

â\222IT E M No.1- B
(For Judgment)

Court No.3

S E C T I O N II

S U P R E M E C O U R T O F
R E C O R D O F P R O C E E D I N G S

I N D I A

CRIM I N A L A P P E A L N O . 7 2 0 / 2 0 0 4

A S R A F S K & A N R .

Appellant (s)

V E R S U S

S T A T E O F W E S T B E N G A L

Respondent (s)

Date : 2 0 / 1 0 / 2 0 0 8 This Petition was called on for judgment today.

For Appellant (s)

Mr. Manoj K.Mishr a , Adv.

For Respondent(s)

Mr.Avijit Bhattacharjee, Adv.

Hon'ble Dr. Justice Arijit P a s ayat pronounced
Judgment of the Bench comprising His Lordship and
Hon'ble Dr. Justice Mukunda k a m Shar m a .

The accused persons are entitled to acquittal. They
shall be released from custody forrthwith unless required to
be in custody in any other case in terms of the signed
judgment.

(Shashi Sareen)
Court Master

(Shashi Bala Vij)
Court Master

Signed Reportable judgment is placed on the file.

RE P O R T A B

L E

I N T H E S U P R E M E C O U R T O F I N D I A
CRIM I N A L A P P E L L A T E J U R I S D I C T I O N
C R I M I N A L A P P E A L N O . 7 2 0 O F 2 0 0 4

Asraf S K and Anr.
ts

...Appellan
ts

Versus

State of West Bengal

...Respondent

J U D G M E N T

Dr. ARI J I T PA S A Y A T , J.

1. Challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court upholding the conviction recorded by learned Additional Sessions Judge, 12th Court, 24 Parganas (South) in Sessions Trial No.1(6) of

1988. Both the appellants were convicted for offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and sentenced to imprisonment of life.

2. The prosecution case, in brief, is that Jayanta Kr. Mukherjee (P W- 12) was posted as Officer- in-Charge of Bishnupur Police Station at the relevant point of time. On 18.08.83 at about 0.02 hours when this witness came to Jhanpur Keyatala Hat, he received written complaints of Anita Pal (P W- 1) alleging, inter-alia, that her niece Kumari Archana Pal, aged about 16 years was kidnapped by the appellants. Kumari Archana Pal was the daughter of her sister Pasani Pal (P W- 2). Her niece could not be traced out since she was kidnapped by appellant no.1 Asraf Sk. and further that as appellant no.1 Asraf Sk. was absconding and on the date of occurrence the said appellant was seen loitering openly around their house. Her elder sister Pasani Pal upon seeing the appellant no.1 became emotional and started crying. On 17.08.1983 early in the evening, when P W- 2 was so crying loudly, appellant no.1 Asraf Sk. alongwith appellant no.2 Rashid Molla Suddenly entered their house and assaulted P. W . 2 for crying loudly. Seeing this, Shibcharan Pal (hereinafter referred to as the 'deceased') being the father of P. W s . 1 and 2 came out from his hut and protested against the acts of the appellants in assaulting P. W . 2 . At this the appellants threatened that they would murder every member of the family of the deceased. Apprehending danger, P. W . 1 alongwith the deceased went to the house of one Suphal Pal, being a local leader, to complain about the aforesaid incident. But said Suphal Pal was not available at his residence then. Thereafter they reported the incident to one Shah Alam Molla, being a member of the local Panchayat. Shah Alam Molla assured P. W . 1 and her father that necessary steps would be taken on the next day. Thereafter they returned home at about 8 p.m. After returning back home, the deceased went out to the field to ease himself. Immediately the

witnesses saw the two appellants following the deceased quickly. They became suspicious about the movement of the two appellants. The deceased having not returned home despite passage of 5/ 7 minutes since he left for the field, P. W . 1 alongwith P. W . 2 P a s a n i P al became suspicious and they went out in search of their father.

As soon as they reached near the local hat (market) they noticed the two appellants were running away quickly "by their side". Soon after they noticed their father Shibchar a n P al, aged about 65 / 7 0 years was lying dead on the steps of the tank on the southern side situated near the hat (market). The legs of the deceased were lying submerged in the water of the tank while upper part of the body was lying above water on the bank. They further alleged in the said complaint that their father was murdered by throttling and other methods. They further expressed their suspicion that at about 8 p.m. appellants Asraf Sk., Rashid Molla and others had murdered their father by throttling and by torturing him and left the dead body on the bank of the tank of Keyatala Market (hat) and fled away. This Complaint was reduced into writing by the scribe, Niranj an P al (P W- 9) and handed over to P. W . 1 4 when he came to the place of occurrence. Said complaint was taken to the police Station and was registered as an F.I. R . under Section 30 2 / 3 4 I.P.C., against the two appellants at 3.3 0 a.m. on 18. 8 . 1 9 8 3 . After investigation Police submitted charge sheet against the two appellants and one Basir Sk. (since acquitted). The case was committed to the Court of Session, North 2 4, P a r g a n a s. On perusal of the materials on record learned trial Court framed charges against the two appellants and another accused, namely, Ba si r Sk., under Section 30 2 / 3 4 I.P.C., to which the appellants and other accused pleaded not guilty. In course of the trial, 16 witnesses were examined. As noted above, the present appellants were convicted while accused Basir Sk. was acquitted.

Before the High Court the stand was that the case rests on circumstanti al evidence and the circumstances do not warra nt conclusion of guilt of the accused. The High Court did not accept this plea and confirmed the conviction.

3. In support of the appeal, learned counsel for the appellants submitted that the trial Court and the High Court have erred in holding that the circumstances were sufficient to hold the appellants guilty.

4. Learned counsel for the respondent- State on the other hand supported the judgments of the trial Court and the High Court.

5. It has been consistently laid down by this Court 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 or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977) SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbsi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M. P. (AIR 1989 SC 1890). 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 negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

6. 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 thus:

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

7. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

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

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

8. In State of U.P. v. Ashok Kumar Srivastava , (19 9 2 CrL.L J 1 1 0 4) , it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

9. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

10. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952 .

11. In Hanu mant Govind Nargundkar and Anr. V. State of Madhya Pradesh , (AIR 1952 SC 343), wherein it was observed thus:

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

1 2. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra*, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;
- (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.

1 3. These aspects were highlighted in *State of Rajasthan v. Rajaram* (2003 (8) SCC 180), *State of Haryana v. Jagbir Singh and Anr.* (2003 (11) SCC 261) and *Criminal Appeal No.180/2001 (Chatter Singh and Ors. v. State of Haryana)* disposed of on 26th August, 2008.

1 4. The circumstances which were highlighted by the prosecution to substantiate the accusations read as follows:

"(1) Appellant No.1 Asraf Sk. kidnapped the granddaughter of the deceased and married her.

(II) In the early evening on the date of occurrence the mother of the kidnapped girl, being the daughter of the deceased was crying loudly as her daughter was kidnapped by appellant No.1 Asraf Sk. Hearing the cries of P W- 1 Smt. Pasani Pal, appellants had the

audacity to trespass into the house of the deceased and slap P W- 2 Smt. P a s a n i P al. They even threatened them that all the members of his family would be annihilated.

(III) An hour or so after the aforesaid incident, deceased went out to the field to ease himself. At that time, though may be intervened by few minutes, the appellants and another were found following the deceased."

1 5. The trial Court and the High Court held that the evidence of P W s 1 and 2 can be acted upon and, therefore, the circumstances were established. The circumstances in our considered opinion do not present a complete chain of circumstances. The evidence of P W s 1 and 2 on which strong reliance has been placed by the trial Court and the High Court are full of contradictions. P W- 1 stated that she had seen the actual assault. This was her statement in court which is contrary to her statement recorded during investigation. In the First Information Report there was also no reference that P W s 1 and 2 had seen the actual occurrence. Similarly P W- 1's statement in court is as follows:

"As my father did not return within 5/ 6 minutes, myself and my sister P a s a n i had been to the garden. Then the accused Asraf and Rashid Molla then started fleeing away after pushing the father on the ground. We then went to our father and found the legs in the water and upper part of the body on the bank of the pond. We noticed mar k of strangulation of his throat and mar k s of ecchymosis in his hand. We picked up our father from that place. He was then dead."

1 6. P W- 2's version is entirely different. Her statement in court was to the following effect:

"As my father did not return within 5/ 7 minutes myself and my sister Anita then went out of our house in search of my father and to know what happened to him. We had been to tank side of Kaytal a Hat, then accused Rashid & Asraf were found fleeing very fast by our side. We then went towards the southern Ghat of the said Keyatal tank and found my father lying on the bank side facing downward.

I did not tell I.O. that while I came near the hat pukar tank the accused persons were fleeing away by our side."

1 7. Above being the position, this is certainly not a case where the prosecution has established the accusations. The accused persons are entitled to acquittal, which we direct. They shall be released from custody forthwith unless required to be in custody in any other case.

J.

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(Dr. ARI J I T PA S A Y A T)

.....J.
(Dr. MUKUN D A K A M

SHA R M A)
New Delhi,
October 20, 2 0 0 8