

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Criminal Appeal No. 1196/2016

Babuchandraray Alias Parimal Chandra Son of Shri Titendra Rai,
Aged 44 years, R/o Barorangras, Police Station Kotwali Katch
Bihar, District Katch, Bihar (West Bengal) At Present Plot No.973,
Shanti Nagar, Durgapura, Jaipur.

(At present confined in Central Jail, Jaipur)

----Accused-Appellant

Versus

The State Of Rajasthan Through P.P.

----Respondent

For Appellant(s)	:	Mr. Sumit Khandelwal for Mr. Kunal Rawat
For Respondent(s)	:	Mr. Vivek Sharma, Dy.G.A. Mr. Naresh Kumar Gupta, PP with Ms. Neha Goyal

HON'BLE MR. JUSTICE MAHENDAR KUMAR GOYAL
HON'BLE MR. JUSTICE BHUWAN GOYAL

Judgment

09/12/2025

This criminal appeal is directed against the judgment dated 14.09.2016 passed by the learned Additional Sessions Judge, No.5, Jaipur Metropolitan (for short 'learned trial court') in Sessions Case No.25/2014 whereby, the accused-appellant (for short 'the appellant') has been convicted and sentenced as under:-

Under Section 302 IPC:- Life imprisonment with
fine of Rs. 5,000/-; in default whereof, six months'
simple imprisonment.

Under Section 201 IPC:- Three years' rigorous imprisonment with fine of Rs. 2,000/-; in default whereof, one month's simple imprisonment. Sentences to run concurrently.

The relevant facts in brief are that on 29.06.2014, Shri Mintudas (PW-2) submitted a written report (Ex.P12) with the Police Station Bajaj Nagar, Jaipur, wherein, it was stated that his cousin Smt Sadhna Das, a domestic helper at House No. A-6, Mahaveer Nagar, Jaipur for last about 15 years, was assassinated last night by some unknown person. Based thereupon, an FIR No. 451/2014 under Sections 302 and 201 IPC came to be registered. After investigation, the appellant was charge-sheeted under the aforesaid sections. The learned trial Court framed charge against him under Sections 302 and 201 IPC. The appellant pleaded not guilty and demanded trial. After trial, he has been convicted and sentenced as stated hereinabove.

Assailing the impugned judgment, learned counsel for the appellant submits that the learned trial Court has erred in recording his conviction based on conjectures and surmises only without appreciating that there was no legally admissible evidence available on record to connect him with the alleged offence. He submits that in this case based on circumstantial evidence, there is no evidence of 'last seen' and the prosecution has miserably failed to establish the complete and unbroken chain of events leading to only one conclusion of his guilt. Learned counsel submits that the testimony of the prosecution witnesses, who

were declared hostile, was wrongly relied upon by the learned trial Court to hold that the appellant knew the deceased and has committed the alleged offence. He further submits that the other two circumstances relied upon by the learned trial Court based on CCTV footage and marks of the slipper, were not reliable and trustworthy. With regard to CCTV footage, he submitted that indisputably, the CCTV was also available in the house where the deceased was found to be murdered but, the prosecution did not produce the same for no plausible reason. He contends that in the CCTV footage obtained from the Carvan Hotel situated in the vicinity of the place of incident, it is not reflected that he visited that place in the fateful night rather, the same shows presence of Shri Avni Ray-brother-in-law of the deceased. Learned counsel submits that moreover, neither the pen drive in which the CCTV footage was allegedly obtained nor, the compact disc in which the footage was copied from the pen drive, were part of the record. He asserts that even otherwise, this electronic evidence could not have been taken into consideration for want of the Certificate under Section 65-B of the Evidence Act. With regard to the finding of the learned trial Court connecting him with the offence alleged on the basis of foot mould, inviting attention of this Court towards the evidence available on record, learned counsel submits that firstly, the foot mould was not obtained in accordance with law; secondly, the mould so obtained from the site, was not sealed and thirdly, the slipper allegedly recovered on 29.07.2014 based on his disclosure statement, is stated to be deposited in the malkhana on 29.06.2014, i.e., a month before its seizure which is

impossible. He, therefore, prays that the appeal be allowed, the judgment impugned dated 14.09.2016 be quashed and set aside and he may be acquitted of the charge framed against him.

Per contra, opposing the submissions and supporting the findings recorded by the learned trial Court, learned Public Prosecutor prays for dismissal of the appeal.

Heard. Considered.

Indisputably, it is a case based on circumstantial evidence. Their Lordships have, in the celebrated judgment of **Sharad Birdhichand Sarda V/s. State of Maharashtra; (1984) 4 SCC 116**, has laid down the following golden principles to be kept in mind in the cases based on circumstantial evidence:-

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra [SCC (Cri) p. 1047] where the following observations were made:

"Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. They should not be explainable on any other hypothesis except that the accused is guilty,

- (3) the circumstances should be of a conclusive nature and tendency,
- (4) they should exclude every possible hypothesis except the one to be proved, and
- (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.

A perusal of the judgment impugned reveals that the learned trial Court has relied upon the following circumstances to connect the appellant with the alleged offence:-

1. Prior acquaintance of the appellant with the deceased and his meeting with her in the night of 27.06.2014.
2. His presence in the vicinity of the place of incident as per the CCTV footage.
3. Matching of the foot mould lifted from the place of incident with his slipper.

So far as previous acquaintance of the appellant with the deceased is concerned, we do not find any trustworthy and reliable evidence available on record to establish the same. The learned trial court has, in this regard, relied heavily upon the testimony of S/Shri Mukesh Chandra Sharma (PW-4), Vishnu Rai (PW-6), Dilip Rai (PW-7), Avni Rai (PW-11) and Rajendra Jain (PW-28) as well as Smt. Sarti Das (PW-5), Smt. Savita (PW-8), Smt. Basumati Rai (PW-9) and Smt. Kalpana (PW-10). So far as deposition of Smt. Sarti Das (PW-5), Smt. Savita (PW-8), Smt. Basumati Rai (PW-9), Smt. Kalpana (PW-10), S/Shri Dilip Rai (PW-7) and Avni Rai (PW-11) is concerned, they have been declared hostile and have not supported the prosecution story but, the

learned trial court, on the basis of conjectures and surmises, drew a misconceived inference that since they are also resident of Shanti Nagar, Durgapura, Jaipur, where the appellant was residing, they must be knowing each other and did not tell the truth in the Court to save him. We are of the considered view that such an inference may depend upon myriad factors such as size of the locality, its population, the period for which the witnesses and the parties to the litigation have been residing therein, proximity of their houses, their occupation and working hours. Indisputably, no such data or evidence was available on record, in absence whereof, the learned trial Court erred in drawing such an inference. Further, this Court has gone through their statement in their entirety and does not find the same to be of any evidentiary value against the appellant.

In so far as the testimony of remaining prosecution witnesses is concerned, statement of Shri Mukesh Chand Sharma (PW-4) is very vague and ambiguous. On the one hand, he has stated that though, he was in his room on 27.06.2014 but, he did not see anything, however, in the same breath, he has stated that Avni was already upstairs and thereafter, the appellant came at about 4-4.30 PM and went upstairs. They returned together after 15 minutes and went away in an Auto. He has further stated that in the evening of Saturday, the deceased as well as Avni have requested him not to permit the appellant to come there. During his cross-examination, he has denied his statement recorded by the Police Under Section 161 Cr.P.C.(Ex-D-1) in its entirety. He has further denied to have seen the appellant coming to the plot No.A-

6, i.e., the house in which the incident took place, however, in the same breath, he has stated that he saw the appellant coming there for the first time on 27.06.2014. Thus, his testimony reflects that it is full of contradictions on the material aspect i.e. as to whether the appellant had visited the deceased on 27.06.2014. The another prosecution witness Shri Vishnu Rai (PW-6) has, during his cross-examination, stated neither to have seen the appellant meeting the deceased nor, to have heard that they used to meet. The remaining prosecution witness in this regard, i.e., Shri Rajendra Jain (PW-28), has stated, in his examination-in-chief, that Shri Avni -brother-in-law of the deceased, used to come for last 2 - 3 years to meet her and two days prior to the fateful day, an another person came and they both quarrelled with each other. He has further stated that the deceased had asked his driver- Mukesh not to permit that man to come again. He has also stated that in the footage of the CCTV camera installed at his house examined by the police in his presence, he identified that person to be the same person who had come once about 6-7 years ago to meet the deceased. He has further deposed that when the deceased apprised him that he used to harass her, he had scolded that person and identified the accused-present in court as the same person. Conspicuously, the prosecution has neither produced the footage so recorded in the CCTV camera installed at this witness' house nor, any explanation has been offered for this failure which renders the testimony of PW-28 doubtful. In view thereof, an adverse inference has to be drawn against the prosecution.

From the forensic analysis of the aforesaid evidence, this Court is not satisfied that the prosecution has been able to establish that the appellant was acquainted with the deceased, had visited her a day prior to the date of incident and had a quarrel with her.

The another circumstance relied upon by the learned trial court is matching of the foot mould lifted from the place of incident with the slipper recovered at behest of the appellant. So far as the recovery of the slipper is concerned, as per Ex.P81, the disclosure statement was made by the appellant on 29.07.2014 and as per Ex.43-the seizure memo, it was seized from the rented premises of the appellant on the same day. However, Shri Mewaram (PW-18) – the Malkhana Incharge has categorically stated in his deposition that on 29.06.2014, the Incharge Police Station Shri Saini has deposited a number of packets with him including the Article No. 889/2014 Ex. P-61, the sealed packet containing slipper. It is beyond human comprehension as to how the slipper allegedly recovered at the instance of the appellant on 29.07.2014, could have been deposited in the malkhana on 29.06.2014. Further, as per the testimony of Shri Mewa Ram, the foot mould lifted from the place of incident was deposited in the malkhana in unsealed condition entailing it prone to manipulation. This fact stands corroborated from the malkhana register (Ex.P49A). Moreover, the witnesses to the Ex.P16 – the inquest memo of foot mould, S/Shri Mintu Das (PW-2) and Vishnu Rai (PW-6) have categorically stated during their cross-examination that their signatures were obtained on the blank paper. Further, a

Division Bench of this Court has, in the case of **Dhoom Singh and Ors. Vs. State of Rajasthan; Criminal Appeal No. 530/1995; decided on 06.07.2017** underlining the importance of the manner of uplifting a mould, held as under:-

22. A Division Bench of this court to which one of us (Kanwaljit Singh Ahluwalia J.) was a party, in *Sunder & Ors. v. State of Rajasthan* [2015 (2) WLC 250], noted rule 6.26 of the Rajasthan Police Rule, 1956, as under:-

6.26. Importance of footprints and track evidence.- (1) Footprints are of the first importance in the investigation of crime. For this reason all officers in charge of police stations shall instruct their subordinates as well as all chaukidars that, when any crime occurs all footprints and other marks existing on the scene of the crime should be carefully preserved and a watch set to see that as few persons as possible are permitted to visit the scene of the crime.

(2) When it is desired to produce evidence of the identity of tracks found at the scene of or in connection with a crime, the procedure for securing the record of such evidence shall be similar to that prescribed in rule 7.31 for the identification of suspects. The attendance of a magistrate of the highest available status, shall be secured or, if that is impossible, independent witnesses of reliable character shall be summoned. In the presence of the magistrate or other witnesses, and in conformity with the reasonable directions which they may give, ground shall be prepared for the tests. On this ground the suspect or suspects, and not less than five other persons shall be required to walk. The magistrate, or in his absence the police officer conducting the test, shall record the names of all these persons and the

order in which they enter the test ground. While these preparations are preceding the tracker or other witness, who is to be asked to identify the tracks shall prevented from approaching the place or seeing any of the persons concerned in the tests. When all preparations are complete the witness shall be called up and required to examine both the original tracks and those on the test ground, and thereafter to make his statement. The magistrate, or in his absence, the police officer conducting the test shall record the statement of the witness as to the grounds of his claim to identify the tracks, and shall put such other questions as he may deem proper to test his bona fides. The officer investigating the case and his assistants shall be allowed no share in the conduct the test. Tracks found, which it is desired to test by comparison as above, shall be protected immediately on discovery, and their nature, measurements and peculiarities shall be recorded at the time in the case diary of the investigating officer. The details of the preparation of the test ground and the actions required of the suspect and those with whom his tracks are mixed must vary according to the circumstances of the case. The officer conducting the test in consultation with the magistrate or independent witnesses, shall so arrange that the identifying witness may be given a fair chance, but under the strictest safeguards, of comparing with the original tracks, other tracks made on similar ground and in similar conditions.

(3) The evidence of a tracker or other expert described in the foregoing rule can be substantiated by the preparation of moulds of other footprints of the criminal or criminals found at the scene of the crime. In making moulds for production as evidence the following precautions should be observed:-

- (a) The footprints found on scene of the crime must be pointed out to the reliable witnesses at the time and these same witnesses must be present during the preparation of the moulds.
- (b) The latter must also be signed or marked by the witnesses and the officer preparing them while still setting.
- (c) After the procedure described in Sub-rule (2) above has been completed a mould should be prepared in the presence of the Magistrate or witnesses of one of the foot prints of the suspect made in their presence. This mould should be signed by the Magistrate or witnesses when still setting.
- (d) Both moulds should be carefully preserved for production in court for identification by witnesses and comparison by the Court."

Dilating the above rule 6.26(3), the Division Bench in the case of Sunder and others (supra) held as under:-

"Thus, Rule 6.26 (3) requires that prior to taking the impression of the footprints and before making a mould, the footprints found on scene of the crime must be pointed out to reliable witnesses. However, in the present case neither Prahlad Singh (P.W.22), nor Jagdish (P.W.13) states that the footprints of the alleged accused persons were pointed out to them. According to Rule 6.26 (3)(c), the moulds of the footprints should be made either in front of Magistrate, or in front of witnesses. The said moulds have to be signed either by the Magistrate, or the witnesses. According to Rule 6.26 (3) (d), during the course of trial the mould should be

produced in the court for identification by the witnesses and comparison by the court.”

Thus, in the aforesaid precedential law, after interpreting the provisions of Rule 6.26 of the Rajasthan Police Rules, 1956, it was held that the foot mould should be lifted either in front of a Magistrate or in front of independent witness(es). In the present case, admittedly, the foot mould was lifted in presence of the aforesaid two witnesses who did not support the prosecution case. In view thereof, we find that the evidence of matching of the foot mould lifted from the place of incident with the slipper allegedly belonging to the appellant, was sketchy and was not creditworthy to warrant conviction of the appellant based thereupon.

In so far as the third circumstance is concerned, the learned trial Court has heavily relied upon the CCTV footage obtained from the Carvan Hotel situated near the place of incident. Indisputably, neither the pen drive in which the CCTV recording was obtained by the Investigating Agency nor, the two Compact Discs on which the CCTV footage was copied from the pen drive, were part of the record as also admitted by Shri Virendra Singh Shekhawat PW-15-the General Manager of the Hotel concerned and Shri Alok Kumar PW-25-the Investigating Officer. Conspicuously, the prosecution has not submitted the certificate under Section 65-B of the Evidence Act, a mandatory condition precedent for placing reliance upon any secondary electronic evidence as was in the present case, in absence whereof, the same could not have been taken into consideration as held by their Lordships in the case of **Arjun**

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Ors.: (2020) 7 SCC 1.**

Moreover, Shri Sushil Kumar Sharma (PW-23)-the In-charge Mobile Forensic Unit, State Forensic Science Laboratory, Jaipur, has admitted during his cross-examination that in the CCTV footage report (Ex.P-77), it was not specifically mentioned that the person seen in the footage was the appellant. He has further admitted that in G to H part of the report, the appellant as also Avni Rai both were seen whereas, in their report, they have mentioned only the appellant. In view thereof, this Court is not satisfied that the secondary electronic evidence sought to be relied upon by the prosecution to prove presence of the appellant in the vicinity of the place of incident at the relevant time, was either admissible in evidence or, it was safe to record conviction of the appellant based thereon.

We also find that although, the prosecution has come out with a case that the deceased was assassinated by the appellant with a stone but, the same has not been recovered and the prosecution is completely silent as to why no investigation was carried out in respect thereof.

Since, in our considered view, the prosecution has failed to establish the complete and unbroken chain of circumstances connecting the appellant with the alleged offence, the appeal deserves to be allowed.

Accordingly, the appeal is allowed. The judgment dated 14.09.2016 passed by the learned Additional Sessions Judge, No.5, Jaipur Metropolitan in Sessions Case No. 25/2014 is quashed and set aside and the appellant is acquitted of the charge

framed against him. Since, the appellant is in custody, he be set at liberty forthwith if not warranted in any other case.

In view of the provisions of section 437-A CrPC (Section 481 Bharatiya Nagarik Suraksha Sanhita, 2023), the appellant namely **Babuchandraray Alias Parimal Chandra Son Of Shri Titendra Rai** is directed to furnish a personal bond in the sum of Rs.25,000/- and a surety in the like amount within four weeks before the Registrar (Judl.) of this court which shall be effective for a period of six months with the stipulation that in that event of special leave petition being filed against the judgment or on grant of leave, the appellant aforesaid, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

(BHUWAN GOYAL),J

(MAHENDAR KUMAR GOYAL),J