Rajasthan High Court - Jodhpur
Rafeek Ahmed vs State on 9 July, 2009

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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Rafeek Ahmed Vs. State of Rajasthan
(1) D.B.CRIMINAL APPEAL NO.2/2005

Gulam Mohd.& anr. Vs. State of Rajasthan
(2) D.B.CRIMINAL APPEAL NO.1186/2004

Jakir Hussain Gauri Vs. State of Rajasthan
(3) D.B.CRIMINAL APPEAL NO.51/2005

against the judgment dt.19.11.04
passed by the Addl.Sessions Judge (FT), Nagaur,
in Sessions Case No.32/04.

Date of Judgment: 9 t h July, 2009

P R E S E N T

HON'BLE MR.JUSTICE A.M.KAPADIA
HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.Sandeep Mehta)
Mr.Javed Moyal)
Mr.M.K.Garg)
Mr.Niranjan Singh) for the respective appellants.

Mr.K.R.Bishnoi, Public Prosecutor.

BY THE COURT : (PER THANVI J.)

1. Since all these three appeals arise out of the common judgment dated 19.11.2004 passed learned Addl. Sessions Judge (Fast Track), Nagaur, whereby he has convicted and sentenced all the four accused appellants namely Rafeek Ahmed, Gulam Mohd., Raju alias Rajjak and Jakir Hussain Gauri alias Jakir Gauri of the offences u/ss.302, 455 & 394 IPC as under, therefore, they are being disposed-of by common judgment:

302 IPC Life imprisonment along with a fine of

	Rs.1000/- and in default to further undergo four months' R.I.
455 IPC	Five years' R.I. along with a fine of Rs.500/- and in default to further undergo two months' R.I.
394 IPC	Ten years' R.I. along with a fine of Rs.1000/- and in default to further undergo four months' R.I.

All the substantive sentences were ordered to run concurrently. However, all the four accused appellants were acquitted of the offence under Section 382 IPC.

2. Facts leading to these appeals are that on 8.5.2004, the complainant Usha Devi filed a written report Ex.P.14 before the S.H.O., Police Station, Nagaur that her house is situated at Soniwada Mohalla, Nagaur wherein her father-in-law, mother-in- law and two daughters are residing. At the time of the incident, her father-in-law was alone and her mother-in-law and two daughters had gone somewhere to attend the marriage in their family and in their back some unknown persons tied up her father-in-law and inflicted injuries and also robbed certain golden and silver ornaments. It was also alleged that a cash amount of Rs.15,000/- was stolen from the box of her mother-in-law. Upon this report, the police registered a case and commenced investigation. Injured Paras Ram was admitted in the Government Hospital, Nagaur, but on the next day of the incident, he died, whereupon his post-mortem was conducted. The "baniyan" of deceased Paras Ram was recovered by the police vide Ex.P.20. All the four accused appellants were arrested on 17.05.2004 and on their information, the recoveries of ornaments were made. The "baniyan" of deceased Paras Ram, handkerchief and currency notes recovered from the accused were sent for chemical examination. The recovered articles were put to identification parade before the learned Magistrate. After investigation, all the accused appellants were chargesheeted under Sections 302, 394, 454, 380 & 411 read with Section 341 IPC. The case was committed to the court of Addl. Sessions Judge (Fast Track), Nagaur. After hearing the arguments on charge, all the four accused appellants were discharged under Sections 454, 380 and 411 IPC but charged under Sections 302, 394 and in alternative 382 and 455 IPC, to which they pleaded not guilty. The prosecution examined 17 witnesses and produced 41 documents along with 24 articles. The statements of the accused appellants were recorded under Section 313 Cr.P.C. They produced 3 witnesses in their defence. After hearing the arguments, the learned trial Judge framed four issues and came to the conclusion that it was a homicidal death committed during robbery by the accused appellants.

3. While assailing the judgment of the learned trial court, it is contended by the learned counsel for the accused appellants that this is a case of no evidence except the recovery that has been made in pursuance to the information furnished by the two accused jointly at different times of the same ornaments. It has further been contended that all the circumstances which the learned trial court

has considered about the identification of the accused and recovery of handkerchief are not at all sufficient to connect the accused with the commission of crime. According to them, the identification parade conducted by the learned Magistrate was also not proper, as the new articles were mixed with the articles said to have been stolen. According to them, when the case is not based on direct evidence, the circumstances should be established in such a manner that the chain of circumstances should lead to no other conclusion except the guilt of the accused.

4. Per contra, the learned Public Prosecutor has supported the judgment of the learned trial court and argued that the recovery itself is sufficient to connect the accused appellants with the commission of crime like robbery and murder and this court while upholding the finding of the learned trial Judge with regard to the guilt of the accused, should draw inference on the basis of presumption contained in Section 114A of the Indian Evidence Act.

5. We have carefully perused the judgment of the learned trial Judge and considered the arguments advanced by learned counsel for the appellants and learned Public Prosecutor on the basis of the evidence brought on record.

6. There is no dispute that deceased Paras Ram died on account of homicidal death which is proved from the post- mortem report Ex.P.10 and the statement of Dr.Ramvilas Choudhary, PW-4, in which, he has stated that the cause of death was seven ante mortem injuries resulting in asphyxia due to compression of air passages associated with shock. In the cross-examination Dr.Ramvilas Choudhary has stated that all the injuries on the person of deceased Paras Ram were caused by blunt object. This testimony of the doctor leads to the conclusion that this was the homicidal death of deceased Paras Ram. With regard to other issues as discussed by the learned trial court while implicating the accused appellants with the commission of crime of robbery and murder, the basic reliance has been placed on recovery and four other circumstances, as there was no direct evidence to connect the accused with the crime.

7. So far as the recovery is concerned, all the four accused appellants were arrested vide Ex.P.1 to Ex.P.4 on 17.05.2004 which is nine days after the incident and on the same day, the recoveries were made in pursuance to the informations furnished by them under Section 27 of the Evidence Act. These informations are Ex.P.21 to Ex.P.24. Ex.P.21 is the information furnished by accused appellant Gulam Mohd. at 4.15 P.M. and Ex.P.22 is the information furnished by accused appellant Jakir Gauri at 4.30 P.M., in which, both have said that they both inter se had concealed the silver ornaments, utensils, and cash by digging soil behind the factory of Mohd. Usman Gauri. Likewise Ex.P.23 is the information furnished by accused appellant Raju alias Rajjak and Ex.P.24 is the information furnished by accused appellant Chhotu alias Rafeek Ahmed recorded at 4.35 P.M. and 4.45 P.M. respectively on 17.05.2004, in which they have said that they have kept the silver ornaments and utensils in the "Bada" of cows by digging soil.

8. While relying upon the decisions of the Hon'ble Supreme Court in the case of Thimma and Thimma Raju v. State of Mysore reported in 1970 SCC (Cri) 320 and Krishan Mohar Singh Dugal v. State of Goa, reported in 2000 SCC (Cri) 6, it is contended by the learned counsel for the appellants that the evidence as to recovery of the same articles pursuant to the informations furnished by two

accused, cannot be said to be admissible under Section 27 of the Evidence Act.

9. We have gone through both the citations but in our view, these citations are not helpful to the facts of the present case because in Thimma and Thimma Raju's case (supra), while upholding the conviction on the ground that the accused appellant developed close intimacy with the wife of the deceased, which was the motive on the part of the appellant to do away with the deceased, the extra judicial confession and deceased was last seen with the appellant a short time before his disappearance, the Hon'ble Supreme Court felt disinclined to take into consideration the information furnished u/s.27 of the Evidence Act with regard to recovery of dead body and other articles found at the spot, which, accused in all probability furnished to the police when he was suspected of complicity in the offence.

10. In Krishan Mohar Singh Dugal's case (supra), the place of concealment of article was already known to the police with regard to hiding of `Charas'. That apart, the evidence of witnesses and Panchnama showed that the police was already informed about the place where the Charas was concealed before the accused led the police to that place and in such circumstances, the Charas could not be said to have been recovered on the basis of the disclosure statement of the accused to be admissible under Sec.27 of the Evidence Act. Whereas in the present case, Ex.P.21 is the information furnished by accused appellant Gulam Mohd. at 4.15 P.M. and Ex.P.22 is the information furnished by accused appellant Jakir Gauri at 4.30 P.M. on 17.5.04, in which, both have said that they had concealed the silver ornaments, utensils, and cash behind the factory of Mohd. Usman Gauri and in pursuance to these informations, the recovery was made vide Ex.P.5 from the accused appellants Jakir Gauri and Gulam Mohd. Likewise, Likewise Ex.P.23 is the information furnished by accused appellant Raju alias Rajjak and Ex.P.24 is the information furnished by accused appellant Chhotu alias Rafeek Ahmed recorded at 4.35 P.M. and 4.45 P.M. respectively on 17.05.2004, in which they have said that they have kept the silver ornaments and utensils in the "Bada" of cows by digging soil. In pursuance to these informations, the recovery was made vide Ex.P.7. When an information is furnished by the accused and the recoveries have been made in pursuance to that information, though conjointly and of the same articles, by two accused distinctly, it cannot be said that the police was having knowledge about the recovery of the articles. The information has been furnished two hours prior to the time of recovery as is revealed from Ex.P.4 and Ex.P.5. Therefore, in our view, the learned trial Judge has rightly held that this recovery is proved about the possession of the accused appellants of the articles, which can be said to have been taken away at the time of commission of robbery and murder of deceased Paras Ram. Thus, the citations of learned counsel for the appellants are not applicable to the facts of the present case.

11. So far as the next part of the case with regard to linking the accused appellants with the commission of robbery and murder on the basis of the recoveries is concerned, the learned trial Judge has basically relied upon the four circumstances. First is about the accused appellant Raju, who used to supply milk for the last eight years at the house of deceased; second circumstance is about the demand of tea leaves by Raju from deceased Paras Ram about two hours before the incident; third is with regard to seeing two persons at the time of incident, one with the handkerchief in his hand, by Smt.Kiran, PW 15 and the last circumstance is about working of accused Gulam Mohd. at the residence of Rama Kishan, PW 6 as a labourer and his absence on the

fateful day i.e. on 8.5.04.

12. We have minutely examined the evidence with regard to all these circumstances. So far as Rami Devi, PW 16, who is wife of deceased Paras Ram, is concerned, she has stated that she saw the accused Raju demanding tea leaves and he used to visit the house for supplying milk. She has nowhere stated in her statement that accused Raju came alongwith three other persons, though she has identified the silver ornaments recovered by the police but in the cross examination, she has stated that she did not narrate the fact of doubt on accused Raju to the police, when they reached just after the crime. There is no other fact in the testimony of this witness, except that accused Raju was the milk supplier at the house of the deceased and other people of the vicinity, to connect him with the commission of crime.

13. Likewise, Smt.Kiran, PW 15, on whose evidence the learned trial Judge has relied upon, has stated that he saw two persons outside the house of deceased, one was in black `pathani' dress with handkerchief in his hand and the other was wearing green colour shirt and both were of the age of 19-20 years. When all the four accused were present in the court and put for identification before this witness, she refused to identify any one of them. Even the police has not cared to put the other witnesses for identification parade of accused appellants. The only identification parade is of ornaments. Likewise, Ramakishan, PW 6 has stated that on 8.5.04, accused appellant Gulam Mohd. did not attend his house as a labourer but before that, he worked at his house for six days and thereafter he did not return. This witness in his cross examination has specifically stated that he did not keep any account of labourers working at his house. In our view, this evidence is not sufficient to connect the accused Gulam Mohd. with the commission of crime, especially when he was a casual labourer.

14. Thus, in our view, all the circumstances on the basis of which the learned trial Judge has implicated the accused with robbery and murder, are not sufficient to arrive at the conclusion of the guilt of the accused appellants. When the investigating Officer Veer Singh, PW 7 was cross examined on this point, he has stated that at the time of incident, Kiran and Parmeshwar were standing outside the house but they did not identify the accused, therefore, the identification parade was not conducted. According to him, this fact came in his investigation in the statement of Parmeshwar that his grand father fell down. Even in the cross examination, the investigating officer has stated that there is no mention of entry of accused Raju in the house of the deceased, when the site was inspected at the instance of accused and he has categorically stated that in his investigation, nobody told him as to who committed theft and killed deceased Paras Ram.

15. Apart from the statement of the investigating officer, if the post mortem report is looked into, the injuries were said to have been caused by blunt object but no weapon has been recovered from any of the accused. Therefore, in our view, it will be very unsafe to uphold the conviction of the accused appellants for the offences u/ss.302, 455 and 394 IPC, except that the stolen articles which have been identified by the witnesses, were recovered in pursuance to their informations. This act of the accused appellants is punishable under Section 411 IPC, which is a lesser offence than Section 394 IPC. The case is entirely based on the circumstantial evidence and except the recovery of stolen articles at the instance of the accused, not a single circumstance is established against the accused

appellants, what to say of forming a complete chain of circumstances pointing towards the guilt of the accused appellants.

16. The Court could have drawn the presumption under Section 114A of the Evidence Act on the basis of the unexplained position of the stolen property, had there been any other link evidence to connect the accused either directly or with any other circumstance with lurking house trespass, robbery and murder. In the absence of it, it will be very unsafe to uphold the conviction of the accused appellants for the offences u/ss.302, 455 and 394 IPC. At the most, the accused appellants can be held liable for the offence u/s.411 IPC.

17. Consequently, the appeals are partly allowed. While setting aside the judgment dt.19.11.04 passed by learned Addl.Sessions Judge (FT), Nagaur convicting appellants Rafeek Ahmed, Gulam Mohd., Raju alias Rajjak and Jakir Hussain Gauri alias Jakir Gauri of the offences u/ss.302 & 455 IPC, their conviction u/s.394 IPC is altered to Section 411 IPC for which they are sentenced to undergo three years' R.I. alongwith a fine of Rs.2000/- each & in default, to further undergo four months' R.I. Since they have already served out the sentence of more than three years, they shall be set at liberty forthwith, if not required in any other case, on depositing of fine amounting to Rs.2000/- each.

(DEO NARAYAN THANVI), J. (A.M.KAPADIA), J.

RANKAWAT JK, PS