.

LEGAL PRINCIPLES *QUA* CIRCUMSTANTIAL EVIDENCE

19. Before we proceed to test the correctness of the findings returned by the trial court as well as the High Court, we must bear in mind that the prosecution case rests on evidence circumstantial in nature. As to when on strength of such evidence an accused can be

convicted, the legal principles, as propounded in a series of decisions[7] of this Court, may be summarized thus:

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established;

(ii) the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) the circumstances taken cumulatively should form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused;

(iv) the circumstances should be consistent only with the hypothesis regarding the guilt of the accused; and

(v) they must exclude every possible hypothesis except the one which is sought to be proved.

20. Adding on to the aforesaid legal principles, in ***Devi Lal vs. State of Rajasthan***[8], a three-judge bench of this Court held that in a case based on circumstantial evidence where two views are possible, one pointing to the guilt and the other to his innocence, the accused is entitled to the benefit of one which is favorable to him.

[7] See: Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116; Hanumat Govind Nargundkar v. State of Madhya Pradesh AIR 1952 SC 343; Santosh @ Bhure versus State (G.N.C.T) of Delhi, 2023 SCC OnLine SC 538
[8] (2019) 19 SCC 447

21. Besides that, before recording conviction, the court must be satisfied that the accused 'must be' and not merely 'may be' guilty. In ***Shivaji Sahabrao Bobade vs. State of Maharashtra***[9], this Court, elaborating upon the above principle, observed that the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. Therefore, even if the prosecution evidence generates strong suspicion against the accused, it cannot be a substitute for proof.

22. Bearing in mind the aforesaid legal principles, we would examine and consider – (a) whether the circumstances relied by the prosecution have been proved beyond reasonable doubt; (b) whether those circumstances are of a definite tendency unerringly pointing towards the guilt of the accused; (c) whether those circumstances taken cumulatively form a chain so far complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused; (d) whether they are consistent only with the hypothesis of the accused being guilty; and (e) whether they exclude every possible hypothesis except the one to be proved.

CIRCUMSTANCES RELIED BY THE PROSECUTION

23. The prosecution case rests on the following circumstances:

[9] (1973) 2 SCC 793

(i) Accused-appellant no.1 and the deceased had supported rival candidates in the last panchayat elections held in 1996, and on 19.01.1997 accused – appellant no.1 had threatened the deceased in a Gram Sabha meet, therefore there existed motive for the crime.

(ii) The deceased was last seen alive on 2.2.1997, at about 4.30 PM, with the accused-appellants by PW-4.

(iii) According to PW-3, whilst accused-appellants were at his shop on 2.2.1997, at about 6.30 PM, they were looking for the deceased.

(iv) In the night hours of 2.2.1997, the accused-appellants were noticed walking on the pathway in front of Mohan Singh's shop from where deceased's body with multiple ante-mortem injuries, confirming a homicidal death, was recovered next day morning.

(v) A polythene bag containing meat was recovered from the place where belongings of the deceased were littered. Testimony of PW-6 proved that accused-appellant no.1 had purchased 1 kg of meat on 2.2.1997 at about 3.30 PM.

(vi) On the disclosure made by the accused-appellants, as well as at their pointing out, on 6.2.1997 blood-stained stone(s) were recovered which might have been used to inflict head injury to the deceased, resulting in his death.

24. We shall now deal with each of the above circumstances separately.

MOTIVE

25. Though prosecution has been successful in establishing that in 1996 panchayat elections the deceased and accused-appellant no.1 had supported rival candidates, but it could lead no concrete evidence as regards any untoward incident precipitating the crime in question. No doubt, evidence about extension of death threat in a public meet of the Gram Sabha, held in January 1997, has come, but, admittedly, no such incident was reported to the police. Hence, motive proved is not such as may have a material bearing on the prosecution case. Otherwise also, motive on its own cannot make or break the prosecution case.

LAST SEEN CIRCUMSTANCE

26. The circumstance of deceased being last seen alive in the company of the deceased is a vital link in the chain of other circumstances but on its own strength it is insufficient to sustain conviction unless the time-gap between the deceased being last seen alive with the accused and recovery of dead body of the deceased is so small that possibility of any other person being the author of the crime is just about impossible. Where the time-gap is large, intervening circumstances including

act by some third person cannot be ruled out.[10] In such a case, adverse inference cannot be drawn against the accused merely because he has failed to prove as to when he parted company of the deceased.

27. In the instant case, PW-4 allegedly saw the deceased walking on a street with accused-appellant no.1 on 2.2.1997, at about 4.30 PM, near Gadhera Degree College. PW-4 further stated that accused-appellant no.2 was walking 50-55 paces behind them. No evidence was led by the prosecution to demonstrate that the place where the deceased was last seen alive with the accused was near the place from where deceased's body was recovered. Further, the time gap between 4.30 PM of 2.2.1997 and 8.30 AM of 3.2.1997 (i.e., when the dead body was recovered) is so large that third party hand in the crime cannot be ruled out. Otherwise also, if two or more persons are seen walking on a public street, either side by side, or behind one another, it is not such a circumstance from which it may be inferred with a degree of certainty that those were together or in company of each other. Quite often on a public path a person may happen to walk side by side a stranger for a considerable distance without even talking to him. Likewise, a person may exchange pleasantries with another person walking on the path, but that by

[10] See Nizam v. State of Rajasthan, (2016) 1 SCC 550; Navaneethakrishnan v. State, (2018) 16 SCC 161; Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715; State of U.P. v. Satish, (2005) 3 SCC 114; Ramreddy Rajesh Khanna Reddy & Anr. V. State of A.P., (2006) 10 SCC 172; and Bodhraj v. State of J & K, (2002) 8 SCC 45

itself is not sufficient to infer that the two are in company of each other. Importantly, the prosecution case is not that the deceased was picked up from his house by the accused-appellant(s). Had it been so, in absence of evidence as to when they parted company of each other, adverse inference against the accused might be permissible, if the other circumstances so warrant. But here there is no evidence of that kind. Therefore, taking into account (a) the place where the accused appellants and the deceased were allegedly seen together; and (b) lack of proximity of the time and place when the three were seen together with the time and place when, and from where, the body of the deceased was recovered, we are of the considered view that the last seen circumstance as canvassed by the prosecution is not of a definite tendency unerringly pointing towards the guilt of the accused-appellants.

APPELLANT(S) LOOKING FOR THE DECEASED

28. PW-3 speaks of accused-appellants' presence at his shop on 2.2.1997, at about 6.30 PM, as also of they being looking for the deceased. This circumstance has been considered incriminating by the courts below because it throws a possibility of accused being looking for the deceased with an intent to finish him off. In our view, this circumstance is not of a definite tendency in unerringly pointing towards the guilt of the accused, inasmuch as there may be multiple reasons for a person

to look for another. Importantly, there is no evidence that the accused appellants were heard conspiring against the deceased or expressing their animosity towards him. Rather, this circumstance runs contrary to the last seen circumstance because if the accused were in the company of the deceased, why would they be looking for the deceased.

APPELLANTS WERE NOTICED IN THE NIGHT HOURS

29. PW-2 stated that on 2.2.1997 he noticed the appellants with Jagdish Punetha coming from the shop of Mohan Singh on 2.2.1997 between 6.30 PM and 7 PM. This circumstance is not an incriminating circumstance because from the statement of Mohan Singh (PW3) he was at his shop when the above three left his shop. However, PW-2 goes on to state that in the night hours of 2.2.1997 when he returned to his shop to fetch his purse, he noticed the accused-appellants walking on the path in front of Mohan Singh's shop. This circumstance is taken as highly incriminating by the courts below because there was no reason for the appellants to be there at that odd hour of cold winter night. According to the courts below, this circumstance explains the presence of deceased's body in front of Mohan Singh's shop.

30. If we test the statement of PW-2 against the weight of other evidence on record, it does not inspire confidence, firstly, because from PW-9's (the first

investigating officer) statement it appears that PW-2 was present at the time of inquest, which was held on 3.2.1997, yet he chose not to disclose about what he saw till 9.2.1997. Interestingly, statement of PW-2 was recorded by PW-10 (i.e., the second investigating officer) on 9.2.1997 after the accused-appellants had already been arrested and even recovery of incriminating articles at their instance had allegedly been made. In what circumstances PW-2 withheld his statement that long and thereafter came to make a disclosure is not explained in the prosecution evidence. Secondly, the site plan (Exb. Ka-20) does not disclose the distance from where PW-2 spotted the two accused in the company of each other. Thirdly, PW-2 admits that in between his shop and Mohan Singh's shop there are shrubs, and it is not possible to see from his own shop as to what is happening at Mohan Singh's shop. Fourthly, PW-2's presence is fortuitous because, admittedly, he had shut his shop and retired to the comfort of his home. It is highly unlikely that a person would take the pains of returning in late hours of winter night, particularly when it is drizzling, only to fetch his purse inadvertently left at his own shop. Fifthly, he is a witness inimical to the accused because he had a fight with appellant no.2 prior to the incident, which, however, resulted in a compromise on his shelling out Rs.3000/-. Besides that, walking on a public pathway in front of a shop where

dead body is found lying next day morning is by itself not an incriminating circumstance on which alone, conviction could be sustained. More so, when there is no evidence that the accused appellants were seen dragging or lifting the body of the deceased to the shop of Mohan Singh. Unfortunately, neither the trial court nor the High Court thoroughly tested the testimony of PW-2 against other proven circumstances on record, as discussed above.

RECOVERY OF POLYTHENE BAG

31. Prosecution proved recovery of a black polythene bag containing 1 kg of meat from the place where other belongings of the deceased were littered. This recovery was made on 3.2.1997 and is considered incriminating by the prosecution because, according to PW-6, on 2.2.1997 at about 3.30 PM the appellant no.1 had purchased a kilogram of meat from him. In our view, this circumstance cannot be considered incriminating as there is no evidence that the meat bag found was identified by PW-6 as the one sold by him to the accused. Otherwise also, black colored polythene is quite commonly used for carrying goods including meat products. Admittedly, there were two or three other meat vendors in the vicinity. In such circumstances which vendor's meat was found can be anybody's guess. This was, therefore, hardly an incriminating circumstance to link the appellant no.1 to the crime. More particularly,

when fingerprints on the polythene were neither lifted nor compared with those of any of the accused.

DISCLOSURE/ DISCOVERY

32. Exb. Ka-18 is the disclosure statement recorded *vide* GD Entry no.27 at 19:20 hrs. on 6.2.1997. Exb. Ka-6, which is also dated 6.2.1997, is the memorandum of seizure of blood-stained stones, plain stones, and plain earth from the spot where, according to the disclosure made by the two accused, the deceased was assaulted and killed. PW-8 is witness of that seizure, whereas PW-10 is the investigating officer who got the disclosure statement recorded. The articles seized *vide* Exb. Ka-6 were initially produced as material exhibits 1 to 5 by PW-9 (i.e., the first investigating officer) and were later identified by PW-10 (i.e., the second investigating officer).

33. Exb. Ka-21 is the site plan prepared by the investigating officer (PW-10) on 9.2.1997 showing the place from where that seizure was made. A perusal thereof would reveal that the place from where recovery of stone, etc. was shown was an open pathway.

34. Exb. Ka-6 reveals that after arrest while the two accused were being brought to the police station, in the presence of Jeevan Upreti (PW-8) and Mahesh Upreti, they pointed out the place where the deceased was assaulted by them with the help of a stone and thereafter dragged to a field at Madhkhetla where he was again

assaulted and killed. Exb. Ka-6, however, does not record that any of the accused had specifically pointed out a particular stone or spot. Rather, it records that on way to the police station the accused had showed the place of assault, therefore the police stopped the vehicle to look for clues, and then the stone, etc. mentioned therein were collected.

35. Importantly, PW-9 who investigated the case on 3.2.1997 (i.e., the first investigating officer) produced these stones, etc. (i.e., one big stone, three small stones, wooden plank, blood-stained and plain earth) as material exhibits 1 to 5 respectively. During cross-examination, PW-9 admitted that the large stone produced as material exhibit no.1 bore no blood stain. PW-9 also stated, during cross-examination, that in the night of 2.2.1997 it had rained, and that rain shower converted into a drizzle on 3.2.1997. He went on to state that the entire land terrain from Lohaghat to Madhkhetla had turned slippery due to rain. Notably, the seizure memorandum (Exb. Ka-6) records that blood on the stone appeared to have been washed away due to rain. In these circumstances there was no chance of blood being found on the stone etc., which was lying in open, on 6.2.1997 (i.e., 4 days after the incident). The forensic report Exb. Ka-22 seems to confirm that there was no blood found on the stone. In fact, as per forensic report (Exb. Ka-22), three items were received by the

laboratory for chemical examination, namely, (1) stone/ blood-stained/ plain earth, (2) cement plaster (blood-stained) and plain earth and (3) blood-stained earth and plain earth. However, the chemical examination report clearly discloses that in respect of items (1) and (2) above no blood was found. Though human blood was found on item (3), it is not clear from the oral testimony of the witnesses as to from where item (3) was lifted. However, from the seizure memorandum (Exb. Ka-4) it appears that item (3) was lifted on 3.2.1997 from that spot where body of the deceased was found in the morning of 3.2.1997. In these circumstances, we are of the view that even if we accept the recovery of stone(s) at the instance of the accused-appellants on 6.2.1997, the same is inconsequential because it could not be connected to the crime.

36. Besides that, two incised wounds with clear cut margins were found on the head of the deceased. Though doctor (PW-1) said that they could be caused by a sharp-edged stone but whether the seized stone could have caused it is not proved. Importantly, the stone was not shown to the doctor to have his opinion as to whether those head injuries could be caused by use of it. For all the reasons above, we are of the considered view that the recovery allegedly made from the place discovered consequent to the disclosure statement/pointing out by the accused is inconsequential as it could not be

connected to the crime. The High Court erred by placing reliance on the same.

37. Otherwise also, the disclosure statement (Exb. Ka-18) was not admissible in evidence because the alleged discovery was not made pursuant to that statement. Disclosure statement was recorded at the police station whereas recovery was made from the place pointed out by the accused enroute to the police station. It was, therefore, a case of recovery from the place allegedly pointed out by the accused and not based on a disclosure statement. In ***Geejaganda Somaiah vs. State of Karnataka***[11], this Court has cautioned the courts about misuse of provision of Section 27 of the Evidence Act, 1872 while observing as under:

> "22. As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of section 27 of the Evidence Act."
>
> (Emphasis supplied)

38. Above apart, there is another reason to doubt the alleged discovery (i.e., based on disclosure made by the

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accused-appellants) or recovery (i.e., at their pointing out), as the case may be. This we say so, because in all seizure memorandums including that of torch, prepared on three dates i.e., 3.2.1997, 6.2.1997 and 9.2.1997, there is one common witness, namely, PW-8. Recovery made on 6.2.1997 is a chance recovery because by then there was no disclosure statement on record. Notably, as per evidence on record, accused appellants were on their way to the police station when they allegedly pointed out the place where they had assaulted the deceased before dragging him to the field. In such circumstances, it is quite unlikely that PW-8 would be present at the spot to be available as a witness of the recovery. For this very reason, during cross-examination, suggestion was given to the investigating officer (PW-10) that recoveries were bogus, and documents were prepared at one go while sitting at the police station. Similarly, PW-8 was cross-examined about his presence at the time of recovery. PW-8, initially, responded by stating that he had not accompanied the police, though he happened to be present at that time. On further query, PW-8 stated that the police must have arrived between 11 and 12. Later, PW-8 stated that the accused were arrested in the evening of 6.2.1997. This indicates that he is not sure as to when the recovery took place. Further, distance of PW-8's village from Madhkhetla is 2 km. All these

circumstances create a serious doubt about the presence of the witness at the time and place of the alleged recovery. Besides that, the site plan of the place from where recovery was made on 6.2.1997 was not prepared until 9.2.1997. This makes us wonder whether papers in connection therewith were prepared at one go as suggested by the defense. Unfortunately, the High Court did not at all advert to these circumstances and relied on the disclosure statement/discovery/recovery without carefully weighing the evidence on record.

CONCLUSION

39. In view of the discussion above, we conclude as under:

(a) The trial court and the High Court failed to test the evidence on record to find out whether the incriminating circumstances were proved beyond reasonable doubt and whether they were of definite tendency unerringly pointing towards the guilt of the accused-appellants.

(b) The circumstance of (i) last seen; (ii) recovery of a meat bag from near the spot; (iii) accused-appellants walking on the pathway near Mohan Singh's shop in the night; and (iv) accused-appellants inquiring about the deceased in the evening of 2.2.1997 are not of a definite tendency unerringly pointing towards the guilt of the

accused-appellants. Circumstance (iii) above, was not even proved beyond reasonable doubt.

(c) The disclosure statement was not admissible as it did not lead to discovery. The stone, etc. were allegedly recovered even before the disclosure statement was recorded. That apart, neither Doctor's (PW-1's) statement nor forensic report could connect them with the crime.

(d) In consequence, no case was made out to hold the appellants guilty. Hence, the appeal deserves to be allowed.

40. Before parting, we would like to put on record that the High Court also erred in converting the conviction from one punishable under Section 302 to Section 304 Part I of IPC only because, according to it, the fatal injury could be a result of a solitary blow. What it overlooked was that there were multiple injuries on the body of the deceased apart from two incised wounds on the head with underlying fracture of occipital bone of the skull. In such a scenario, whosoever committed the crime had clear intention to kill the deceased. Once that is the position, in a case based on circumstantial evidence, when no effort is made on the part of the accused either to take a plea, or lead evidence to show, that their act would fall in any of the exceptions to Section 300 IPC, there was no justification at all to alter the conviction.

41. However, since we have held that the prosecution had failed to establish the chain of incriminating circumstances, the accused appellants are entitled to be acquitted of the charges for which they have been tried and convicted. The appeal is, therefore, allowed. The impugned order is set aside. The appellants are acquitted of the charges for which they have been tried and convicted. They are on bail. They need not surrender. Their bail bonds stand discharged.

.....J.
(J.B. Pardiwala)

.....J.
(Manoj Misra)

New Delhi;
November 28, 2024