

Reserved

A.F.R.

Neutral Citation No. - 2024:AHC:99856-DB

Court No. - 43

Case :- CRIMINAL APPEAL No. - 1620 of 1982

Appellant :- Rajesh And Others

Respondent :- State

Counsel for Appellant :- D.N.Wali,Bhavya Sahai,D.Singhal,N.N. Wali,Neeraj Tomar,Om Singh Tomar,P.S.Pundir,Patanjali Mishra (A.C),R.N.Sharma,Sunil Vashistha

Counsel for Respondent :- N.K.Verma,Brijesh Sahai,Dga,Keshav Sahai,Rishi Chadha

Hon'ble Siddhartha Varma,J.

Hon'ble Vinod Diwakar,J.

1. When the deceased Ajay Kumar who was a student of B.A. in the D.A.V. College had gone missing then an application for missing/first information report was lodged on 8.1.1980 with allegations that the first informant had given Rajesh Kumar, a friend of his nephew Ajay Kumar, Rs. 700/- for getting diesel which was in short supply then, on 6.1.1980 at around 5:00PM and when till 7.1.1980 till around 11:00AM, Rajesh Kumar did not come with the diesel then he sent his nephew Ajay Kumar to him who thereafter went missing. It had further been stated in the application/first information report that despite extensive search Ajay Kumar had not been found. He states that even Rajesh Kumar also was not to be found. The first informant/applicant, therefore, prayed that Ajay Kumar, his nephew, be searched out.

2. This application/F.I.R., with regard to Ajay Kumar going missing, was entered in the Police Report at GD-25. The chick as was prepared of the first information report lodged was exhibited as Exhibit – Ka-8 and was written by the Head Moharrir Jagdish Sharan for offences under Section 364 IPC. On. 8.1.1980 investigation of the case was entrusted to the P.W.- 10 Rajendra Pal Jain, Sub-Inspector and he commenced the search for Ajay Kumar. Thereafter, the investigation was handed over to P.W. -13 K.C. Tyagi, who in the course of investigation reached Sarwat Gate and from an informer he got information that the accused Rajesh Kumar had gone a little earlier towards Minakshi Talkies and from there he could be arrested. On the basis of this information along with police personnel on 9.1.1980 in a patrol car P.W.- 13 reached the cross-road of Minakshi Talkies where he came across witnesses Kharag Singh, Rishipal, Yusuf and Rajeshwar and took them alongwith him.

3. From the record, it appears that Rajesh was seen approaching the Investigating Officer from the side of the Minakshi Talkies. The appellant-accused Rajesh Kumar was thereafter arrested at around 6:00pm. Upon an interrogation the accused Rajesh told that he could lead the police party to the clothes, with which the dead body of the deceased Ajay Kumar, was wrapped. He also stated that he would get recovered the *baniyan* and other clothes which could be found in the room of the house of one Sukhveer situate in Mohalla Keshavpuri wherein in room no. 14 one Ombir (another accused) lived. Upon getting this information,

P.W. -13 K.C. Tyagi reached the Room No. 14 where, it had been stated by Rajesh that, the dead body was to be found. He had stated that in the Room No. 14 of the premises owned by P.W. -12, Sukhveer Singh, the dead body was to be found wrapped in a bedding below the cot.

4. When the police party along with the accused Rajesh reached the room in question, the key of the lock was not there with Rajesh and, therefore, P.W. - 13, the Investigating Officer K.C. Tyagi, pushed the door and the door opened. It has been stated in the statement of the P.W. - 13 that the time at which the door was opened was around 7.45PM. Thereupon, Rajesh entered the room and in the light of various torches the bedding was taken out in which the dead body of Ajay Kumar was allegedly wrapped. The bedding was opened in the presence of witnesses and the corpse of the deceased Ajay was recovered and it was identified by the witnesses. A slip of plastic was found on the neck of the deceased and a baniyan was also found stuffed inside his mouth. There and then, it has been alleged that the recovery memo was prepared as Exhibit – Ka-2 by P.W. - 13 in the presence of witnesses who had accompanied him to the spot. Thereafter, recovery memo of the said dead body was sent by the P.W. 13, K.C. Tyagi, along with constables – Satyapal and Baburam – for adding Section 302 and 201 IPC in the first information report which was already lodged on 8.1.1980.

5. Further case of the prosecution is that thereafter when there was shortage of light in the evening of 9.1.1980, the inquest was not done

there and then in the night but was adjourned for the next day i.e. for 10.1.1980 and the same was got prepared on the next day. Thereafter, the corpse was sent in a sealed bundle for post mortem in the mortuary at Muzzaffar Nagar. When the dead body was recovered, the recovery memo was prepared and was exhibited as Exhibit Ka-3. With regard to the articles, which were found in the room, recovery memos were prepared.

6. On 10.1.1980 at about 2:00PM, the other accused/appellant Rajguru was arrested and on 14.1.1980 the accused-appellant Omvir surrendered. Upon the investigation being completed, charge sheet was submitted by the Investigating Officer, P.W. - 13, K.C. Tyagi against the accused – Rajesh and Rajguru and a charge sheet was also submitted by Hariraj Singh against the accused Ombir.

7. After considering the material on record, the accused were charged by the court of IVth Additional Sessions Judge under Sections 302 read with Section 34 IPC and under Section 201 IPC. When the appellants/accused denied the charges and prayed for trial, the case was put to trial.

8. From the side of the prosecution as many as 13 witnesses were brought to the witness box. They gave their statements-in-chief and they were also cross-examined. The accused thereafter got their statements recorded under Section 313 Cr.P.C. and when thereafter the IIIrd Additional District & Sessions Judge, Muzaffarnagar on 30.6.1982 found the accused Rajesh, Rajguru and Ombir guilty under Section 302/34 IPC

and under Section 201 IPC then they were punished for life imprisonment under Section 302/34 IPC and were also sentenced to undergo 7 years of rigorous imprisonment under Section 201 IPC (both the sentences were directed to run concurrently).

9. Aggrieved by the judgement and order of the Sessions Court dated 30.6.1980, the present Criminal Appeal has been filed.

10. On 3.3.2017, the appellant Rajguru was declared juvenile. The order dated 3.3.2017 was brought on record by the counsel for the appellant no. 2 by means of affidavit of compliance dated 10.4.2017.

11. During the trial the P.W.- 1 Raghunath Singh who is the first informant, in the statement-in-chief, had stated that the deceased Ajay Kumar was his nephew and that the incident was of 6.1.1980. On that date, his brother Raghu Prakash along with Ajay (deceased) and another nephew were sitting at their house. He states that Rajesh who was known to Ajay had always been coming to their house. Ajay Kumar and his father and the first informant were all living in the same house. He has stated that at the relevant point of time there was scarcity of diesel and they were all sitting together in the house of the first informant on 5/6th January when Rajesh approached them and said that he had certain coupons of diesel and that he could fetch diesel for them. For this purpose, the first informant gave Rs. 700/- to Rajesh and requested him to get him as much diesel as he could get for him. Therefore, Rajesh had promised that he would get diesel on the next date i.e. on 7.1.1980. Rajesh took the money

and when he did not come on the 7th i.e. on the next date then the first informant P.W.-1 waited till 11:00am and when he did not come he sent his nephew (deceased) Ajay to search out Rajesh. After having sent Ajay kumar, the family had waited for Ajay Kumar to come back with Rajesh but when he did not return then on the 8th of January 1980 a missing report was got lodged in the Kotwali. In his cross-examination, he has stated that he had come to know about the fact that Ajay Kumar had died on 10.1.1980 at around 12:00Noon and this information was given to him by Sunil the real brother of the deceased- Ajay Kumar. He has stated that he was not aware as to when the accused were arrested after he had submitted his report. He has also stated that the witness Rishi Pal (P.W.-3) was related to the accused as his sister was married to Ram Kumar, the real brother of Ajay Kumar. He has denied that the witnesses P.W. 9 Salauddin Yusuf, P.W. 8 Rameshwar Dayal and Kaliram were known to him.

12. P.W. - 2, Kharak Singh, who was the witness of the recovery of the dead body, had stated that the deceased Ajay Kumar was known to him and he repeated the story as to how the witness was contacted by P.W. - 13 and how they had gone to the room where the dead body was found. He has also stated the manner in which Rajesh was arrested. He has categorically stated that after Rajesh was arrested, he had informed the Police Officials that he knew where the dead body of Ajay Kumar was and he also could get recovered the Baniyan by which the strangulation

had been done. He also states how exactly Rajesh had led them to the place from where the recovery was done. He has, thereafter, stated that the recovery memo was prepared by P.W. - 13 which was marked as Exhibit ka-2. He has stated in his cross-examination that he had seen the dead body of the deceased Ajay Kumar twice after recovery and that he had fainted thereafter. He has also stated that the dead-body was recovered at around 9:00PM on 9.1.1980. He has further stated that he never informed to anyone in the family of the deceased Ajay Kumar. Upon a specific question being asked as to how the door of the room was opened, he specifically answered that the door was pushed and despite the fact that there was a lock in the door, it opened.

13. P.W. - 3, Rishi Pal is again the witness in whose presence the dead body was recovered. He has also stated that he knew Ajay Kumar from before and he also stated the same story as to how they were contacted by the Police and as to how Rajesh was arrested.

14. P.W. - 4, Anil Kumar, is the witness who professes that he had last seen the deceased along with the accused Rajesh. He has stated that on 7.1.1980 at around 11:00 to 11:30am, he along with Munish was at the Sarpat gate and from the Chandra Talkies a Rikshaw carrying Ajay (deceased) and Rajesh also with a drum containing oil was seen. When Ram Kumar, the real elder brother of the deceased saw them, he had shouted and asked Ajay Kumar as to where he was going. Ajay had answered that he was going to take the diesel along with Rajesh. The

deceased and Rajesh were followed by P.W. - 4, Anil Kumar, Ram Kumar and Munish on another Rikshaw. Thereafter Rajesh had got the Rikshaw stopped at the shop of Madhu Panwale and, Rajesh and the witness P.W. - 4 reached the petrol pump and they had stopped in the neighbouring tea shop and, thereafter, the P.W. - 4 left Ajay Kumar alongwith Rajesh and went away. On that very day, somebody from the house of the Ram Kumar had come to the house of P.W. -4 and had informed that Ajay had not returned to the house and therefore on the next day i.e. on 8.1.1980 a search was made but Ajay Kumar was not to be found. They had also gone to the house of Rajesh but he was also not traceable. He has stated that after 7.1.1980 when he had seen Ajay Kumar with Rajesh he had never seen Ajay Kumar thereafter.

15. P.W. - 5, Munish is also a witness who had stated that he had last seen Ajay Kumar with Rajesh on 7.1.1980 and he repeated the story as was narrated by P.W. - 4.

16. P.W. - 6, Hariram, is the constable who had taken the dead body on 10.1.1980 for postmortem.

17. P.W. - 7 is the Doctor who had conducted the post mortem and had stated that the hyoid bone was fractured and had given his opinion that the death had taken place because of strangulation and throttling. However, he has not stated that there was any strangulation sign over the dead body.

18. P.W. - 8, Rameshwar Dayal, is again the witness who stated that he had seen the deceased Ajay Kumar along with Rajesh Kumar, Omveer

and Rajguru. He had stated that on 7.1.1980 at around 7:15PM he was in his room opposite to the building where Omveer was staying. Along with him, Salauddin and Kaluram were also there with him and that in his room an electricity bulb was lit. At around 8:00pm in the night Omveer, Rajesh and Rajguru, the accused persons, who were present in the court came along with the deceased – Ajay Kumar. The latter greeted him by saying – Namaste. When Rameshwar Dayal P.W. - 8 questioned as to how Ajay Kumar was, he had replied that he was alright and had said that he had gone with Rajesh for fetching diesel. Then thereafter the four i.e. the three accused and Ajay Kumar as per the P.W. - 8 went inside the Room No. 24 and it has been stated that P.W.-8 Rameshwar Dayal continued to sit where he was sitting and at around 8:30PM, he saw that the accused persons came out of the room but Ajay Kumar did not come out. Again upon asking the accused where Ajay Kumar was they had answered that he had gone out with the coupons to get the diesel. He had, thereafter, stated that the accused had, thereafter, left the place. They had before leaving the place locked the room and had not returned the whole night.

19. P.W. - 9, Salauddin, is again the witness who was sitting with P.W. - 8, Rameshwar Dayal. He has also stated somewhat, what had been stated by the P.W. - 8, Rameshwar Dayal. He has stated that he had come to know the names of Rajesh, Rajguru and Omvir a few days ago when they had come to play cards in the room of Omvir.

20. P.W. - 10 is one Rajendra Pal Jain, the Sub-Inspector. He is one who had initiated the case under Section 364 IPC.

21. P.W. - 11 is again the constable, Sita Ram, who alongwith P.W. - 6 Kaliram had taken the dead body for postmortem.

22. P.W. - 12 is the land-lord Sukhvir Singh and who had categorically stated that he was a landlord of the property no. 409 and that there were 14 rooms in the building which he owned and that since the year 1979-80 in Room No. 14 Omvir and Rajpal were tenants. He recognized the accused Omvir who was present in the Court. In Room No. 10, he states, Devendra Kumar Tyagi and Rameshwar Dayal were staying as tenants. Then he states that Rameshwar was not, in fact, his tenant but he quite often used to come to meet his friend Devendra.

23. PW-13 is the Investigating Officer and has given his statement-in-chief indicating as to how on 09.01.1980 on the information of an informer, he had arrested the accused at around 06:00 pm in the presence of the witnesses Kharak Singh (PW-2), Rishipal (PW-3), Yusuf and Rajeshwar and has thereafter once again stated that how Rajesh upon arrest had stated that he would lead to the place where the dead-body of Ajay was to be found and also he would get discovered the baniyan and clothes in which the dead-body was wrapped. He has stated that Rajesh had told him that room no. 24 was a room which was rented by the co-accused Omvir. He, thereafter, states that the room had a lock and Rajesh had informed that the key was with Omvir. He stated that upon pushing

the door, the door had opened. He states that this was done i.e. opening of the door at 07:45 pm. Thereafter, the accused Rajesh had entered the room and in the light of various torches he had pulled out a holdall in which the dead-body was wrapped. In the presence of the witnesses present, the holdall was opened and it revealed the dead-body of Ajay, which was wrapped and also had a ligature mark around the neck. Also the mouth was stuffed with a baniyan. He prepared the recovery memo as Exhibit Ka-2 in his own handwriting and thereafter, he had sent Rajesh alongwith the Constables, Babu Ram and Satyapal alongwith the recovery memo to get the F.I.R. changed from Section 364 of the I.P.C. to 302 of I.P.C. The entry thereafter in the Police Station was made at around 08:05 PM on 9.1.1980 by Rajeshwar Dayal, Constable. He also stated that exhibit Ka-21 was the charge sheet submitted by the police vis-a-vis Rajesh and Rajguru and the exhibit ka-22 was the charge sheet against the accused Omvir. Thereafter, the Police had reached the spot for preparing the inquest report. Since there was no light in the room, the Panchayatnama was not prepared in the night and that it was prepared in the presence of witnesses at 07:30 am on 10.01.1980 i.e. on the next day. Upon a specific question being asked in his cross-examination, as to whether the lock was broken, he had replied that it was not broken and only upon pushing the door, the same had opened.

24. The statements of the accused recorded under Section 313 of Cr.P.C. were mostly to the effect that they had denied all the allegations

made against them and they had denied that they had committed the crime. However, one important question vis-a-vis Rajesh i.e. question no. 29 is important which is with regard to Exhibit -24 through which the accused Rajesh on 08.01.1980 had got a report lodged stating that while he was returning from school a boy with the name of Munish had accosted him and had taken him to a nearby barber shop where Raj Kumar along with other boys, whose names he did not know, had given him a good beating. They had also threatened him with dire consequences. He has stated very categorically that he was taken away in between 11:00 AM to 12:00 Noon on the 8th of January, 1980.

25. Sri Brijesh Sahai, learned counsel has appeared alongwith Sri Rahul Sharma for the appellant no. 1 and Sri Sunil Vashishth, learned counsel appeared for the appellants no. 2 and 3 have specifically argued that the entire case was of a circumstantial evidence and that the accused who were apprehended and tried and, thereafter, convicted should be acquitted as the judgement under challenge had not appreciated the evidence correctly. He basically argued on following issues:-

- (i) Sri Brijesh Sahai learned Senior Counsel submitted that the first issue on which he intended to argue was that, in fact, there was no motive with the accused. He has argued that the motive was an extremely weak one. He submits that the first informant had come up with a case that on 06.01.1980 he had given Rajesh Rs. 700/- to bring diesel coupons for him which would fetch the first informant

diesel. He thereafter states that when Rajesh did not come he had sent Ajay on 07.01.1980 and thereafter Ajay had disappeared and, therefore, on 08.01.1980 at around 05:00 PM in the evening he had got a report lodged with regard to the fact that Ajay was missing. Learned counsel for the appellants states that motive is an important aspect on the basis of which a person who had been made an accused on the basis of circumstantial evidence could be convicted. He submitted that it was important to see if the motive was a strong one or was not such a motive which could be relied upon to convict a person. He submits that when the motive itself was an absolutely weak one, the case could not have proceeded on the basis of it and he therefore submits that the prosecution under circumstantial evidence ought not to have proceeded.

- (ii) Next argument which the learned counsel for the appellants thereafter has made is that the evidence of the witnesses who had last seen the accused was a weak one. They should have seen the deceased at such a time which would have made the statements of the witness reliable. That is to say that they should have seen the deceased Ajay at such a time by which it could have been said that it was in proximity to the time of the offence. PW-4 and PW-5 had seen the deceased Ajay on 07.01.1980 at around 11:00 AM in the morning and thereafter in the evening of 7.1.1980 at around 04:00 PM. Learned counsel for the appellants states that the statements of Anil Kumar and Munish were somehow self contradictory. At one

place they have stated that they actually saw the deceased going with the appellant Rajesh for fetching diesel and thereafter they state something which was absolutely unconnected. They said that the four of them had entered the room no. 14 at around 07:30PM. Their statements are in direct contradiction with the statement of PW-8, Rameshwar Dayal who had stated that Rajesh, Raj Guru and Omvir had entered the room of Omvir at around 08:00 PM in the night and he also states that Ajay had greeted him and had also stated that Rajesh would give him the coupons on a future date for the diesel which was required to be given to his uncle. Learned counsel therefore states that at one place the witnesses who had last seen the deceased state that they had actually seen the deceased taking the diesel whereas the PW-8 Rameshwar Dayal states that the deceased was mentioning that he would actually get the diesel subsequently.

- (iii) Learned counsel for the appellants thereafter argued stated that the appellant - Rajesh since had got the dead-body recovered after he was arrested and that recovery was done under Section 27 of the Evidence Act, the conviction or the acquittal of the appellant Rajesh would to quite an extent depend on the fact as to whether the recovery was a proper one under Section 27 of the Evidence Act. Learned counsel for the appellants states that under Section 27 of the Evidence Act, the discovery ought to be made from the spot which:-

- (i) is not accessible to the public at large,
- (ii) the spot should be a special spot which was specially within the exclusive knowledge of the arrested person who was getting the recovery done.
- (iii) There ought to be a disclosure statement which in addition to the fact that the recovery was going to be made had also to state that the arrested person was the author of the concealment.

Learned counsel relied upon paragraphs no. 42, 43, 44 and 45 of the judgement in **Shahaja@ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra** reported in **2022 SCC Online SC 883**. Since learned counsel relied upon those paragraphs, they are being reproduced here as under:

“**42.** The conditions necessary for the applicability of Section 27 of the Act are broadly as under:

- (1) Discovery of fact in consequence of an information received from accused;
 - (2) Discovery of such fact to be deposited to;
 - (3) The accused must be in police custody when he gave informations and
 - (4) So much of information as relates distinctly to the fact thereby discovered is admissible - *Mohmed Inayatullah v. The State of Maharashtra* : (1976) 1 SCC 828 : AIR 1976 SC 483 : 1975 CLJ 668
- Two conditions for application -
- (1) information must be such as has caused discovery of the fact; and
 - (2) information must relate distinctly to the fact discovered - *Kirshnappa v. State of Karnataka* : (1983) 2 SCC 330 : AIR 1983 SC 446 : 1983 Cri LJ 846

43. We may refer to and rely upon a Constitution Bench decision of this Court in the case of *State of Uttar Pradesh v. Deoman Upadhyaya* reported in AIR 1960 SC 1125, wherein, the Supreme Court in Paragraph-71 has explained the position of law as regards Section 27 of the Act as under:

“71. The law has thus made a classification of accused persons into two : (1) those two have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the first category the law has ruled that their statements are not admissible, and in the case of the second category, only that portion, of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says:“I pushed him down such and such mineshaft”, and the body of the victim is found as result, and it can be proved that his death was due to injuries received by a fall down the mineshaft.”

44. The scope and ambit of Section 27 of the Act were illuminatingly stated in *Phulukuri Kottaya v. Emperor*, AIR 1947 PC 67, which have become *locus classicus*, in the following words:

“It is fallacious to treat the ‘fact discovered’ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed ‘A’” these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

45. What emerges from the evidence of the PW-4 & PW-10 respectively is that the appellant stated before the panch

witnesses to the effect that “I will show you the weapon concealed adjacent the shoe shop at Parle”. This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence.”

Also learned counsel relied upon the judgements reported in **AIR 2022 SC 5273 : Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh** and in **AIR 2022 SC 5110 : Subramanya vs. State of Karnataka**, and submitted that the accused while in custody ought to have given his statement before two independent witnesses, and the exact statement or rather the exact words uttered by the accused should be incorporated in the panchnama prepared by the Investigating Officer. Learned counsel submitted that the first part of the deposition for the purpose of Section 27 of the Evidence Act ought to have been drawn in police custody in the

presence of two independent witnesses. The judgements cited above held as follows:

“This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.”

- (iv) Learned counsel for the appellants then submitted that the evidence of the Investigating Officer had to be of a very good quality and if there was any doubt with regard to the evidence as was produced by the Investigating Officer then the whole case would become doubtful and the conviction could not be done.

26. In this regard, learned counsel for the appellants has very categorically stated that after the arrest had taken place on 09.01.1980 at around 06:00 PM of the appellant Rajesh and thereafter when Rajesh had proceeded for getting the dead-body recovered, learned counsel for the appellant states that he never confessed with regard to the actual authorship of the concealment. Learned counsel for the appellants thereafter submitted that in the absence of the confession and in the absence of the fact that he had stated that he was the author of the concealment, the recovery as was made under Section 27 of the Evidence Act could not be considered a recovery under Section 27 of the Evidence Act and would therefore be only a confession which would come in the category of Section 25 of the Evidence Act and could not be relied upon.

27. Learned counsel for the appellants thereafter submitted that after the arrest had taken place at 06:00 PM, the document Exhibit Ka-2 was prepared at 07:00 PM and this document clearly is to the effect that the dead-body had been discovered and that the case had already been got registered under Section 364/ 302/ 201 of I.P.C. Learned counsel for the appellants thereafter drew the attention of the Court to the statement of PW-13 wherein he states that he had actually sent the accused Rajesh with the Constable, Babu Ram and Satyapal at 08:05 PM with a direction that the F.I.R. now be also got registered under Section 302 of I.P.C. Learned counsel for the appellant therefore states that when this direction was being given at around 08:05 pm on 09.01.1980 then the Exhibit Ka-2 which was of 09.01.1980 and was prepared at 07:00 PM definitely goes to show that the recovery was a sham recovery and that the Exhibit Ka-2 and the F.I.R. thereafter which was registered as Exhibit Ka-22 were all prepared sitting in the Thana and, therefore, no reliance could be placed on the evidence as had been brought forth by the PW-13.

28. Learned counsel for the appellants further states that if the statement made by the PW-13 is perused then it becomes clear that after the arrest had taken place at 06:00 PM and the Police party had started searching for the room in which the dead-body was to be found then there was a clear averment that everything had been done in the light of various torches. However, he submits that when it came to the preparation of the actual inquest report, the Police Officer had mentioned that there was no light present and, therefore, he was adjourning/postponing the preparation

of the Panchayatnama for the next day. Learned counsel for the appellants therefore submits that this definitely goes to show that in fact the recovery memo etc. was not recorded on that day and the same was actually prepared subsequently when the Police had got the whole night of 09.01.1980 and 10.01.1980 to do the mischief. Before the Panchayatnama was prepared all the documents with regard to the recovery etc. were manufactured and while doing so they had missed out the timing given in the panchayatnama and therefore the evidence of the PW-3, the Investigating Officer which ought to have been of a high quality was definitely not of such a quality which could lead the Court to convict a person.

29. Learned counsel for the appellants further drew the attention to the Panchayatnama and from it he had shown that the Panchayatnama proceedings had commenced on 09.01.1980 at 09:30 PM and when it came to an end it was not shown in the Panchayatnama. He, therefore, submits that the preparation of the Panchayatnama was also not done on the spot but was done elsewhere. Learned counsel for the appellants having shown that the evidence of the PW-13 the Investigating Officer was of a weak kind thereafter went on to argue that the deceased Ajay was a young boy studying in the B.A. Class and was of around 21 years of age and that he submits that if he was being throttled by three young men then he would have definitely resented the acts of the three young men and there would have been at least some noticeable injuries on his own body. But, in fact, no injury has been found. Learned counsel for the appellants

therefore submits that in fact the murder had taken place in some other way and the dead-body was planted in the room from where discovery had been shown and that in fact the appellants had thereafter been implicated only on the basis of suspicion.

30. Learned counsel for the appellants thereafter to substantiate his arguments that the investigation had proceeded only on the basis of suspicion, has drawn the attention of the Court to the Exhibit Ka-24 which was an N.C.R. which had been got lodged by the appellant Rajesh on 08.01.1980 against one prosecution witness Munish PW-5 and against Ram Kumar the real brother of the deceased Ajay. He submits that thereafter the Police had only a feeling/suspicion that it was just possible that Rajesh might have committed the crime. He submits that suspicion cannot take the place of proof and therefore the conviction on the basis of suspicion was absolutely erroneous. Learned counsel relied upon the case of **Brij Bhushan Singh vs. Emperor** reported in **AIR 1946 PC 38** to bolster this argument.

31. Learned counsel for the appellants further has stated that to say that the accused was not in his proper senses at the time when he was taken by the three accused persons as per the case of the prosecution was also wrong. He submits that PW-8 when had seen the accused persons going with Ajay, PW-8 had stopped him and had specifically asked various questions which he had definitely answered in his full consciousness.

32. Learned counsel for the appellants also to make the recovery etc. doubtful submits that the PW-2 has stated that when he had seen the dead-

body, he had actually fainted and thereafter had become conscious only at 09:00 PM in the night of 09.01.1980. He therefore submits that if that was the case then the signature which was there of PW-2 on the recovery memo becomes doubtful and, therefore, he submits that the entire case of the prosecution which is based on the investigation as was done by the Investigating Officer was absolutely doubtful in nature and therefore could not be considered by the Court for convicting the three accused.

33. Learned counsel for the appellants has relied upon the judgment of Supreme Court reported in **AIR 1984 SC 1622 : Sharad Birdichand Sarda vs. State of Maharashtra** and has submitted that as per the law laid down in it if the links which lead to the conviction, are not complete and if there is any broken link then the Court could not convict an accused. In the instant case, he submits, that the entire evidence of the Investigating Officer is doubtful. The arrest had taken place at 06:00 PM. The recovery memo was prepared at 07:00PM (which contained the Sections 302 and 201 of I.P.C.) even before the F.I.R. was upgraded to Section 302 of I.P.C. in the Police Station which was done at 08:05 PM. He, therefore, submits that the entire case of the prosecution as has been brought forth through the various witnesses becomes doubtful and the case is a fit case for the acquittal of the three accused-appellants.

34. Learned counsel submitted that as per the judgement in the case of **Sharad Birdichand Sarda vs. State of Maharashtra** reported in **AIR 1984 SC 1622**, the Supreme Court has held that “before conviction could

be based on circumstantial evidence the following conditions must be fully established and they are:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.
2. The fact so established should be consistent only with the hypothesis of the guilt of the accused.
3. The circumstances should be of conclusive nature and tendency.
4. They should exclude every possible hypothesis except one to be proved.
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These conditions have been called as the ‘Five golden principles’ or to say’ constitute the panchsheel of the proof of a case based on circumstantial evidence.’

35. Sri Amit Sinha, learned A.G.A. assisted by Ms. Mayuri Mehrotra, however, in reply, has submitted that the recovery which was done in the presence of the witnesses could not be lightly brushed aside. Learned counsel for the State further submits that even if there was certain shortcomings in the time etc. which had been given in the recovery memo and in the F.I.R. which stated that the Section 302 of I.P.C. had been added in the F.I.R., it would make a little difference and, therefore, the

appeal be dismissed and the conviction of the three appellants be affirmed. He relied upon a judgement of Supreme Court reported in **2010 (9) SCC 567 : C. Muniappan and others vs. State of Tamil Nadu**. He specifically relied upon paragraph no. 85 of the judgement which is being reproduced here as under:-

“85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses.”

36. Learned A.G.A. has further submitted that the motive was definitely there and he submits that in the year 1980 a sum of Rs. 700/- was a valuable amount and murders did take place for the recovery of such amount. Learned A.G.A has also submitted that the evidence of such persons who had last seen the accused along with the deceased specially PW-8 which was approximately in the time the offence took place could not be lightly brushed aside.

37. Before parting, we would like to bring on record the fact that certain original documents of the paper book were torn and, therefore, the photocopy of the paper book which the learned counsel for the appellants has submitted and which contains the photocopies of the original

documents were relied upon by the Court. Learned AGA had not denied the fact that the photocopies attached in the paper book which had been handed over by the learned counsel for the appellants were not reliable.

38. Having heard Sri Brijesh Sahai, learned Senior Counsel, assisted by Sri Rahul Sharma and Sri Sunil Vashisth learned counsel for the appellants, learned AGA Sri Amit Sinha assisted by Ms. Mayuri Mehrotra for the State, we do find that the motive as was given for the commission of the murder of Ajay Kumar was not a strong one. It was said that Rs. 700/- were given to Rajesh with a request to him to get the coupons for fetching diesels. When he did not come with the diesel on 7.1.1980, the deceased was sent and when he did not again return on the 8th of January 1980 then a missing report was got reported. For a person like the uncle of the deceased Rs. 700/- was definitely of not much importance and he would definitely not have ventured to send his nephew, the deceased, to Rajesh one of the accused for getting back with money. This, we also conclude, on account of the fact that on 8th of January 1980 Rajesh had got a report lodged with regard to the fact that the brother of the deceased Ajay, Munish Kumar had manhandled him. We also find that the recovery as was made under Section 27 of the Evidence Act was not as per the law. Definitely when Rajesh was under the police custody, he had not approached the place which was not accessible to public at large. Room No. 24 was such a room where Rajesh, Omvir and Rajguru had easy access. In fact, we find as per the evidence on record that when Rajesh

had gone to get the dead-body recovered, he had not open the lock but had entered the room by just giving a push to the door. We also find that the recovery under Section 27 of the Evidence Act was not as per the law which has been laid down by the Supreme Court in the cases of **Shahaja@ Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra** reported in **2022 SCC Online SC 883**, **Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh** reported in **AIR 2022 SC 5273** and **Subramanya vs. State of Karnataka** reported in **AIR 2022 SC 5110**.

39. We thus are definitely of the view that the recovery as was made under Section 27 of the Evidence Act was of no value whatsoever. Still further, we are of the view that the evidence of the witnesses who had last seen the accused was not reliable. The evidence had definitely to be of such a nature which was in proximity to the time of the offence. P.W. 4 and P.W. - 5 were mentioning of something which had happened on 7.1.1980 and similarly P.W. 8 had mentioned about having seen the deceased in the company of the accused on the same day but in the evening on that date. Not only does this create a doubt with regard to the truthfulness of the witnesses but it also creates a doubt as to whether anything which the prosecution had done was done with sincerity. The time at which the deceased was seen could not be said was in the proximity of the time when the murder had actually taken place. One can easily see that one set of witnesses had seen the deceased on 7.1.1980 in the morning while the other set of witnesses had seen the deceased in the company of the accused in the evening and thus the evidence of having

seen the deceased last with the accused loses its importance. We are also of the view that evidence of the Investigating Officer was not above board. The document which shows that first information report was earlier lodged under Section 364 IPC had been converted into a first information report under Section 302 /201 IPC at 7:00PM could, in fact, not have been converted at 7:00PM as the Investigating Officer himself had stated that he had given directions to Constable Babu Ram and Satyapal at 8:05PM to get the first information report registered under Section 302 IPC. Also, we are of the view that when under torch light the dead body could have been discovered at 6:00PM on 9.1.1980, there was no reason to adjourn/postpone the preparation of the panchayatnama to the next day. Also we are of the view that the panchayatnama becomes a doubtful document when it shows that the proceedings had commenced on 9.1.1980 at 9:30PM but it did not show any time when the panchayatnama was finally prepared.

40. Thus, we are of the view that when the prosecution had not been able to prove its case beyond reasonable doubt the conviction of the appellants would be an unsafe proposition. We are of the view that when a doubt has been created in the minds of the Court upon consideration of the entire evidence, the appeal should be allowed and the appellants had to be acquitted. The paragraph no. 177 of the judgement of the Full Bench decision in **Rishi Kesh Singh & Ors. vs. The State** reported in **AIR 1970 Allahabad 51 (FB)** is being reproduced here as under:-

“177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows:—

The majority decision in 1941 All LJ 619 = AIR All 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused.”

41. Ultimately, we are of the view that the prosecution has definitely failed to prove the case which was taken by it beyond reasonable doubt.

42. Under such circumstances, the instant criminal appeal is **allowed**. The judgement and order dated 30.6.1982 passed by the IIIrd Additional Sessions Judge, Muzaffarnagar is quashed and set aside. The appellants are acquitted of the charges on the basis of which the trial had proceeded. Since the appellants are on bail, the bail bonds and sureties are discharged.

Order Date :- 31.5.2024

PK

(Vinod Diwakar,J.) (Siddahrtha Varma,J.)