Harivadan Babubhai Patel vs State Of Gujarat on 1 July, 2013

Equivalent citations: 2013 AIR SCW 4575, 2013 (7) SCC 45, 2013 CRI. L. J. 3944, AIR 2013 SC (CRIMINAL) 1853, (2013) 3 MH LJ (CRI) 490, (2013) 3 JCR 413 (SC), 2013 (3) SCC(CRI) 27, (2014) 1 ALLCRILR 518, (2014) 2 GUJ LR 1057, (2013) 128 ALLINDCAS 213 (SC), 2013 (8) SCALE 17, (2014) 1 RECCRIR 28, (2013) 55 OCR 1059, (2013) 3 CURCRIR 218, (2013) 3 ALLCRIR 2817, (2013) 8 SCALE 17, (2013) 3 DLT(CRL) 546, (2014) 1 CRIMES 329

Author: Dipak Misra

Bench: Dipak Misra, B.S. Chauhan

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1044 OF 2010

Harivadan Babubhai Patel ... Appellant

Versus

State of Gujarat .. Respondent

J U D G M E N T

Dipak Misra, J.

The appellant, A-1, along with Dipakbhai Zinabhai Patel, A-2, Raghubhai Chaganbhai Patel, A-3, and Babubhai Khushalbhai Patel, A-4, faced trial in Sessions Case No. 28 of 2006 in the Court of the learned Sessions Judge, Valsad, for the offences punishable under Sections 342, 346, 302, 120B and 201 read with Section 34 of the Indian Penal Code (for short "IPC"). The learned trial Judge acquitted A-3 and A-4 as he found them innocent and convicted A-1 and A-2 for all the offences and imposed rigorous imprisonment for life and fine of Rs.1,000, in default of payment of fine, to undergo further imprisonment for one month under Section 302 and separate sentences for the other offences with the stipulation that all the sentences shall run concurrently.

2. Grieved by the aforesaid conviction and sentence, the accused- appellant and A-2 preferred

Criminal Appeal No. 860 of 2007 and the High Court, by the impugned judgment dated 20th April, 2009, acquitted A-2 but sustained the conviction of the appellant for all the offences. Hence, the present appeal by the accused-appellant, A-

1.

3. Filtering the unnecessary details, the prosecution case is that on 23.1.2006, deceased, Ashokbhai Nanubhai, accompanied by his brother- in-law, Kantibhai Manilal Patel, PW-13, had gone to Udwada R.S. Zanda Chowk on his scooter and went to a tea stall where the deceased was engaged in a conversation with one Durlabhbhai Kikubhai Bhandari,PW-15. Durlabhbhai took the deceased near the railway crossing where 3-4 persons were waiting in a Maruti car. As the prosecution story further gets unfurled, the deceased had discussion with them and, thereafter, those persons informed that they would take the deceased to the house of Gulia at Valsad and, accordingly, they took him in the Maruti car bearing No. GJ-15-K- 9263. They had provided one mobile number stating that if there would be any delay in the return of the deceased, they could be contacted on that mobile number. The brother-in-law of the deceased supplied that mobile number to his sister Madhuben, PW-14, and went to Daman for his work and came back in the evening about 5.00 p.m. Thereafter, he enquired from his sister whether she had talked with the deceased on the given number or not and he was informed by her that the mobile phone was picked up by different persons who spoke differently and, at a later stage, it was switched off. Someone speaking on the mobile had also enquired from Madhuben whether she had gone to the police station. Coming to know about the situation, Kantibhai made enquiry and searched about the deceased for two days and when the deceased did not return, he lodged a complaint at Pardi Police Station on 25.1.2006 which was registered as C.R. No. 1-12/2006. After the criminal law was set in motion, the investigating agency examined the witnesses and after coming to know about the place where the accused persons had hidden themselves, the Investigating Officer arrested them and they confessed before the police that they had wrongfully confined the deceased and assaulted him. They also confessed that they had pressurized the deceased for returning the money as the money was paid to the passport agent, namely, Bharatbhai, who was introduced by the deceased, in the presence of one Ashokbhai alias Amratbhai. They also stated that they had assaulted the deceased on 23.1.2006 and when the deceased succumbed to the injuries, they buried the dead body in an agricultural farm. At the instance of the accused, the dead body of the deceased was taken out in the presence of the panch witnesses. Discovery panchnama was prepared in presence of the Executive Magistrate. After carrying out the seizure of footwear, clothes and jute old blanket, samples of the same were sent for forensic examination and thereafter, the dead body, after being identified by wife Madhuben, was initially sent to the Dungri Primary Health Centre for post mortem, but as the Medical Officer opined that it was to be done by a forensic expert, it was sent to Surat Civil Hospital Forensic Department. The identification of the accused persons was carried out by the Executive Magistrate. The Maruti car which was used for the offence was taken into possession. The investigating agency examined number of witnesses and, after completing the investigation, placed the charge-sheet before the competent court for all the offences in respect of A-1 to A-3 and as far as A-4 was concerned, he was charge-sheeted for the offence punishable under Section 201 IPC.

4. The accused persons pleaded innocence and false implication and claimed to be tried.

5. The prosecution, in support of its case, examined 19 witnesses and got number of documents including the FIR, discovery panchnama, panchnama of the seized articles, the FSL report and the serology report and panchnama of the test identification parade, exhibited. In the statement under Section 313 CrPC, the accused persons made a bald denial of every aspect and did not offer any explanation and chose not to adduce any evidence.

6. The learned trial Judge, on the basis of the material brought on record, found A-1 and A-2 guilty of all the offences and the High Court affirmed the conviction and sentence in respect of A-1 only as stated hereinbefore.

7. We have heard Mr. Rauf Rahim, learned counsel for the appellant and Ms. Hemantika Wahi, learned counsel for the respondent-State.

8. It is the undisputed position that the death was homicidal in nature and the case of the prosecution rests on the circumstantial evidence. Learned counsel for the appellant has assiduously endeavoured to point out certain loopholes and contended that because of the said dents, the prosecution version deserves to be discarded. Per contra, learned counsel for the respondent would support the analysis made in the judgment of the High Court and stand for its sustenance.

9. We shall deal with the challenges and the stance in oppugnation one by one. The first ground of attack is that there is delay in lodging of the FIR and in the absence of explanation, the case of the prosecution should be thrown overboard. On a perusal of the judgments, it is noticeable that the said aspect has been dealt with in great detail and the plea of delay has been negatived. It is urged before us that though the occurrence, as alleged, had taken place on 23.1.2006, yet the FIR was lodged only on 25.1.2006 indicating that efforts were being made to search for the deceased and the said effort is based on some kind of surmises which do not inspire confidence. On a close scrutiny, it is evident that as per the FIR and the evidence of the informant, PW-13, and Madhuben, PW- 14, they had searched for the deceased and realizing that it was an exercise in futility, they went to the police station. It has been deposed by them that they had never apprehended that the deceased would be done to death though there was a previous quarrel pertaining to demand of money from the deceased as he had introduced the passport agent to A-1 who had paid more than rupees one lakh to obtain the necessary documents to go to United States of America. It has been clearly proven that the informant was engaged in search and he had not apprehended that the life spark of the deceased would be extinct. The issue is whether such an explanation is to be believed. In this context, we may refer with profit to the authority in State of H.P. v. Gian Chand[1] wherein a three-Judge Bench has opined that the delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay. If the explanation offered is satisfactory and there is no possibility of embellishment, the delay should not be treated as fatal to the case of the prosecution.

10. In Ramdas and others v. State of Maharashtra[2], it has been ruled that when an FIR is lodged belatedly, it is a relevant fact of which the court must take notice of, but the said fact has to be considered in the light of other facts and circumstances of the case. It is obligatory on the part of the court to consider whether the delay in lodging the report adversely affects the case of the

prosecution and it would depend upon the matter of appreciation of evidence in totality.

11. In Kilakkatha Parambath Sasi and others v. State of Kerala[3], it has been laid down that when an FIR has been lodged in a belated manner, inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened. Similar view has also been expressed in Kanhaiya Lal and others v. State of Rajasthan[4].

12. Scrutinized on the anvil of the aforesaid enunciation of law, we are disposed to think that there had been no embellishment in the FIR and, in fact, there could not have been any possibility of embellishment. As we find, the case at hand does not reveal that the absence of spontaneity in the lodgment of the FIR has created a coloured version. On the contrary, from the other circumstances which lend support to the prosecution story, it is difficult to disbelieve and discard the prosecution case solely on the ground that the FIR was lodged on 25.1.2006 though the deceased was taken by the accused persons some time on 23.1.2006. The explanation offered pertaining to the search of the deceased by the informant has been given credence to by the learned trial Judge as well as by the High Court and, in our considered opinion, adjudging the entire scenario of the prosecution case, the same deserves acceptation. Hence, the said submission is sans substance.

13. The next limb of attack relates to the confessions made by the accused persons and the issue of leading to discovery of articles. It is submitted that the confession part is absolutely inadmissible and that apart, when the panch witnesses had not supported the panchnama, the recovery or discovery of the seized articles cannot be utilized against the appellant. There can be no shadow of doubt that the confession part is inadmissible in evidence. It is also not in dispute that the panch witnesses have turned hostile but the facts remains that the place from where the dead body of the deceased and other items were recovered was within the special knowledge of the appellant. In this context, we may usefully refer to A.N. Venkatesh and another v. State of Karnataka[5] wherein it has been ruled that by virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped person was found would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. In the said decision, reliance was placed on the principle laid down in Prakash Chand v. State (Delhi Admin.)[6]. It is worth noting that in the said case, there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

14. In State of Maharashtra v. Damu S/o Gopinath Shinde and others[7], it has been held as follows: -

> "It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor[8] is

> the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

15. Same principle has been laid down in State of Maharashtra v. Suresh[9], State of Punjab v. Gurnam Kaur and others[10], Aftab Ahmad Anasari v. State of Uttaranchal[11], Bhagwan Dass v. State (NCT) of Delhi[12], Manu Sharma v. State[13] and Rumi Bora Dutta v. State of Assam[14].

16. In the case at hand, the factum of information related to the discovery of the dead body and other articles and the said information was within the special knowledge of the present appellant. Hence, the doctrine of confirmation by subsequent events is attracted and, therefore, we have no hesitation in holding that recovery or discovery in the case at hand is a relevant fact or material which can be relied upon and has been correctly relied upon.

17. The next circumstance that has been seriously criticized by Mr. Rauf Rahim, learned counsel for the appellant, pertains to the last seen theory. It is submitted by him that as per the testimony of the informant, the appellant along with others had taken the deceased in a Maruti car, but there is no material evidence to suggest that the accused was in the company of the deceased for two days. The learned counsel would further submit that the last seen theory faces a hazard because of the time gap and, hence, should be totally discarded. It is evident from the material on record that the deceased was taken away from Zanda Chowk in a Maruti car. The appellant has been identified by Kantibhai, PW-13, and Durlabhbhai, PW-15, and their evidence remains totally embedded in all material particulars. It has been proven by the prosecution that the Maruti Zen car belongs to the appellant. There has been no explanation offered by the accused in this regard, though such incriminating materials were put to him. It is also worth noting here that from the testimony of Dr. Pandav Vinodchandra Prajapati, PW-16, who had conducted the autopsy on 28.1.2006 about 10.00 a.m., that the injuries found on the dead body were approximately four days old. Thus, the argument that there is long gap between the last seen and the time of death melts into insignificance inasmuch as the time the deceased was seen in the company of A-1 and the time of death is not long and the said fact has been duly established by the medical evidence and we see no reason to discredit the same. It is apt to note here that A-1 had said that they were taking the deceased to the house of Gulia but during investigation, nothing was found in the house of Gulia. On the contrary, from the testimony of Madhuben, PW-14, wife of the deceased, it is evincible that she had talked on telephone to both the accused persons. Thus, the circumstance pertaining to the theory of last seen deserves acceptance.

18. The next plank of submission is that Gulia to whose house the deceased was taken to has not been examined by the prosecution and non-examination of such a material witness makes the whole case of the prosecution unacceptable. The learned trial Judge, dealing with the said contention, has opined that during the test identification parade, Shaikh Gulamhusssain had not identified the accused persons and that is the reason the prosecution was of the view that the said witness would not support the case of the complainant and, accordingly, chose not to examine him. In State of H.P. v. Gian Chand (supra), it has been opined that non- examination of a material witness is not a

mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution. The three-Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.

19. In Takhaji Hiraji v. Thakore Kubersing Chamansing and others[15], the Court has opined thus: -

> "It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non- examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

20. In Dahari and others v. State of Uttar Pradesh[16], while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and thetestimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Be it noted, the Court also took note of the fact that during the cross-examination of the Investigating Officer, none of the accused persons had voiced their concerns or raised any apprehension regarding the non-examination of the material witness therein.

21. In the case at hand, it was A-1 who had announced that he was taking the deceased to the house of Gulia. On a search being conducted, nothing has been found from the house of Gulia. There has been no cross-examination of the Investigating Officer about the non-examination of Gulia. On the contrary, it was A-1 who had led to the discovery of the dead body and other articles. Thus, when the

other evidence on record are cogent, credible and meet the test of circumstantial evidence laid down in Sharad Birdhichand Sarda v. State of Mararashtra[17] State v. Saravanan[18], Sunil Kumar Sambhudayal Gupta v. State of Maharashtra[19] and further reiterated in Jagroop Singh v. State of Punjab[20], there is no justification to come to hold that the prosecution has deliberately withheld a witness that creates a concavity in the concept of fair trial.

22. Another facet is required to be addressed to. Though all the incriminating circumstances which point to the guilt of the accused had been put to him, yet he chose not to give any explanation under Section 313 CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. (See State of Maharashtra v. Suresh[21]). In the case at hand, though number of circumstances were put to the accused, yet he has made a bald denial and did not offer any explanation whatsoever. Thus, it is also a circumstance that goes against him.

23. We will be failing in our duty if we do not note another submission of the learned counsel for the appellant. It is urged by him that A-2 stood on the same footing as the appellant and hence, the High Court should have acquitted him. It is also canvassed by him that A-2 has been acquitted of the charge of criminal conspiracy and, therefore, the appellant deserves to be acquitted. The High Court has taken note of the fact that A-2 was not identified by any one in the test identification parade. It has also noticed number of material contradictions and omissions and, accordingly, acquitted A-

2. As far as the appellant is concerned, all the circumstances lead towards his guilt. As far as conspiracy under Section 120B is concerned, we are inclined to think that the High Court erred in not recording an order of acquittal under Section 120B as no other accused had been found guilty. The conviction under Section 120B cannot be sustained when the other accused persons have been acquitted, for an offence of conspiracy cannot survive if there is acquittal of the other alleged co-conspirators. It has been so laid down in Fakhruddin v. The State of Madhya Pradesh[22]. Thus, the conviction of the appellant under Section 120B is set aside.

24. Resultantly, the appeal fails except for the acquittal for the offence of conspiracy. However, as we have sustained the conviction under Section 302 IPC and all the sentences are directed to be concurrent, the acquittal for the offence punishable under Section 120B would not help the appellant. Therefore, the appeal stands dismissed, but the conviction and sentence under Section 120B IPC is set aside. The other convictions and sentences will stand.

.....J. [Dr. B.S. Chauhan] .....J. [Dipak Misra] New Delhi;

July 01, 2013.

---

[2] (2001) 6 SCC 71 [4] (2007) 2 SCC 170 [6] AIR 2011 SC 1064 [8] 2013 (6) SCALE 242 [10] (2005) 7 SCC 714 [12] AIR 1979 SC 400 [14] (2000) 6 SCC 269 [16] AIR 1947 PC 67 [18] (2000) 1 SCC 471 [20] (2009) 11 SCC 225 [22] (2010) 2 SCC 583 [24] AIR 2011 SC 1863 [26] AIR 2010 SC 2352 [28] Crl.A. 737 of 2006 decided on 24.5.2013 [30] (2001) 6 SCC 145 [32] (2012) 10 SCC 256 [34] (1984) 4 SCC 116 [36] (2008) 17 SCC 587 [38] (2010) 13 SCC 657 [40] (2012) 11 SCC 768 [42] (2000) 1 SCC 471 [44] AIR 1967 SC 1326
