2022 LiveLaw (SC) 461

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
UDAY UMESH LALIT; VINEET SARAN, JJ.
MAY 4, 2022
RAVINDER SINGH @ KAKU *Versus* **STATE OF PUNJAB**

Indian Evidence Act, 1872; Section 65B(4) - Certificate under Section 65B(4) is a mandatory requirement for production of electronic evidence - Oral evidence in the place of such certificate cannot possibly suffice. *(Para 20-21)*

Criminal Trial - Circumstantial Evidence - Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. *(Para 10)*

CRIMINAL APPEAL NO.1307 OF 2019 [ARISING OUT OF SPECIAL LEAVE PETITION [CRL] NO.9431 OF 2011] WITH CRIMINAL APPEAL NOs. 1308-1311 OF 2019 (ARISING OUT OF SPECIAL LEAVE PETITION [CRL] NOs.9631-9634 OF 2012)

For Parties Mr. Bharat Bhushan, AOR Mr. Shubham Khanduja, Adv. Mr. Aasheesh K. Paandey, Adv. Mr. Sandeep Kumar Dwivedi, Adv. Mr. Avadh Pratap Singh, Adv. Ms. Sucheta Kumari, Adv. Mr. Pradeep Kumar Dwivedi, Adv. Mr. Satyam Pandey, Adv. Mr. Raghvendra Upadhyay, Adv. Mr. Rakesh Mishra, AOR Ms. Jaspreet Gogia, AOR Ms. Shivangi Singhal, Adv. Mr. Karamvir Gogia, Adv. Ms. Anuradha Mutatkar, AOR Mr. Vikas Mahajan, Sr. Adv. Mr. Anil Kumar, Adv. Mr. Vivek Mahajan, Adv. Ms. Reena Devi, Adv. Mr. Arun Singh, Adv. Mr. Salik Ram, Adv. Mr. Vinod Sharma, AOR.

J U D G M E N T

VINEET SARAN, J.

1. These appeals arise out of the judgment dated 22.02.2011 passed by the High Court of Punjab & Haryana in a case in which two children namely; Aman Kumar and Om, aged about 10 years and 6 years respectively were kidnapped and murdered. There were three accused namely; Anita @ Arti (mother of the children) (A-1); Ravinder Singh @ Kaku (A- 2) and Ranjit Kumar Gupta (A-3). The Trial Court convicted all the three accused and sentenced them to death for the offence punishable under Section 302 read with 120B IPC and rigorous imprisonment for 10 years and fine of Rs.5000/-each for the offence punishable under Section 364 IPC.

2. Being aggrieved by the Trial Court order, the present appellant filed a criminal appeal before the High Court of Punjab and Haryana, which got tagged along with the criminal appeals filed by the other co-accused persons.

3. The High Court, vide judgment dated 22.02.2011, acquitted Anita @Arti (A-1) and Ranjit Kumar Gupta (A-3) and partly allowed the appeal filed by Ravinder Singh @ Kaku (A-2) and while setting-aside the death penalty, sentenced him to undergo rigorous imprisonment for 20 years under Section 302 IPC.

4. The facts leading to the present case are dealt with in paragraphs 2,3 and 4 of the judgment dated 25.05.2010 of the Trial Court, which are reproduced below:

"2. Tersely put, on 24.09.2009, complainant Rakesh Kumar son of Khushal Chand, resident of Nanak Nagri, Moga moved application to the Station House Officer (SHO), Police Station City1. Moga regarding missing of his two sons namely Aman Kumar and Om, aged about 10 years and 6 years respectively. He submitted in the application that on 24.09.2009, both of his sons had gone for tuition as usual near their house. Usually, they used to return from tuition at about 6 p.m. But on that day, they did not return to their house till 9 p.m. He (complainant) along with his neighbours searched for them. It is further submitted that two days prior to the occurrence, his wife had a dispute with Ranjit Kumar Gupta (Accused) and his wife Sanju. And Sanju threatened the complainant and his wife to take care of their children and, therefore, they had suspicion that their children might have been abducted by Ranjit Kumar Gupta and his wife Sanju. On the basis of such application of the complainant, report No. 23 dated 24.09.2009 was made in the Roznamcha. The matter was entrusted to S.I. Subhash Chander for investigation and on the basis of his report, F.I.R under Sections 364/506/120-B IPC was registered against Ranjit Kumar Gupta and his wife Sanju.

3. On 25.09.2009, in the morning, dead bodies of both the children were found from the paddy field of Bhagwan Singh son of Piara Singh, resident of Purana Moga, which were handed over to their relatives for getting the autopsy conducted from Civil Hospital, Moga. And Section 302 IPC was added. During investigation, on the basis of statements of Krishan Lal, son of Shiv Lal Bansal, resident of Nanak Nagri, Moga and Amarjit Singh, son of Jai Singh, resident of Mehme Wala, Moga, Ravinder Singh alias Kaku and Anita alias Arti also nominated as accused. The accused were arrested on 27.09.2009. However, during investigation, accused Sanju was found innocent. After completion of entire investigation, accused Anita alias Arti, Ravinder Singh alias Kaku and Ranjit Kumar Gupta were challaned to face trial in this case under Sections 302/364/506 read with Section 120-B IPC. And Sanju, wife of Ranjit Kumar Gupta (accused) was placed in column No.2 of report under Section 173 Cr.P.C.

4. On commitment of the case to this Court, charge under Sections 302/364/120-B IPC was framed against accused Anita alias Arti, Ravinder Singh alias Kaku and Ranjit Kumar Gupta, to which they pleaded not guilty and claimed trial".

5. The High Court opined that the prosecution had established the motive of the offence committed by A2, which was his determination to eliminate the school going children of Rakesh Kumar (PW5) and A1 because he was madly in love with A1. The High Court further held that the prosecution's attempt to rope in A1 in the crime of murder was not successful as their only witness against A1 i.e. PW10 [Krishan Lal, who accompanied PW5 while searching for the deceased kids] turned hostile. However, against A2 and A3, it was held that the prosecution has partially established the last seen theory through the testimonies of PW6 and PW7. The High Court further rejected the evidence of PW13 which was in the nature of extra judicial confession of A2 and A3.

6. As far as A2 i.e. the present appellant is concerned, the High Court, while upholding his conviction held that:

"As regards the second accused, it is evident that PW12 who raided his house, arrested him on 27.09.2009 and recovered the mobile phone bearing sim card No. 9781956918. A school bag and a rope also were recovered from the field based on the disclosure statement given by him. DW1 had been fielded by A2 to bat his cause. In the face of the credible evidence as to the arrest of A2 by PW12 on 27.09.2009 during the raid of his house, the evidence of DW1 does not seem to be

trustworthy. The arrest of second accused and the recovery effected based on his disclosure statement lend corroboration to the case of the prosecution as against the second accused.

At the initial stage the first accused Anita was not at all suspected. Later on she was arrested from her house on 27.09.2009 and from her custody the mobile phone bearing sim cards No. 9592851851 and 9914505216 were recovered. The recovery of those mobile phones and the relevant call details Ex.D41 to Ex.D44 would support the case of the prosecution that A2 had a close intimacy with A1 which culminated in the unfortunate occurrence.

As far as the second accused is concerned, the motive part of the case has been established by the prosecution. Through the first limb of the last seen theory as regards the second accused projected through PW10 Krishan Lal by the prosecution failed, the prosecution could establish the second limb of the last seen theory through PW6 Amarjit Singh and PW7 Gurnaib Singh. His arrest and recovery of the material objects also would support the case of the prosecution as against him. The failure to establish the extra judicial confession alleged to have been given by the second accused to PW13 Goverdhan Lal does not affect the case of the prosecution as against him. It is to be noted that arrest of A2 and the recovery of material objects from his person and also at his instance were established.

A2 is convicted only based on the circumstantial evidence produced by the prosecution. The infatuation he had with A1 had completely blinded his sense of proportion and ultimately he had committed the cruel murder of the children of PW5 Rakesh Kumar. The murder of the children as such had not been committed in a diabolic or monstrous manner. Both the children had been strangulated to death by A2. A2 was just 25/26 years old at the time when he committed the crime. The crime was committed propelled by sexual urge at the young age on account of infatuation towards a women. Reformation is possible during the long years of his imprisonment in jail. Further, if the second accused having spent his prime time in jail comes out after 20 years, he may not be a menace to the society."

7. Challenging his conviction and sentence of 20 years, the present appellant Ravinder Kumar @ Kaku filed Criminal Appeal No. 1307 of 2019 @ SLP (Crl.) 9431 of 2011, which shall be treated by us as the lead appeal/petition.

8. The case of the prosecution herein has remained that the Trial Court and the High Court have rightly convicted A2 since the prosecution could successfully establish that there was a motive for the murder. It is contented that the call details produced relating to the phone used by A1 and A2 have established that they shared an intimate relationship, which became the root cause of offence committed herein. It is further submitted that the last seen theory, the arrest of the accused, the recovery of material objects and the call details produced, would conclusively establish the guilt of the accused persons in conspiring the murder of the children of PW5.

9. We have heard learned counsel for the parties at length and have perused the record.

10. The conviction of A2 is based only upon circumstantial evidence. Hence, in order to sustain a conviction, it is imperative that the chain of circumstances is complete, cogent and coherent. This court has consistently held in a long line of cases *[See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa @ Krishnappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh @ Dalbir Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P.*

(AIR 1989 SC 1890)] that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab (AIR 1954 SC 621)*, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negate the innocence of the accused and bring the offence home beyond any reasonable doubt. We may also make a reference to a decision of this Court in *C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193*, wherein it has been observed that:

"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....".

[Emphasis supplied]

11. Upon thorough application of the above settled law on the facts of the present case, we hold that the circumstantial evidence against the present appellant i.e. A2 does not conclusively establish the guilt of A2 in committing the murder of the deceased children. The last seen theory, the arrest of the accused, the recovery of material objects and the call details produced, do not conclusively complete the chain of evidence and do not establish the fact that A2 committed the murder of the children of PW5. Additionally, the argument of the Respondent that the call details produced relating to the phone used by A1 and A2 have established that they shared an intimate relationship and that this relationship became the root cause of offence is also unworthy of acceptance.

12. The High Court fell in grave error when it fallaciously drew dubious inferences from the details of the call records of A1 and A2 that were produced before them. The High Court inferred from the call details of A2 and A1 that they shared an abnormally close intimate relation. The court further inferred from this, that unless they had been madly in love with each other, such chatting for hours would not have taken place. The High Court eventually observed that:

"We have to infer that the unusual attraction of A2 towards A1 had completely blinded his senses, which ultimately caused the death of minor children. It is quite probable that A2 would have through that the minor children had been a hurdle for his close proximity with A1"

[Emphasis supplied]

The above inferences were drawn by the High Court through erroneous extrapolation of the facts, and in our considered opinion, such conjectures could not have been the ground for conviction of A2. Moreover, the High Court itself observed that "*there is no direct evidence to establish that A1 and A2 had developed illicit intimacy*" and in spite of this observation, the court erroneously inferred that the murder was caused as an outcome of this alleged illicit intimacy between A1 and A2.

13. When a conviction is based solely on circumstantial evidence, such evidence and the chain of circumstances must be conclusive enough to sustain a conviction. In the present case, the learned counsel of the appellant has argued that conviction of A2 could not just be upheld solely on the ground that the prosecution has established a motive via the call records. However, we hold that not only is such conviction not possible on the present scattered and incoherent pieces of evidence, but that the prosecution has not even established the motive of the crime beyond reasonable doubt. In the present case, the fact that A1 and A2 talked on call, only proves that they shared a close relationship. However, what these records do not prove, is that the murder was somehow in furtherance of this alleged proximity between A1 and A2. The High Court's inference in this regard was a mere dubious conclusion that was drawn in absence of any cogent or concrete evidence. The High Court itself based its inferences on mere probability when it held that "*It is quite probable that A2 would have through that the minor children had been a hurdle for his close proximity with A1*". Moreover, the prosecution has also failed to establish by evidence the supposed objective of these murders and what was it that was sought to be achieved by such an act. The court observed that the act of A2 was inspired by the desire to "exclusively possess" A1. However, it seems improbable that A2 would murder the minor children of PW5 and A1 to increase or protect his intimacy to A1 rather than eliminate the husband of A1 himself. Hence, the inference drawn by the High Court from the information of call details presented before them suffers from infirmity and cannot be upheld, especially in light of the fact that there is admittedly no direct evidence to establish such alleged intimacy and that the entire conviction of A2 is based on mere circumstantial evidence. We cannot uphold a conviction which is based upon a probability of infatuation of A2, which in turn is based on an alleged intimacy between him and A1, which has admittedly not been established by any direct evidence.

14. In the context of the Prosecution's Last Seen Theory, it is imperative to examine the evidence of PW6 and PW7, since the prosecution claims to have established the theory against A2 on the testimonies of these two witnesses. In essence, the prosecution tried to establish the first limb of its Last Seen Theory against A1 through PW10, claiming that A2 and A3 used to visit the house of A1 and hence all three colluded to commit the murder of the minor children. However, the High Court rightly rejected this limb of the theory and held that since the entire attempt to rope A1 in as an accused was based on the testimony of PW10 and he himself had turned hostile and had come up with a self-contradictory version of his testimony, no portion of his evidence could be relied upon.

15. However, where the High Court has erred is that it held that the second limb of the prosecution's Last Seen Theory stands duly established against A2 and A3 through the evidence of PW6 and PW7. PW6 (Amarjit Singh) is the farm servant of PW7 (Gurnaib Singh) who claims to have seen A2 and A3 along with the deceased children of PW5. PW6 deposed that though he was present when the police was conducting inquest on the dead bodies, he chose not to disclose the fact of the presence of A2 and A3 to the police. Rather, PW6 shared this information with PW7 and thereafter both of them proceeded to inform the police about the presence of A2 and A3. However, the High Court erred in not appreciating the numerous contradictions and inconsistencies that the

evidence of PW6 and PW7 entail. These contradictions and inconsistencies assume capital important in light of the fact that the entire conviction of A2 is based merely on circumstantial evidence, and they also render the evidence non-conclusive to establish the guilt of A2.

16. In the context of the abovementioned contradictions and inconsistencies, the following must be noted: *Firstly,* W6 deposed that when he saw A2 in the field with the two children, he went ahead and made inquiries from him, to which A2 responded that his associate has gone to answer the call of nature. PW6 gives no reason in his deposition as to why he went ahead and asked such questions from A2. The need and rational of such line of inquiry is missing from his testimony and the same appears to be cooked up. *Secondly,* PW6 did not immediately disclose the fact to the police that he had earlier seen A2 and A3 with the deceased children. More importantly, the story of the prosecution is that the accused were arrested on 27.09.2009. However, PW6 said in his testimony said that "*the accused were present in the CIA staff when I visited there on 25.09.2009*". When the prosecution itself says that the police arrested the accused on 27.09.2009, it is not understood that how could they have been present in the CIA staff on 25.09.2009. Moreover, PW7 in his testimony stated that when he reached the CIA Staff, A2 and A1 were not present there and he did not ask the police if the accused persons were arrested. Such material contradictions regarding the arrest of the accused persons make it difficult to believe the evidence of PA6 and PW7. *Thirdly,* PW6 explicitly stated that he and PW7 came to condole the death of the kids to PW5 and that PW5 and PW7 had previous relations with each other. On the contrary, PW7 in his testimony explicitly states that he had no acquaintance with the complainant (PW5) and that he and PW6 did not go to condole the death of the kids of PW5. *Lastly,* the testimonies of PW6 and PW7 also differ on the question of when did they reach the police station to report. PW7 deposed that he and PW6 reached the CIA Staff at 6 PM and remained there only for 2 hours i.e. they left by 8 PM. However, contradicting this, PW6 clearly states that he reached the CIA Staff along with PW7 at 9 PM.

17. In a case where the conviction is solely based on circumstantial evidence, such inconsistencies in the testimonies of the important witnesses cannot be ignored to uphold the conviction of A2, especially in light of the fact that the High Court has already erred in extrapolating the facts to infer a dubious conclusion regarding the existence of a motive that is rooted in conjectures and probabilities.

18. With respect to the extra judicial confessions, suffice it to say that the attempt of the respondent herein to rely on that is untenable since the High Court has taken note of the inconsistences in the evidence of PW13 Goverdhan Lal and has rightly rejected his evidence "*in toto*". We uphold the judgement of the High Court to the extent that it rejects the testimony of PW13 and finds the theory of extra judicial confession of A2 and A3 to be unnatural.

19. The last piece of evidence against A2 remains the alleged recovery of the school bag at the instance of the disclosure statement given by A2. However, similar to the other evidence against A2, this also suffers from the same inconsistencies and incoherence that makes it difficult for the such evidence to support the conviction of A2. In this context,

it is imperative to understand that there were two bags involved in the entire offence, which belonged to the two deceased children. The learned counsel for the respondent has contended that the recovery of one of such bags was at the instance of the disclosure statement given by A2. The High Court also has supported its conviction of A2 on this piece of evidence. However, where the High Court has erred is that it analysed this evidence in isolation with the other testimonies. However, when the claim of the prosecution is examined in the entire context of the other testimonies and evidence, it becomes apparent that even this evidence of Recovery is not free from contradictions and inconsistencies. For instance, PW6 categorically mentions in his deposition that he observed "two bags" near the dead bodies of the children when he arrived the next day at the place of the unfortunate incident. He further said that he saw those two bags in court also. This contradiction is also supported by the Testimony of PW5 i.e. father of the deceased children himself, who explicitly states that *"The belongings of the children i.e. clothes, bags and chapels were recovered from the spot."* He further went on to testify in great detail that *"The bags contained exercise books, books, geometry box etc. I bought the bags from the market. I identified both the bags and belongings on 30.09.2009 in the police station".* Hence, it is not understood that when both the bags were recovered beside the dead bodies itself on the day of the inquest by police, then how could a bag be recovered at the instance of the disclosure statement of A2. Moreover, to add to the inconsistency, PW9 in his testimony states that "*when I had gone to my field, I found dead bodies of two children in my field. Nothing else was lying by their side.*" Although the prosecutions maintains that the second bag was recovered at the instance of A2, the statement of the Investigating Officer (PW12) itself contradicts the stand of the prosecution. PW 12 stated in his testimony that "*one school bag of Aman Kumar deceased containing books and geometry box etc. was lifted from the spot.*". As for the second bag, PW12 deposed that "*Thereafter on 29.09.2009, accused Ranjit Kumar[A3] suffered disclosure statement that one school bag was kept concealed by him in the fields of paddy along with the rope which only he knew and he could get the same recovered.*" These contradictions and inconsistencies in the testimonies of PW6, PW5, PW9 and PW12 make the story of the prosecution weak and non-conclusive to hold and establish the guilt of A2, especially in light of the fact that there is virtually no direct evidence to link A2 to the commission of the offence.

20. Lastly, this appeal also raised an important substantive question of law that whether the call records produced by the prosecution would be admissible under section 65A and 65 B of the Indian Evidence Act, given the fact that the requirement of certification of electronic evidence has not been complied with as contemplated under the Act. The uncertainty of whether *Anvar P.V. vs P.K. Basheer & Ors*; *[(2014) 10 SCC 473]* occupies the filed in this area of law or whether *Shafhi Mohammad v. State of Himachal Pradesh (2018) 2 SCC 801* lays down the correct law in this regard has now been conclusively settled by this court by a judgement dated 14/07/2020 in ***Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal [(2020) 7 SCC 1]*** wherein the court has held that:

"We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar

P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). ***Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law.*** *Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.*

Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

The clarification referred to above is that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. ***In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4).****"*

21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, Oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law.

22. To conclude, the tripod stand of Motive, Last Seen Theory and Recovery, that supported the conviction of A2 according to the High Court, is found to be non-conclusive and the evidence supporting the conviction of A2 is marred with inconsistencies and contradictions, thereby making it impossible to sustain a conviction solely on such circumstantial evidence.

23. Accordingly, the appeal filed by the appellant Ravinder Singh (A2) i.e. Criminal Appeal No.1307 of 2019 is allowed and the impugned order of the High Court is set aside to the extent that it convicts A2 under section 302 and 364 of the Indian Penal Code. Hence, the conviction of A2 is set aside. However, the acquittal of A1 and A3 by the impugned order is upheld. Accordingly, the appeals filed by the Respondent/State against the impugned order challenging the acquittal of A1 and A3 i.e. Criminal Appeal Nos. 13081311 of 2019 are dismissed. Therefore, we direct that a copy of this order be communicated to the relevant jail authorities and the appellant i.e. Ravinder Singh (A2) be immediately set at liberty, unless his detention is required in any other case. No order as to costs.