Sonu @ Sunil vs The State Of Madhya Pradesh on 29 May, 2020

Author: K.M. Joseph

Bench: K.M. Joseph, Sanjay Kishan Kaul

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.57 OF 2013

SONU @ SUNIL ... APPELLANT(S)

VERSUS

STATE OF MADHYA PRADESH ... RESPONDENT(S)

J U D G M E N T

K.M. JOSEPH, J.

1. The appellant was tried with 4 others and was convicted under Sections 394, 460 and 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as, 'the IPC', for short). He was also found guilty of offences under Sections 11 and 13 of the Madhya Pradesh Dakaiti Avam Vyapharan Adhiniyam, 1981 (hereinafter referred to as, 'Madhya Pradesh Adhiniyam'). The appellant was, in fact, sentenced to death for the offence under Section 302 read with Section 34 of the IPC along with two other accused ARORA Date: 2020.05.29 16:57:08 IST Reason:

> apart from a fine of Rs. 5000/-. He was sentenced to 10 years Rigorous Imprisonment in regard to the offence under Section 460 of the IPC. He was also handed down a sentence of 10 years for the offence under Section 394 read with Section 34 of the IPC. Still further, he was also sentenced to 7 years for the offence under Sections 11 and 13 of the Madhya Pradesh Adhiniyam. By the impugned judgment, the High Court answered the death reference by holding that in the circumstances, the death penalty was not warranted. In place of death penalty, the High Court sentenced the appellant and two other accused to life imprisonment and enhanced the fine to Rs. 25,000/-. The appeal filed by the appellant was dismissed otherwise. The prosecution case, in brief, appears to be as follows:
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> On 08.09.2008, in the night, Bharosilal (hereinafter referred to as, 'the deceased', for

short) was at his village Bilaua. He was residing alone. One Abhay Sharma-PW9, who is the son of the deceased, was informed by one Neeraj Bhargav that his father has not opened the door on that day. On receiving such information, PW9, who also turned out to be the complainant, finally went to his father's residence and it was found that his father was dead and the First Information Report (FIR) was lodged on 10.09.2008. On the basis of the investigation conducted, Kalli, Hariom, Veeru, Virendra and the appellant came to be charged with the offences as noticed. In fact, the appellant was charged under Section 397 of the IPC also.

2. PW1 to PW15 were examined as prosecution witnesses. Material objects were also produced. The following are the questions, which were framed by the Trial Court:

> "(i) Whether accused Kalli @ Gopal Sharma, Sonu @ Sunil and Hariom on the date of incident after sunset and before sunrise after committing house tress pass in the residential house of deceased Bharosilal, committed the murder of Bharosilal?
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> (ii) Whether accused Kalli @ Gopal Sharma, Sonu @ Sunil and Hariom formed common intention to commit murder of Bharosilal?
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> (iii) Whether accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil in fulfilment of their common intention committed murder of Bharosilal by strangulation and cutting by a chhuri (knife)?
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> (iv) Whether accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil by using deadly weapon in committing robbery, committed the murder of Bharosilal and looted gold and silver jewellery and two mobile phones of Nokia made from the possession of Bharosilal?
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> (v) Whether accused Veeru and Virendera along with accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil, at the house of accused Virendra Singh, Kushmah hatched conspiracy of committing robbery in the house of Bharosilal?
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> (vi) Whether the accused persons committed the offence defined and specified under Section 2(b) of MPDVPK Act and committed the offence u/s 11/13 of the above said Act?"

3. The Trial Court found that it was a case entirely based on circumstantial evidence. It noticed that the deceased had suffered the following injuries:

> "Injury No.1 Incised of 6x1.5x1 c.m. on the right side of the chin.
>
> Injury No. 2 Incised wound of 4 x 1 ½ cm below 1 cm from the injury no. 1.
>
> Injury No. 3 Incised wound of 6 x 3 x 2cm left fore arm anteriority middle.

Injury No. 4 Incised wound of 6 x 1 x 1cm, just 2cm below injury no. 3.

Injury No. 5 Incised wound of 6 x 1 x 1cm, just 2cm below injury no. 4.

Injury No. 6 Incised wound on abdomen 3" below measuring 3 x 2 x deep upto peritoneum, part of intestine coming out from the wound."

4. The cause of death was found to be shock and hemorrhage due to excessive bleeding caused by multiple wounds. The death was caused within 36 hours of the postmortem report. The postmortem was conducted on 10.09.2008. It cannot be disputed that the death was homicidal and it was caused with the intent to commit murder. The Trial Court further proceeded to find that the certain articles were found missing from the almirah in the house where the deceased stayed. PW8 is wife of the deceased. PW9, as already noticed, is one of the sons of the deceased. PW13 held identification of the gold and silver jewellery and the mobile phones, which according to them, belonged to the deceased. The identified articles were belonging to the deceased. One hasli (necklace) made of silver, one pair of earrings and two mobile phones were identified. The contention of the accused that PW13, who held the identification proceedings, deposed that at that time a Police Officer was present, was rejected by finding that from the Identification Memo- Exhibit P21, it was clear that no Police Officer was present at the time of the identification of the proceedings. The Court also relied upon the evidence of PW8 and PW9, who were found to have not stated about the presence of Police Officers at the time of the identification proceedings. The evidence of PW9 and the evidence of PW8, were also referred to, to find that the Police came to open the door. It was opened and it was seen that the almirah was opened and goods/gold articles were scattered, and out of the said goods, one hasli (necklace) made of silver, one pair of gold earrings and two mobile phones, were missing. The evidence of PW3-another son, was relied upon to find that PW5 had overheard the conversation between all the accused which was to the effect that the deceased was living alone and they were making a plan for committing a loot in his house. No doubt, the Court also noticed that PW1, who was cited by the prosecution, to prove the said conversation, turned hostile. PW3 had also deposed that he was told by PW5 about having overheard the conversation between the accused. The evidence of PW3 was relied upon to find that both Virendra and Veeru used to come to massage the body of his father and his father used to say that they would be got employed. PW3 deposed about his familiarity with accused Virendra, Veeru and Kalli present in the Court. PW6- another son of the deceased, has deposed that Kalli used to come to his village to sell ghee and used to sit and talk with the deceased and used to massage the body of his father. The Trial court finds that Veeru, Virendra and Kalli used to come and they were also acquainted with the deceased and his family members. Thereafter, the Trial Court also referred to the recoveries of the articles. From Hariom, one mobile phone was recovered. From Kalli, the Chhuri(knife), used for committing the offence, was recovered. From the appellant, another mobile phone of Nokia Company, Model 5110, of black colour, upon which the Number 97321820 was written in red ink, was also seized. The evidence of PW9 was relied upon wherein he has deposed, that a Nokia Mobile on which B.L. in English was written with red marker, and on the battery of the same, Number 97321820 in red ink, had been written, was stolen. From accused Virendra, the recovery of hasli(necklace) was effected. From Veeru, one pair of gold earrings was seized. On the basis of the same, it was found that the stolen property and weapon have been seized on the statement of the accused, and that these

circumstances, completed the chain of circumstantial evidence. Reliance was placed on the deposition by PW5, who had overheard the conversation between the accused about the criminal conspiracy. PW7, a witness to the recovery statement of the appellant-Exhibit P13 and also evidence of PW12- the Police Inspector, who arrested the appellant, has been relied upon to prove the statement leading to the recovery of the mobile from the appellant. The following findings may be noted:

> "In the above said analysis it is proved that there is criminal conspiracy amongst the accused persons to commit theft or loot in the house of deceased, on the basis of memorandum statement of accused Hariom, the looted mobile is recovered/ seized from the possession of accused Hariom on the basis of memorandum of accused Kalli @ Gopal Sharma and on producing by him one blood stained sharp edged chhuri (knife) used in the offence has been seized from the possession of accused Kalli @ Gopal Sharma. On the basis of memorandum statement of accused Sonu @ Sunil and on producing by him the looted mobile Nokia is seized from accused Sonu @ Sunil. In the same manner on the basis of Accused Virendra one old and used hasli (necklace) made of silver is seized from the possession of accused Virendra. On the basis of accused Veeru and on producing by him the looted property i.e. one pair of earrings are seized by the police from the possession of accused Veeru. All the four looted properties i.e. two mobile phones, one hasli (necklace) and one pair of gold earrings have been identified by Rukmani (PW-8) and Abhay Kumar Sharma (PW-9) in identification proceedings and they admitted that the same belong to them. All these circumstances complete the chain of circumstances against the accused persons. The accused persons have not produced any evidence in rebuttal of the same. The defence did not explain the fact that the looted property and weapon of offence have been recovered from their possession in this situation it is clear that. The accused persons hatched criminal conspiracy of committing loot in the house of the deceased, accused Kalli @ Gopal Sharma, Hariom and Sonu @ Sunil has committed murder of deceased before sun rises and after sun set by entering in the house of the deceased.
>
> From the criminal conspiracy and in fulfillment of the same and from the seizure of weapon of offence and looted property from the accused Kalli @ Gopal Sharma, Hariom, Sonu @ Sunil and no explanation of the same on behalf of defence it would be presumed that accused Kalli @ Gopal, Sonu @ Sunil and Hariom by entering in the house of deceased before sun rise and after sun set has committed loot and in committing of the said loot has committed the murder of deceased Bharosilal Sharma by inflicting injuries with knife. Because at the time of committing loot all the three accused persons Kalli @ Gopal, Hariom and Sonu @ Sunil were present at the place of occurrence, all the three have also committed loot and in committing of the said loot the murder of deceased Bharosilal has been committed, from this it is clearly concluded that there were common intention amongst the accused persons Kalli @ Gopal, Hariom and Sonu @ Sunil to commit the murder of deceased Bharosilal. Therefore, the offence u/s460/302/34 against accused Kalli @ Gopal, Hariom and

> Sonu @ Sunil are proved beyond reasonable doubt.
>
> So far as the question of offence u/s 397/34 IPC against accused Kalli @ Gopal, Hariom and Sonu @ Sunil is concerned the weapon used in the offence knife is only seized from accused Kalli @ Gopal Sharma, it is clear from the same that at the time of incident a chhuri, used in the incident which is deadly and sharp edged was in possession of accused Kalli @ Gopal Sharma." (Emphasis supplied)

5. The appellant was found along with Hariom, guilty of the offence under Section 394 read with Section 34 of the IPC, whereas, Section 397 of the IPC was found proved against Kalli. The Trial Court found Kalli guilty under Section 397 read with Section 34 of the IPC. Appellant was also convicted under Section 302 read with Section 34 of the IPC. Thereafter, it was also found that the appellant and others were guilty of the offences under Sections 11 and 13 of the Madhya Pradesh Adhiniyam, based on the offences proved otherwise.

6. The High Court, in appeal, proceeded to find that eleven circumstances emerged before the Trial Court:

> i. The incident in connection with the loot took place on 08.09.2008 after locking the doors from inside in the house of the deceased who was residing alone.
>
> ii. That the postmortem confirms the prosecution case. It is found that it is natural that on 09.09.2008 when the deceased did not appear to be seen and was not responding on knocking the door, Neeraj Bhargava informed PW9 that he was not responding. PW9 and PW8 departed to the place to know about the welfare of the deceased.

iii. Upon request of PW9, his neighbor- Phoolchand climbed through the stairs and he found the deceased with blood on his hand and was lying dead. He went to the Police Station Bilaua for lodging the report which was recorded at about 11:30 P.M in night. The dead body was referred for postmortem on the same day and the FIR was lodged in the evening of 10.09.2008. iv. On 10.09.2008, Ashok Kumar(PW3), in his Case Diary Statement, disclosed that the Cell Phone Number 9406586386, generally used by his father, was also found missing. Another Cell Phone Number 9928120429, which was made available by son of deceased, was also found missing. v. Investigation was conducted by PW15 and initially names of the assailants were not dictated by that time.

vi. The successor of PW15-(PW14) conducted subsequent investigation. Statements of witnesses were recorded, call details of stolen mobile sets from Cyber Cell was received. On 18.10.2008, he came to know the names of assailants from Cyber Cell. Within two days, arrests were made of the accused, viz., Kalli, Hariom, Parihar, Virendra Kachhi and Veeru. The Churri(knife) was seized from accused Kalli, one necklace from Virendra, one pair of gold earrings from Veeru.

vii. The accused cannot get benefit for the inaction/ latches of the investigation. viii. On 02.11.2008, D.P. Sharma-PW12, arrested appellant and recovered from him one mobile phone bearing SIM No. 97321820.

ix. As per medical evidence, it is clear that the deceased was put to death by the accused or any one of them. Looking to the nature of the incised wounds seen on the body of the deceased, the death appears to be homicidal.

x. Identification of properties, which were seized/ recovered in between 18.10.2008 to 02.11.2008, was conducted on 10.12.2008, which cannot be said delayed because the persons who have identified the articles, were the residents of Gwalior.

xi. The motive of the incident is apparently clear. It was committed for committing loot/theft, and during the incident of theft, the deceased was killed by the accused.

7. We have heard learned Senior Counsel for the appellant and also learned counsel for the state. Learned Senior Counsel would complain that there is no evidence against the appellant for convicting him for the offences, he has been found guilty of. He complained that the Court's below have erred in placing reliance upon PW-5 who allegedly overheard the conversation between the five accused persons by standing outside the house of one of them. He points out that the witness could not be believed. It is pointed out that PW-1 who was cited by the prosecution to prove the said conversation has not adhered to the version which was sought to be attributed to him. It is highly improbable that PW-5 could have overheard any such conversation. He pointed out that a clear discrepancy in regard to the recovery of the mobile phone from the appellant. In the memorandum relating the alleged recovery of the mobile phone, what is stated is that the appellant took one mobile phone make of Nokia of the deceased and he has hidden the same on the roof of his house. The seizure memo reveals the following as what was recovered:

> " S.No. Property Signatures obtained on packets or property
>
> 1. One mobile phone of Nokia company of black colour old and used, model No. 5110 made in Finland CE 0188X no.
>
> 490541/30/26305416 is written. Code No. 0502182 is written. B.L. is written on the mobile in red ink and on its battery a no. 97321820 is written with red ink.
>
> (some portion not illegible).
>
> "
>
> 8. He would then point out that the High Court, in the recital of circumstances, has found that a Cell Phone Number 9928120429 was found missing, and then he points out the eighth circumstance, which is noted by the Court, is that one mobile phone, bearing SIM Number 97321820, was recovered from the appellant. Therefore, the

phone that was seized from the appellant was not the phone number which was mentioned by the son of the deceased, PW-3, as was being used by his father. He further pointed out about the mysterious maxi found at the premises. In this regard, we may notice the following findings by the Trial Court:

"It is argued on behalf of defence that one blood stained and sleeveless maxi of white colour having lines of brown colour, the lower portion of the same is blood stained and the same is used is seized by the police wide Ex P-6 from the place of occurrence, while there was no woman present at the place of occurrence. In such a situation, on account of seizure of maxi from the place of occurrence, the presence of any woman at the time of the incident is proved, but who was that woman, the prosecution did not produce any evidence in this regard hence, the prosecution case is doubtful. Only recovery/ seizure of blood stained maxi from the place of occurrence does not make doubtful to the prosecution case. Human blood was detected on the shirt of deceased and on the said maxi, there is no evidence that there was blood of any other person on the maxi. Because the wife of the deceased Rukmani Sharma is alive and Rukmani Sharma (Pw-8) has admitted in her cross examination that she used to go occasionally to the house/ place of occurrence at Bilaua. In this sitation where there are visits of the wife of deceased in the house then this probability could not be denied that the said maxi would be of the wife of the deceased. In this situation from the seizure of maxi from place occurrence the incident could not be doubtful."

9. He would point out that the Investigating Officer admitted that he did not carry out any investigation regarding the maxi. He would further contend that there is no evidence, as far as the appellant is concerned, to convict him of the offences. The evidence, even according to the prosecution witnesses, show that the other accused, viz., Veeru, Virendra and Kalli, were known to the prosecution witnesses as persons who would frequent the house of the deceased. As far as the appellant is concerned, there is no such evidence. In short, the contention is that the case is one where the appellant is convicted without any evidence and the injustice may be set right.

10. Per contra, learned Counsel for the State supported the judgment.

11. As already noticed the appellant stands convicted under Section 460, 302 read with Section 34 of the IPC and Section 394 read with Section 34 of the IPC. This is besides convicting the appellant under Sections 13 and 14 of the Madhya Pradesh Adhiniyam. The case hinges entirely on circumstantial evidence. Though eleven circumstances have been enlisted by the High Court, the circumstances Nos. 2 and 3 relate to the prosecution version as to the discovery of the death of the deceased by his son and his wife. They relate to going to the place of his residence, finding out the dead body and the lodging of the FIR. Circumstance No. 5 also does not amount to a circumstance. Equally, we are not convinced that the circumstance No. 7, viz., that the accused cannot get benefit for the inaction/latches of the investigation, can amount to a piece of circumstantial evidence for the prosecution to discharge its

burden to prove the case against the accused.

12. The circumstances, which can be culled out, can be put as follows:

The deceased died in his house where he was living alone, as a result of shock and hemorrhage from 6 incised wounds as noticed and proved by medical evidence. The death is homicidal too. There were valuable articles, namely, a silver necklace, gold earring and two mobile phones which were found missing too. These articles have been recovered from the accused as already mentioned.

A knife stood recovered from Kalli, one of the accused. The other valuable articles identified by the closed relative, namely, his wife and his son stood recovered. From the articles so recovered, one mobile phone was recovered from the appellant.

13. There is evidence of prosecution witnesses that out of the five accused, viz., Kalli, Veeru and Virendra used to frequent the house of the deceased.

The over hearing of the conversation by PW-5 amongst the accused prior to the death of the deceased about their plans to commit loot/theft from the house of the deceased is another circumstance relied upon. WHETHER A MOBILE PHONE WAS RECOVERED BASED ON STATEMENT BY APPELLANT

14. PW12 has deposed that on 01.11.2008, after arresting the appellant and on enquiry in custody, he (appellant) made Statement-P13 to the effect that the looted mobile seized was hidden on the loft of his room and he would recover the same. He further deposed that appellant took the looted mobile from the loft and he prepared the Seizure Memo. In the cross-examination, he states that the seized mobile was of the deceased. He further stated that no documents were produced. He denied that he had planted the mobile from anywhere and false proceedings have been done. PW7 has been examined to prove, inter alia, that he was called to the Police Station, and after 15 to 20 days of the proceedings relating to the recovery of the knife from Kalli, enquiry was made from the person, who he has told was Sonu-appellant. On making enquiry, he gave an information in respect of the mobile. He deposed that he has signed on the Statement-P13 [the Statement purportedly to be under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as, 'the Evidence Act', for short)]. He also admits that he had signed on the Seizure Memo prepared based on the Statement-P14. Thus, PW7 and PW12 prove that a statement was given by the appellant while in custody. Based on the statement, a mobile phone was recovered from the appellant. The recovery was from his house. It was not from an open space.

WHETHER RECOVERED PHONE PROVED AS BELONGING TO THE DECEASED. EVIDENCE RELATED TO THE MOBILE PHONE, RECOVERED FROM THE APPELLANT

15. PW3-son of the deceased has this to say:

On 10.09.2008, his brother told him that some persons had committed murder of his father causing injuries with sharp-edged weapon and took away goods/articles from the almirah. Along with this, they also took away two mobile phones of his father. The mobile phone of his father is 940655863866 which is of BSNL. The sim of the same has been issued either from Dabra or Bilaua (We are not concerned with this phone as this phone has been recovered from another accused).

What is stated next is as follows:

The other phone bearing number 9920121429 make of M-Nokia was fitted with square LKD Red LED which had a light while charging the mobile. The mobile was bought by him at Bombay prior to three months ago when his father came to Bombay so that information about him could be communicated. He, however, also says in his cross-examination that he had stated in his statement to the Police that when his father came to Bombay, then, he had given him another phone of make Nokia which had LED and showing light while charging the mobile. The mobile number of the other phone was mentioned in Exhibit D1. He is unable to explain as to why if such statement is not found in the statement given by him to the Police. He said that again he is unable to give the reason as to why it is not mentioned in the statement to the Police that he had stated that the father had two sims out of which one was of Vodafone which was purchased from Bombay. Lastly, he states in further cross as follows:-

"Cross-examination by Sh. A.K. Shrotiya, Advocate for Sunu@Sunil.

I could not tell the date on which I had given mobile phone to my father the above said mobile I had purchased from Mahesh Gahera, Mahesh Gahera is residing Bombay he lived at Bandra the same was given in gift the EMI of the same. I could not tell today I can not produce a receipt of the same as I was given the above said mobile as gift to me by Mahesh Gahera, he deals in mobile phone he as several sets of the same. My father had another mobile phone made of Nokia EMI no of the same I would not tell I neither have receipt of the same nor I could produce the same."

16. PW9 is another son of the deceased, who has identified the mobile phones. This is what he has to say in regard to the mobile phones:

The mobiles were of black colour and having old antenna. On the battery of one mobile A-

9406586386 is written in red ink and on the other mobile on the back side it is written capital 'BL', in English and number 97321820 was written with red marker. He says that after 8 to 10 days, when they checked the goods, they came to know that some articles had been stolen. He further states that they had informed the Police by that day about the theft of the mobiles. He and his mother went to identify the goods.

> His mother was called first and he went later.
>
> It is to be remembered that PW3 says he had given the mobile in question prior to 3 months ago when deceased came to Bombay. The deceased was staying alone. It is PW9 now who has identified by the number written in the battery.

17. PW8 is the mother. She says first, on the next day, Police Officer came and they opened the room and they saw that almirah was opened and articles were scattered. Out of the articles, one hensli (necklace made of silver), gold earrings and two mobile phones of Nokia Company, were stolen. Except this, no article was stolen. She says that identification of the articles was got done by her. In cross-examination on behalf of Kali alias Gopal, she says that on 11th or 12th, she came to know about the articles which were stolen. She says that in her statement to the Police, she has stated that on the next day of incident, the almirah was opened and the articles were scattered and, then, she came to know that her goods had been stolen. She had not made any complaint anywhere in respect of her stolen goods. She denies allegation that they have concocted a false story of goods being stolen after 8 to 10 days of the incident for creating evidence. In this regard, it may be noticed that in the evidence of PW9-son, he has stated that after going to the lower room on the next day, he saw the almirah on that day. Articles were lying outside. Therefore, they guessed that something had been stolen. At that time, it could not be known what had been stolen. After 8 to 10 days, when they checked the goods, they came to know that some articles had been stolen.

18. In the Recovery Memo of the phone from the appellant, it is stated as follows:

> One mobile phone of Nokia company of black colour mode no. 5110, made in Finland, followed by a certain number, code number is shown as 0502182 was written, BL is written on the mobile in red ink and, on its battery, the number 97321820 is written with red ink.

19. According to the deposition of PW3, the recovery of phone which is attributed from the appellant, was bearing number 9920121429. The High Court has, in the impugned judgment, found that another Cell Phone Number 9928120429, which was made available by his son-PW3, was found missing. Thereafter, the finding by the High Court is that D.P. Sharma, ASI arrested the accused and on 02.11.2008 recovered from him one mobile phone bearing sim number 97321820. It is clear that the finding by the High Court that recovery was made from the appellant of one mobile phone sim number 97321820, is clearly contrary to the version of PW3 who purchased or was gifted the phone which he allegedly gave to his father. Even, according to the Recovery Memo, the Number 97321820 is shown as the number on the battery of the mobile phone. The number, which is allegedly provided by PW3, is the Number 9920121429.

20. In Ashish Jain v. Makrand Singh and others1, it is held as follows:

> “28. We find substance in the argument of the learned Amicus Curiae that this identification was not done in accordance with due procedure. It is evidence from the testimony of several of the examined pledgors, such as PWs 15, 16 and 28, that the

> identification procedure was conducted without mixing the recovered jewellery with similar or identical ornaments....” 1 (2019) 3 SCC 770

21. In this case also in regard to the mobile phone only the two mobiles were kept for identification and it was purportedly identified as noticed by PW9 besides PW8. In the identification conducted by PW13, it is come out that two mobile phones were not mixed with any other mobile phones

22. What is the effect of recovery of the mobile proceeding on the basis that it belonged to the deceased? Section 114 of the Evidence Act with illustration (a) reads as follows:

> “114. Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> Illustrations The Court may presume—
>
> (a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;”

23. The scope of this provision has been considered by this Court on various occasions. In Sunder Lal alias Sundera v. State of Madhya Pradesh2, both the accused and deceased were seen together. After the alleged murder, the accused went with the article belonging to the deceased for pledging/selling it. In the circumstances, the Court took the view that the ornaments were established to be the ornaments worn by the deceased. No explanation was forthcoming how the accused came to be in possession on the very same day on which the alleged murder was committed. On this, the Court took the view that the conviction under Section 302 of the IPC, based on the circumstances, was correct.

24. On the other hand, in Sanwant Khan and another v. State of Rajasthan3, one Mahant Ganesh Das, who was a wealthy person, used to live in a temple of Shri Gopalji along with another person. Both of them were found dead. The house had been ransacked and boxes and almirah opened. It was not known at the time who 2 AIR 1954 SC 28 3 AIR 1956 SC 54 committed the offence. Investigation resulted in arrest of the appellant, and on the same day, he produced a gold khanti from his bara, where it was found buried in the ground. Another accused produced a silver plate. The Court found that there was no direct evidence. There were certain circumstances which were rejected by the Sessions Judge and the solitary circumstance was the recovery of the two articles. In these circumstances, the Court held, inter alia, as follows:

> “Be that as it may, in the absence of any direct or circumstantial evidence whatsoever, from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants the only inference that can be raised in view of illustration A to S. 114 of the Evidence Act is that they are either receivers of stolen

property or were the persons who committed the theft, but it does not necessarily indicate that the theft and the murders took place at one and the same time.

xxx xxx xxx Here, there is no evidence, direct or circumstantial, that the robbery and murder formed parts of one transaction. It is not even known at what time of the night these events took place. It was only late next morning that it was discovered that the Mahant and Ganpatia had been murdered and looted. In our Judgment, Beaumonth, C.J., and Sen J. in – Bhikha Gobar v. Emperor, AIR 1943 Bom 458 (B) rightly held that the mere fact that an accused produced shortly after the murder ornaments which were on the murdered person is not enough to justify the inference that the accused must have committed the murder.

xxx xxx xxx In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murdered. Suspicion cannot take the place of proof.

(Emphasis supplied)

25. In Baiju v. State of Madhya Pradesh4, the Court held:

"14. The question whether a presumption should be drawn under illustration (a) of S. 114 of the Evidence Act is a matter which depends on the evidence and the circumstances of each case. Thus the nature of the stolen article, the manner of its acquisition by the owner, the nature of the evidence about its

4 AIR 1978 SC 522 identification, the manner in which it was dealt with by the appellant, the place and the circumstances of its recovery, the length of the intervening period, the ability or otherwise of the appellant to explain his possession, are factors which have to be taken into consideration in arriving at a decision." That was a case where the Court found that prosecution had proved the case.

26. This Court, in Shri Bhagwan v. State of Rajasthan5, held:

"11. The possession of the fruits of the crime, recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found is the real offender, unless he can account for such possession in some way consistent with his innocence. It is founded on the obvious principle that if such possession had been lawfully acquired, that party would be able to give an account of the manner in which it was obtained. His unwillingness or inability to afford any reasonable explanation is regarded as amounting to strong, self-inculpatory evidence. If the party gives a reasonable explanation as to how he

> obtained it, the courts will be justified in not drawing the presumption of guilt. The force of this rule of presumption depends upon the recency of the possession as related to the crime and that if the interval of time be considerable, the presumption is weakened and more especially if the goods 5 AIR 2001 SC 2342 are of such kind as in the ordinary course of such things frequently change hands.

It is not possible to fix any precise period. This Court has drawn similar presumption of murder and robbery in a series of decisions especially when the accused was found in possession of these incriminating articles and was not in a position to give any reasonable explanation. Earabhadrappa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] was a case where the deceased Bachamma was throttled to death and the appellant was taken into custody and gold ornaments and other articles were recovered at his instance. This Court observed: (Para 13) "This is a case where murder and robbery are proved to have been integral parts of one and the same transaction and therefore the presumption arising under Illustration (a) to Section 114 of the Evidence Act is that not only the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction." PW5, WHO OVERHEARD THE CONSPIRATORIAL CONVERSATION

27. In this case both the courts have apparently drawn strength from the testimony of PW5. PW5 is a person whose evidence is virtually the sole testimony relied on to prove the conspiracy to commit theft/robbery. It is worthwhile to consider what he has deposed in Court. He and Mohan Sharma, (who is PW1 and has turned hostile) at the house of Virendra Kushwah (Virendra is one of the accused in this case) found Virendra, Veeru Dheemar and three other persons sitting and talking. When they (PW1, PW5) passed in front of the gate, he saw that they stopped talking. Then they went little forward. He told that these goondas/miscreants (Badmaash) seem to be outsiders. Let us listen to their conversation. They heard, Virendra Kushwah and Veeru were saying to the three persons that Bharosilal is an old man and he has a lot of money and is living alone. He and Veeru would remain here. Kalli-the appellant and Hariom would go to the house of the deceased to commit the theft. Then they left from there. Next day it was known that someone had killed Bharosilal. In the evening of the next day he refrained from telling anyone because they were goondas. Later on, he told the son of Bharosilal, whose name is Abhay, that these five accused have committed murder. He identified them. In cross, he says his house is far from where the goondas were making conversation. On the 16th day, when the Police came for inquiry, he told all the above things to the Police. He himself did not tell by going to the Police Station. He says that he has seen all the three persons (which apparently includes the appellant) at the Police Station. On 16.10.2008, when he was called at the Police Station, at that time, all the three persons were sitting. [The arrest of the appellant, it may be noted, is made by PW-12 only on 01.11.2008]. He deposed that he did not also see the accused persons at the Police Station. The Police made inquiry in the office and these three accused persons were detained in the Police Station. The police officials also not shown him the three accused persons at there. He further says that when the accused persons were sent to jail, then S.I. had shown to him the accused persons in the vehicle. The names of all the three were told and all the three were got identified. He further says that he had got knowledge of the names of all the three persons when Police recorded his statement, i.e., after 8 to 10 days from 16.10.2008. Then, he came to the name of the remaining three persons. In earlier cross-examination on behalf of another

accused, he has stated in his statement that till the Police recorded his statement. He did not know about the residence of the three persons whose names he has told except Virendra and Veeru but they seemed to be outsiders. He further says that he has no knowledge of the fact that the persons who were sitting in the house of Virendra, if they were uttering by taking wrong names of each other. He, no doubt, says that there was light in the house of Virendra. The light of the same was scattered.

28. In the case of recovery of an article from an accused person when he stands accused of committing offences other than theft also, (in this instance murder), what are the tests:

> i. The first thing to be established is that the theft and murder forms part of one transaction.
>
> The circumstances may indicate that the theft and murder must have been committed at the same time. But it is not safe to draw the inference that the person in possession of the stolen property was the murderer [See Sanwant Khan (supra)];

ii. The nature of the stolen article;

iii. The manner of its acquisition by the owner; iv. The nature of evidence about its identification; v. The manner in which it was dealt with by the accused;

vi. The place and the circumstances of its recovery; vii. The length of the intervening period; viii. Ability or otherwise of the accused to explain its possession [See Baiju (supra)].

29. In this case, applying the tests as above, we find as follows:

> I. The appellant has not given any explanation as to how he came by possession of the mobile. He has no explanation in his questioning under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the CrPC', for short);

II. As far as length of the intervening period is concerned, recovery was effected on 02.11.2008 whereas the date of the incident is 08.09.2008. That means, a gap of less than two months. The arrest of the appellant was effected on 01.11.2008, i.e., a day before the recovery; III. As far as nature of the article is concerned, it was a mobile phone which was capable of being transferred by mere delivery. No doubt, it would contain a sim which may connect the phone with the previous owner or person in possession. It is also common knowledge, however, that it may be open to the person, who possesses the mobile, to equip it with a new sim;

IV. As far as identification is concerned, we have already seen the nature of the evidence; V. It is not in dispute that the two mobile phones were kept and they were not mixed with any other similar looking mobile phones.

30. The appellant, along with the others, were charged under the offences with the aid of Section 34 of the IPC. The finding by the Trial Court in this case is that there was a criminal conspiracy hatched to commit robbery. As far as Section 34 is concerned, it proclaims the principle of vicarious criminal liability. The soul of the Section, and the principle which underlies criminal liability for the acts of another therein, is the shared intention or the common intention to commit an offence. The common intention must be for the very offence which the accused is charged with. In this case, it is to be noted that though there is a charge of causing death by strangulation, the finding is that the death was caused as a result of the injuries inflicted with the knife. The knife was, apparently, carried and wielded by the co-accused-Kalli. From him, in fact, the recovery of the knife was also effected which becomes all the more reason for us to conclude that it will be totally unsafe to convict the appellant of the charges of which he is found guilty including Section 302 of the IPC based only on the recovery of the mobile phone where the recovery itself suffers from suspicion and doubt. We may, in this regard, notice the view expressed by this Court in Hardev Singh and others v. State of Punjab6: -

> "9. The view of the High Court that even the person not committing the particular crime could be held guilty of that crime with the aid of Section 34 of the Penal Code if the commission of the act was such as could be shown to be in furtherance of the common intention not necessarily intended by every one of the participants, is not correct. The common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention. Then only others can be held to be guilty....." (Emphasis supplied)

31. In Arun v. State by Inspector of Police, Tamil Nadu7, this Court, dealing with the case where Section 34 of the IPC was sought to be invoked against the appellant in the matter of committing the offence of murder. No doubt, it was a case where there was no charge or evidence that he committed the murder. This Court referred to the tests laid down in the decision in Dharam Pal v. State of Haryana8 and we would refer 6 AIR 1975 SC 179 2008 (15) SCC 501 1978 (4) SCC 440 to paragraphs 14 and 15 of the said judgment. The same reads as under:

> "14. It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.
>
> 15. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit.

The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender." (Emphasis Supplied)

32. As far as the presumption being drawn of common intention, we notice the judgment of this Court in Brijlal Pd. Sinha v. State of Bihar9:

> "11.....The liability of one person for an offence committed by another in the course of a criminal act perpetrated by several persons will arise under Section 34 of the Penal Code, 1860 only where such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention will, of course, be difficult to get and such intention can only be inferred from the circumstances. But the existence of a common intention must be a necessary inference from the circumstances established in a given case. A common intention can only be inferred from the acts of the parties. Unless a common intention is established as a matter of necessary inference from the proved circumstances the accused persons will be liable for their individual act and not for the act done by any other person. For an inference of common intention to be drawn for the purposes of Section 34, the evidence and the circumstances of the case should establish, without any room for doubt, that a meeting of minds and a fusion of ideas had taken place amongst the different accused and in prosecution of it, the overt acts of the accused persons flowed out as if in obedience to the command of a single mind. If on the evidence, there is doubt as to the 1998 (5) SCC 699 involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused person. ...."

33. In Girija Shankar v. State of U.P.10, this Court made the following observations:

> "9. ..... In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime....." (Emphasis supplied)

34. Thus, in this case, as far as the appellant is concerned, the evidence against him essentially consists of the recovery of the mobile phone and there is discrepancy about the number which we have noted. PW5 has not taken the name of the appellant. Essentially evidence of PW5 and the recovery is relied on to hold that the chain of circumstances is complete. We have noticed the testimony of PW5. The appellant is 2004 (3)SCC 793 not mentioned as one of the persons who used to visit the deceased's father though three of the other accused were named, viz., Veeru, Kalli and

Virendra. There is complaint from the appellant that no Test Identification Parade was conducted for the accused. We have referred to what PW5 has deposed.

35. In the facts of this case, we are inclined to think that it would not be safe to uphold the conviction of the appellant. He would be entitled to the benefit of doubt. We allow the appeal. The impugned judgment in so far as it relates to the appellant will stand set aside and he will stand acquitted. The appellant's bail bond shall stand discharged. He will be set at liberty if his custody is not required in connection with any other case.

... ... J . [S A N J A Y K I S H A N K A U L]
.....J. [K.M. JOSEPH] NEW DELHI;

MAY 29, 2020.