

Recovery of Weapon and Prosecution's Theory – Recovery made over a month after the incident – Place of recovery an open space accessible to many – Inconsistencies in police witnesses' statements regarding the recovery – Absence of independent witnesses to the recovery – Rendered recovery theory suspicious and doubtful. [Paras 7, 8]

Alternate Suspects and Lack of Investigation – PW-2 suspected Naresh Yadav's involvement, but no investigation conducted into this angle – Failure to investigate alternative suspects or motives undermined the prosecution case. [Para 10]

Benefit of Doubt and Acquittal – Due to unreliable recovery and eyewitness testimony, serious doubt cast on prosecution's case – Benefit of doubt extended to appellant Krishan – Conviction quashed, and appellant acquitted of all charges. [Paras 11, 12]

Directive for Immediate Release – Supreme Court directs immediate release of appellant Krishan unless required in another case. [Para 12]

Referred Cases:

- John Pandian etc. V. State (2010) 14 SCC 129
- Golakonda Venkateswara Rao v. State of A.P. (2003) 9 SCC 277
- State of Punjab v. Jagir Singh & Ors. (1974) 3 SCC 277
- State, Govt. Of NCT of Delhi v. Sunil & Anr. (2001) 1 SCC 652
- Pawan Kumar @ Monu Mittal etc. V. State of U.P. & Anr. Etc. (2015 7 SCC 148
- Suresh Chandra Bahri etc. V. State of Bihar Supp. (1) SCC 80

J U D G M E N T

Abhay S. Oka, J.

FACTUAL ASPECTS

1. The appellant is accused no.2, who, along with accused no.1 – Mahesh, was convicted for the offences punishable under Section 302 of the Indian Penal Code (for short 'IPC') and Section 25 of the Arms Act. The appellant and the co-accused were ordered to undergo life imprisonment for the offence punishable under Section 302 of the IPC. The conviction and sentence of the appellant have been confirmed by the High Court by the impugned judgment.

2. It is a case of the murder of Pawan and Aju Chaudhary. According to the prosecution case, on 03rd of January 2004, the deceased Pawan went to Rohini to meet his ailing sister Sushila. Dharmender (PW-2) is the complainant. Dharmender is the brother of the deceased Pawan. According to Dharmender, the deceased Pawan had fallen into bad company and cases of dacoity and theft were registered against him. He stated that on 04th January 2004, he enquired with his sister, who told him that the deceased Pawan had returned after meeting her. According to Dharmender, around 09:00 a.m. on 05th January 2004, he was informed by someone that his brother Pawan had been shot dead. Thereafter, the bodies of both the deceased were found by the police.

3. The prosecution examined a total of 20 witnesses. The prosecution relied upon the evidence of PW-1 – Mukesh and PW-3 – Vijender as they were allegedly the eyewitnesses. Dharmender (PW-2) was also examined. The other two material witnesses are PW-15 Sub-inspector Desh Raj and PW-20 DSP Puran Chand. At the relevant time, PW-20 was the Investigating Officer. Both the witnesses are relevant on the issue of recovery of the weapon of the offence at the appellant's instance, as there are no independent witnesses to the recovery. According to the case of the prosecution, the report of the ballistic expert showed that the bullets recovered from the body of the deceased Pawan were fired from the country-made pistol, which was recovered at the instance of the appellant.

SUBMISSIONS

4. Shri Gaurav Agrawal, learned counsel appointed as *amicus curiae* submitted that the case of the prosecution is not based on circumstantial evidence but on the eye-witness account of witnesses PW-1 and PW-3. He submitted that neither of the eyewitnesses supported the prosecution and both were declared hostile. He urged that in the absence of any independent witness, the recovery of the alleged weapon at the instance of the appellant

cannot be relied upon. Moreover, the recovery is from an open place accessible to all, and that also happened more than one month after the date of the incident. He pointed out that PW-2 – Dharmender had deposed that as deceased Pawan was on inimical terms with one Naresh Yadav, he suspected that Pawan and Ajju Chaudhary must have been either murdered by Naresh Yadav or by someone at his instance. By pointing out the testimony of PW-20, he submitted that no investigation was carried out about the involvement of Naresh Yadav, who was the first suspect. He would, therefore, submit that the prosecution has failed to prove the case beyond a reasonable doubt.

5. Ms. Bina Madhavan, the learned counsel appearing for the State of Haryana, submitted that the recovery of the weapon of assault had been proved to have been made at the instance of the appellant. The report of the expert establishes that the bullet found on the dead body of deceased Pawan could have been fired from the weapon recovered at the instance of the appellant. She placed reliance on the following decisions:

- (i) John Pandian etc. v. State¹
- (ii) Golakonda Venkateswara Rao v. State of A.P.²
- (iii) State of Punjab v. Jagir Singh & Ors.³
- (iv) State, Govt. of NCT of Delhi v. Sunil & Anr.⁴
- (v) Pawan Kumar @ Monu Mittal etc. v. State of U.P. & Anr. etc.⁵⁶
- (vi) Suresh Chandra Bahri etc. v. State of Bihar⁶

¹ (2010) 14 SCC 129

² (2003) 9 SCC 277

³ (1974) 3 SCC 277

⁴ (2001) 1 SCC 652

⁵ (2015) 7 SCC 148

⁶ Supp. (1) SCC 80

She relied upon the decisions in support of her contention that conviction can be based on the disclosure and recovery of a weapon at the instance of the accused.

OUR VIEW

6. We have carefully considered the submissions made across the bar. We have perused the evidence of the material prosecution witnesses with the assistance of the learned counsel appearing for the appellant. At the outset, it must be noted here that the prosecution case is not based on circumstantial evidence. It is specifically based on the evidence of the alleged eye-witnesses, i.e., PW-1 and PW-3. Apart from the eyewitnesses, the prosecution relied upon the recovery of the alleged weapon of offence at the instance of the appellant and the fact that the appellant disclosed the place where he had thrown the dead bodies.

7. As neither PW-1 nor PW-3 supported the prosecution, what remains to be considered is only the evidence of alleged recovery at the instance of the appellant. According to the prosecution case, the offence occurred after the evening of 04th January 2004 and before 09:00 a.m. on 05th January 2004. According to the versions of PW-15 and PW-20, the appellant allegedly made a disclosure statement on 09th February 2004. According to both the witnesses, the appellant disclosed that he had kept a country-made pistol along with two cartridges wrapped in a polythene bag in front of the Plaza building. Though PW-15 deposed that the appellant disclosed that the country-made pistol, along with two cartridges wrapped in a polythene bag, was kept underneath the earth in the eastern corner of the open space, PW-20 did not specifically depose that the appellant disclosed that the articles were kept underneath the ground. PW-15 described how the appellant took the police to the park in front of the Plaza Building. He did not state that the recovery was made after digging the earth. He stated that the appellant led the police to the eastern corner of the park and showed the country-made pistol of 315 bore along with two cartridges. Even PW-20, in his examination-in-chief, did not disclose that recovery was made after digging. Though Memorandum Panchnama of recovery recorded that the weapon was recovered after digging, both PW-15 and PW-20 have not deposed to that effect. Though both the police witnesses initially stated that no independent witnesses were available, PW-20 stated in his cross-examination that there were public witnesses available who were not found interested.

- 8.** More than one factor renders the prosecution theory regarding recovery very suspicious and doubtful. The first factor is that the recovery was allegedly made one month and four days after the occurrence. Secondly, the recovery was made from open space in a garden. Thus, the place was easily accessible to many. Thirdly, neither PW-15 nor PW20 have stated that the weapon and cartridges were buried underground and were recovered only after digging. Lastly, though independent witnesses were available, they were not made witnesses to the Panchnama made pursuant to the alleged statement made by the appellant. As the recovery of the weapon at the appellant's instance cannot be believed, the decisions relied upon by the learned counsel for the respondent are not significant at all. She relied upon the decisions which hold that in certain cases, a conviction can be based on the recovery of the weapon of offence at the instance of the accused.
- 9.** According to the prosecution case, on 09th February 2004, the appellant led the police party to a place where he had thrown the dead bodies. However, dead bodies were already recovered on 05th January 2004. Therefore, the place from which dead bodies were recovered was known to the police long before 09th of February 2004. Consequently, it cannot be said that there was a discovery by the appellant of the place where dead bodies were kept. Therefore, that part of the statement of the accused, which records that he would show the place where he had thrown the dead bodies, is not admissible in evidence under Section 27 of the Indian Evidence Act, 1872.
- 10.** PW-2 – Dharmender, the complainant and real brother of deceased Pawan, deposed that he suspected the involvement of one Naresh Yadav in the offence. PW-20, in his cross-examination, admitted that he did not make any investigation whether there was any enmity between the said Naresh and the deceased. He admitted that one Mukesh was a personal friend of the deceased Pawan. He pleaded ignorance about the correctness of the suggestion that Mukesh had murdered Naresh. The police have not investigated the role played by the said Naresh Yadav, who, according to PW-2, the brother of the deceased, was on inimical terms with the deceased. When, according to the family of the deceased, Naresh Yadav was the suspect, police ought to have investigated the role played by Naresh Yadav. There is yet another critical aspect of the case. PW-15 and PW-20 have not stated in their examination-in-chief how they became aware that PW-1 and PW-3 were the eyewitnesses.

- 11.** For all the aforesaid reasons, the evidence of recovery of the weapon at the instance of the appellant cannot be accepted as reliable. Moreover, the findings we have recorded above create a serious doubt about the truthfulness of the prosecution case. Therefore, in any case, the benefit of the doubt must be extended to the appellant. It can also be said that once the evidence of recovery is disbelieved, it was a case of no evidence as the eyewitnesses did not support the prosecution.

- 12.** Accordingly, the appeal must succeed. The impugned judgment and order dated 02nd May 2011 in Criminal Appeal No.942-DB of 2007 passed by the High Court of Punjab and Haryana and the judgment and order dated 19th September 2007 in Sessions Case No.13 of 2004 passed by the Additional Sessions Judge, Gurgaon are hereby quashed and set aside insofar as the appellant Krishan is concerned, and he stands acquitted of the offences alleged against him. We direct that the appellant shall be immediately set at liberty unless his custody is required in connection with any other case.

- 13.** Appeal is accordingly allowed.

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