

**(1994) 08 MP CK 0014**

**Madhya Pradesh High Court**

**Case No:** Criminal A. No. 102 of 1988

State of M.P.

APPELLANT

Vs

Anil Kumar and Others

RESPONDENT

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**Date of Decision:** Aug. 31, 1994

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 109, 201, 302, 34

**Citation:** (1995) CriLJ 735

**Hon'ble Judges:** R.D. Shukla, J; A.G. Qureshi, J

**Bench:** Division Bench

**Advocate:** S.M. Jain, for the Appellant; K.G. Maheshwari and A.H. Khan, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

R.D. Shukla, J.

This appeal, by the state, is directed against the judgment of acquittal, passed by the Additional Sessions Judge, Shajapur, in Sessions Trial No. 43/86, whereby the accused respondents have been acquitted of the offence punishable under Sections 302, 201 and 109/34 of the IPC, for having committed murder of Sanjay son of Basantkumar, a child aged about 12 years between 20th September 85 at about 11 a.m. to morning of 21-9-85 and causing disappearance of the body by severing the head leg and burning it with the help of kerosene.

2. The brief slated facts are that Sanjay Kumar was a student of a school. On 20th September 85", as usual. He left for school at 11.00 a.m., but he did not come back in the evening at 5.00 p.m., as such a search was made by the members of the family i.e., brother Vijay Kumar and father Basant Kumar. Thereafter, they lodged report of Gumshudgi at 10.40 p.m. vide p/40 in police station Susner.

On 20th September 85 at about 9.30 a.m. an information was received about the presence of a human body in a public lavatory, the same was reported by one Chaturbhujdas to the police, Shri R.N. Mishra started investigation. The body was rapped in a thick gunny sheet, the leg and head were chopped off. The said body was identified by Vijay Kumar and Basant Kumar as the body of Sanjay.

Basant Kumar has two other brothers i.e. Birdiehand and Chirongilal. They are residing separately in separate houses. There is one other house named as "Kanthali Bhawan" but there is dispute about the ownership of this house. Anil Kumar s/o Birdiehand was found missing from his house, as such in the presence of Birdiehand a search of the room belonging to Anil Kumar was taken. Some signs of burning and blood stains were found there. The books and note-books belonging to Sanjay Kumar were also found. There was smell of kerosene with burn marks on the drum and in the room, Half burnt clothes were also found there. They were seized. The key of the lock of the room was earlier recovered from Birdiehand. Dilip Kumar gave information about the carton of philips bulb.

Anil Kumar was subsequently apprehended nearly 20 days after the incident. A knife was recovered at his instance and seized accordingly. After investigation a challan against the accused persons was filed, which was committed to the Court of Session in due course. Accused persons abjured the guilt and pleaded false implication. The learned trial Judge has acquitted all the accused persons. Hence, this appeal by the State.

3. The contention of the learned counsel for the appellants is that circumstantial evidence proves the involvement of accused Anil Kumar in the crime and other accused persons have helped him in screening the offender.

As against it learned counsel for the respondents have submitted that firstly the different pieces of circumstantial evidence taken together or in other words the chain of evidence taken together is not complete and cannot lead to an irresistible conclusion of guilt of any of the accused persons. Further contention of the learned counsel for the respondents is that the circumstances relied upon by the prosecution have also not been proved.

4. The first circumstance relied upon by the prosecution is that Anil was seen taking some heavy thing of a carton towards public lavatory and that a dead body of Sanjay was subsequently found therein. The learned trial Judge has not believed this story, PW 16 Shaukatkhan and PW 21 Mangukhan have been examined to prove the fact of Anil Kumar taking the carton in which the body of Sanjay was subsequently found, but both of them have turned hostile. PW 16 in his statement before police (Ex. P/15) and statement u/s 164 Cr. PC before the Magistrate (Ex.P/16) and Mangukhan in his police statement Ex.P/21 and statement u/s 164 Cr. PC (Ex. P/22) have stated about the fact of carrying carton on a bicycle by Anil, but the same cannot be taken to be a substantive piece of evidence and it has rightly been held so

by the trial Court.

5. PW 15 Shahjad has been examined to prove the information given by Ahesan that Anil Kumar carried a carton with heavy load containing the dead body of Sanjay, but Ahesan has not been examined in the Court. Moreover, this witness has turned hostile and has not supported even information given by Ahesan Khan.

6. PW 22 Dinesh Kumar has been examined to prove the fact that Anil took one carton of wheel soap from the shop of his brother and carried it with him, but he has also not supported this part of statement and he turned hostile. Even otherwise according to PW 33 R.N. Mishra, Sub-Inspector and Investigating Officer of the case, the body was found in a packing carton of philips bulb.

7. Then, the other circumstantial evidence, against accused Anil relied/on by the prosecution, is the seizure of knife at the instance of Anil.

As per prosecution story Anil was arrested on 3-10-85 and he was absconding after 20th September" 85. This has also been tried to prove as a circumstance against him, which shall be discussed later. It may be recalled here that Shri. R.N. Mishra (PW 13), Investigating Officer of the case has stated in para-5 of his statement that he took search of the house "Kanthali Bhawan" and seized certain incriminating objects that very day. The key of the room belonging to Anil was handed over by his father Birdichand. The knife was not found that day. Of course other incriminating articles including lock and key were seized. The lock was earlier, broken, thereafter, Birdichand got the key recovered from his house of that broken lock.

8. Accused Anil Kumar gave information about the knife and the same was recovered by H.C. Dinanath, vide Ex.P/26. PW 25 Bherulal has supported the prosecution story regarding information about the knife having been given by accused Anil Kumar and the same was recorded vide Ex.P 26. Similar statement has been given by H.C. Dinanath (PW 32). Both these witnesses have proved the seizure of knife vide Ex.P/28 and the same was seized on production by the accused. Though learned trial Court has held it that since a search of "Kanthali Bhawan" was taken earlier and, therefore, it is difficult to believe that in a same very premises subsequently after nearly 15 days a knife could be recovered, but as per prosecution story it was taken out from a hole of a pipe and the two witnesses have supported it. It is, therefore, found proved that knife was seized at the instance of accused Anil. This article was sent for chemical examination. Though the Chemical Examiner's report (Ex.P/45) reveals presence of blood in the Chhuri, but the same has not been confirmed to be human blood as per Serologists" report, Ex.P/49 and, therefore, no adverse inference can be drawn on the basis of recovery of Churi from the accused Anil and it cannot be accepted with all certainty that the same was used for murder.

9. The next circumstances relied upon by the prosecution is that the accused Anil remained absconding between 20th September "85 to 3-10-85. The accused has given an explanation that he was out because of his work of business and had gone

to Nagpur and other places. The same has been believed by the trial Court. Even if the explanation of the accused is not accepted, the fact of absconson itself would not be sufficient to implicate the accused with the crime. The fact of absconson is also doubtful as the Rojnamcha Sanha indicating search of the accused and his subsequent arrest has not been produced and proved in the case.

10. The books and note-books belonging to deceased Sanjay were seized from one of the room of "Kanthali Bhawan", but the same has been shown to be in possession of accused and the father of deceased Sanjay. PW 11 Tarabai mother of deceased Sanjay has admitted in para 13 of her statement that "Kanthali Bhawan" is a joint property though, she has further explained it that their residential houses, i.e. of all the three brothers Chironjilal Birdichand and Basant kumar are separate. But, the para 4 of her statement she has very clearly stated that bedding and all other articles of all the three brothers remain in "Kanthali Bhawan". This goes to show that the house was not in the exclusive possession of Birdichand and accused Anil. Even if it is accepted that house was in possession of the family members of Anil since other family members including women and children had access in the house the exclusive possession of Anil in the house cannot be accepted. This possibility cannot be ruled out that books and note-books found in the alleged room of Anil-kumar may have been kept by some other member of the family.

11. The recovery of key, as per Birdichand, relied upon by the prosecution, after breaking open the lock appears to be doubtful. If the key could be recovered there was no need of breaking the lock and once lock was broken, the recovery of key loses importance as the recovery of key earlier and opening of the lock on production of the key would show possession of the person who hands over the key as such, but once a search of the room has been taken after having broken the lock the subsequent recovery of key from Birdichand would not be sufficient to connect him with the crime.

12. PW 1 Vijay Singh, a contractor by profession, has stated that on receiving the information of some carton lying in the public lavatory he went to the spot. Accused Birdichand was also along with him. Some Police Officials and nearly 100 persons were also present there. Birdichand disclosed that the dead body of Sanjay is inside the carton. This witness has probably been examined to show that Birdichand had the knowledge of dead body from before, but as two police constables were there and nearly 100 persons were also assembled, that goes to show that Birdichand may have received information from hearsay or otherwise about the dead body.

13. PW 2 Balkrishna and the police officer who has been examined to show that some half burnt material was found inside the room, but this witness has turned hostile and not supported the case of the prosecution.

14. PW 3 Manakchand has been examined to prove the strained relations between accused persons and father of Sanjay. From the evidence of this witness it appears

that the accused persons had some grudge against the father of deceased.

15. PW 4 Chaturbhuj has been examined to show that accused Dilip and Anil used to take books from the shop of this witness and they have taken one book "Gandhi Rahen" on 19-9-85. The same probably has been adduced to show that the accused Dilip and Anil who are comparatively young were in the habit of reading detective novels.

16. PW 5 Jagdish Chandra Soni has been examined to prove that accused Anil kumar had gone to Agar by Indore-Soyat bus and the same had started about 3-30 p.m. and on querry Anil has disclosed that he was going Agar, but this witness could not give the accurate and correct date of such travel by Anil kumar and, therefore, the same cannot be connected with the date of incident to show that Anil kumar absconded from that day.

17. PW 6 Madanlal Jain has been examined to show that on 20th September" 85 accused Anil kumar was seen with bicycle at about 2.30 to 3.00 p.m. As per prosecution story the dead body in the carton was taken to be thrown in the public lavatory. It is difficult to believe that the person would carry the dead body in the broad day light and merely because Anil kumar was found along with bicycle will not connect him with the crime.

18. PW 7 has been examined to show that the distance of place where dead body was found, from "Kanthali Bhawan" and that is about 350 yards.

19. PW 8 Vidhyadhar, Tehsildar has been examined to prove the fact of identification of articles -- books etc. found inside the room of "Kanthali Bhawan" allegedly in possession of Anil kumar and Birdichand. Vijay kumar and Rajendra kumar have rightly identified to books and other articles found inside the room as stated above to be of deceased Sanjay, Vijay kumar and Rajendra kumar i.e., PW 12 and PW 24 further identified those articles to be of deceased.

20. PW 18 Dr. Govindlal Gupta has been examined to prove the post mortem report and the fact of homicide death of Sanjay. The same has not been disputed in the case and has rightly been found that Sanjay met homicidal death on the intervening period of 20th September and 21st Sept." 85.

21. PW 10 Premlata has been examined to show that sanjay was alive at about 11 a.m. of 20th and was carrying a school box and enquired about Banti, the brother of Sanjay who is also a student of the same school.

22. PW 11 Tarabai mother of deceased has proved the strained relation between accused persons and her husband, but at the same time she has admitted the joint possession of the house "Kanthali Bhawan". She has also stated about the separate possession of the room by Birdichand and his members of the family i.e., his wife and children including accused Dilip and Anil.

23. PW 12 Vijay kumar and PW 19 Basant kumar have proved the identification of dead body of Sanjay kumar and have stated about the articles which Sanjay kumar has taken as student. They have identified them in the Court and before Tehsildar.

24. PW 13 Rampratap Bhavsar has proved the fact of absence of Sanjay from school on 20-9-85. PW 17 Harinarin servant of accused Birdichand. He has stated that at about 3.30 p.m. on 20th September" 85 Basant kumar had come and informed that Sanjay is missing and thereafter Birdichand left the shop and came after an hour and further asked them to handover the key to his elder brother after closing the shop in time.

25. As referred earlier Shahjad Khan, Mangukhan (PW 22), Dinesh Kumar PW 22A, Akhlakh PW 23 and Rajendra kumar PW 24 and Nannubeg (PW 26) have turned hostile and they have not supported the story of prosecution about the dead body being carried by Anil kumar.

26. PW 13 Chaturbhuj itself has also turned hostile. Who has been examined to prove the seizure of articles belonging to deceased. Similarly, PW 29 Rajak Khan has also turned hostile, who was examined to prove the seizure of carton.

27. PW 33 Ravinarain Mishra, the Investigating Officer has tried to prove the seizure of books and school box belonging to Sanjay, which was subsequently identified by Birdichand and Basant kumar to be of Sanjay, as observed earlier they have identified those articles during identification parade by Tehsildar (PW 8). Thus, from the evidence referred above, the only thing that is found proved is that articles i.e. books, note book, school box and the bag belonging to Sanjay were found in a room occupied by Birdichand and his family, specially Anil kumar. But, as observed in the earlier paragraphs, firstly the house was in joint possession. Though exclusive possession of room has been proved by Basant kumar, Taraban Birdichand and his family, but Investigating Officer instead of getting the key from the possession of Birdichand or members of his family broke open the lock and subsequently recovered the key from Birdichand. A doubt has been expressed in the earlier paragraphs that when the key was with Birdichand, there was no necessity of breaking open the lock and Birdichand was in exclusive possession of the room the key of that exclusive part could very easily be obtained from him.

28. In such a situation, the exclusive possession of Anil kumar or Birdichand of the room where all those articles were found cannot be accepted to have been proved beyond reasonable doubt.

28 A. Even otherwise other members of the family including women had also access in the alleged part in the occupation of Birdichand. Though a strong doubt is created against Birdichand and Anil kumar about their complicity in the crime except recovery of articles belonging to Sanjay kumar from the part of the house in the occupation of their family but the exclusive possession has not been proved with all certainty and, therefore, the case cannot be accepted to have been proved

beyond reasonable doubt.

29. It is an established principle of law that in order to bring home the guilt of the accused on the basis of circumstantial evidence the chain of the same has to be proved in such a way that it leads to irresistible conclusion of guilt of accused. The chain of the circumstances should be so complete that the same is not only compatible with the hypothesis of the guilt of the accused, but it should be totally incompatible with the hypothesis of the innocence of the accused.

30. In our opinion, therefore, though we do not agree with the conclusion on certain facts, drawn by trial Judge, specially" the recovery of books, note books and other articles belonging to Sanjay, but in the absence of clear and cogent evidence about Birdichand and Anil kumar"s exclusive possession of the house, irresistible conclusion of guilt cannot be drawn.

31. While dealing with the cases of appeal against the acquittal this has always to be kept in mind that the trial Judge had the advantage of seeing the demeanour of the witness and unless inference of the trial Judge is wholly perverse or material evidence available has been rejected on flimsy and baseless grounds, the same ought not to be disturbed.

There is always a presumption of innocence in favour of the accused and the same is not weaken because of the pronouncement of acquittal of accused by the trial Court.

32. In our opinion, therefore, despite disagreement on certain conclusions of the trial Judge we are not convinced that the accused persons or any of them alone committed the ghastly crime of murder and they are, therefore, entitled for benefit of reasonable doubt. Their conduct may be suspicious, but that would not warrant the conviction specially in the background of pronouncement of acquittal by the trial Court. As a result, the appeal fails and is hereby dismissed.