

## APPELLATE CRIMINAL.

*Before D. Falshaw, C.J., and H. R. Khanna, J.*

MST. JITAN AND ANOTHER,—*Appellants.*

*versus*

THE STATE—*Respondents.*

Criminal Appeal No. 886 of 1963.

*Evidence Act (I of 1872)—S. 27—Statement leading to recovery made by one of the co-accused implicating both of them—Whether admissible against the other co-accused.*

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December. 15th.

*Held*, that a statement made by a co-accused under section 27 of the Evidence Act, 1872, while in police custody, implicating himself and the co-accused, is admissible against him but not against the co-accused. Section 27 does not sanction the letting in of the statement of one person made to a police officer, while in police custody, as evidence against another person.

*Appeal from the order of Shri S. C. Mital, Sessions Judge, Hissar, dated the 16th September, 1963, convicting the appellants.*

M. R. GUHIBAR, ADVOCATE, AND H. L. SARIN, SENIOR ADVOCATE, WITH MISS ASHA KOHLI, ADVOCATE, for the Appellants.

NARINDER SINGH, ADVOCATE, AND R. S. MONGIA, ADVOCATE, FOR ADVOCATE-GENERAL, for the Respondent.

### JUDGMENT

Khanna, J.

KHANNA, J.—This is an appeal by Shrimati Jitan, aged 30 years, and Ramji Lal, aged 35 years, who have been convicted by the learned Sessions Judge, Hissar, under section 302 read with section 34, and section 201 read with section 34, Indian Penal Code, for killing Govardhan deceased, aged about 8 or 9 years, and for causing disappearance of his dead body, and have been sentenced to undergo imprisonment for life on the former count and rigorous imprisonment for a period of five years on the latter count. The two sentences in the case of each accused have been ordered to run concurrently. Ramji Lal has also been ordered to pay a fine of Rs. 1,500 or in default to undergo rigorous imprisonment for a further period of two years. Out of the fine, if paid, Rs. 1,000 have been directed to be paid to Dana (P.W.) or his heirs.

The prosecution case is that Ramji Lal accused is a Jat of village Pilimandori. His wife died about seven years ago and he did not marry thereafter. Jitan accused is a Harijan widow of that village, her husband having died about the same time as did the wife of Ramji Lal accused. There is no male member in the family of Jitan and she lived in her house situate in Mohalla Harijan of her village along with her two minor daughters. Ramji Lal accused developed illicit connection with Jitan and thereafter started visiting her house in Mohalla Harijan openly. Dana (P.W.), father of Govardhan, deceased, is also Harijan and his house too is situated in Mohalla Harijan. Badamo, wife of Dana, objected to the visit of Ramji Lal to the house of Jitan and told Jitan about 5 or 7 days before the present occurrence that it did not look proper. Jitan consequently began to nurse grudge against the family of Badamo.

On 8th February, 1963, Dana went to the fields in the morning. His wife Badamo left for jungle to collect fuel-wood some time before noon leaving her son Govardhan deceased and her younger son to play at the house. At about 12 noon or 1 p.m. when Govardhan deceased was playing along with other children including Kamli. (P.W. 8) in the *chowk* in front of the house of Jitan, Jitan came there and took Govardhan deceased, inside her house saying that she would give him sugarcane. Ramji Lal accused was also present in Jitan's house at that time. Gopi, Chuni and Chawli (P.Ws.) saw Jitan accused taking Govardhan deceased inside her house. Badamo returned from the jungle after collecting fuel-wood in the afternoon, and found Govardhan deceased missing. When Dana returned from the fields later in the evening, Badamo told him that Govardhan was missing. Dana then went out in search of Govardhan and was told by Gopi and Chuni (P.Ws.) that they had seen Jitan accused taking Govardhan into her house, while Ramji Lal was standing in that house. Dana and Badamo then went to the house of Jitan and asked her if she had taken Govardhan inside her house as stated by Gopi and Chuni (P.Ws.). but Jitan replied that she did not know regarding the whereabouts of Govardhan. Dana then went to the house of Ramji Lal accused but the latter was not present in his house. Dana also went to the village Sarpanch and told him that Govardhan was missing and he suspected the two accused about that. As it had got very dark, the Sarpanch advised Dana to keep a watch at the house of Jitan. Next morning, Dana went to Police Station Fatehabad, at a distance of sixteen miles from the place of occurrence, and lodged there report Exhibit P.A., at 11 a.m. A case under section 364, Indian Penal Code, was then registered by S.I. Daya Chand (P.W. 13).

The Sub-Inspector, thereafter went to village Pilimandori along with Dana, and, in the presence of Shankar Sarpanch, Ganpat, Mukh Ram and Dana, the Sub-Inspector interrogated Jitan accused. Jitan then disclosed that she and Ramji Lal had buried the dead body of Govardhan in the courtyard of her house with a piece of cloth in his mouth and another piece of cloth round his neck. Her statement Exhibit P.C. was recorded by the Sub-Inspector. Jitan then took out the dead body of Govardhan deceased from

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the courtyard of her house. The mouth of Govardhan was gagged with a piece of cloth and a twisted cloth Exhibit P. 2 was found round the neck of the deceased. Recovery memo Exhibit P.D. was prepared. Kassi Exhibit P. 1 was found lying near the place of recovery and was taken into possession. The Sub-Inspector, after preparing the inquest report Exhibit P.F., sent the dead body for post-mortem examination to the mortuary in Hissar where post-mortem examination was performed by Dr. Hem Chand, Civil Surgeon on 10th February, 1963, at 5 p.m. The doctor found some abrasions on the neck, left cheek and the lips of the deceased, besides two contusion marks on his chest. Death, in the opinion of the doctor, was due to strangulation by twisting a cloth round the neck of the deceased, Ramji Lal accused was arrested on 11th February, 1963, and both the accused were thereafter challaned.

At the trial the plea of each of the two accused in their statements under section 342 of the Code of Criminal procedure was denial simpliciter. Jitan accused denied that she had any illicit connection with Ramji Lal or that Badamo had objected to their illicit intimacy. Jitan also denied having taken Govardhan deceased inside her house or having made any statement which led to the recovery of the dead body of the deceased from the courtyard of her house. According to Jitan, she was involved in this case because she was a poor widow, Ramji Lal accused likewise in his statement denied all the prosecution allegations. No evidence was produced in defence.

There can be no manner of doubt that Govardhan deceased was strangled to death. This is clear from the statement of Dr. Hem Chand, who performed the post-mortem examination on the body of the deceased. The prosecution case, that it was Jitan accused who was responsible for the death of the deceased and for causing disappearance of his dead body, is, in my opinion, well established. We have the evidence of Chawli (P.W. 4), Gopi (P.W. 9) and Chuni (P.W. 10) that on the day of occurrence at about 12 noon or 1 p.m. they saw Jitan accused taking Govardhan deceased inside her house. There is then the evidence of Kamli (P.W. 8), with whom the deceased was playing, to the same effect. It is also clear from their evidence that

the deceased was never seen thereafter. We have further the evidence of S. I. Daya Nand (P.W. 13), Dana (P.W. 2), Ganpat, Member, Panchayat (P.W. 11) and Mukh Ram, Member, Panchayat (P.W. 12), that after Dana had reported the matter to the police, S.I. Daya Nand interrogated Jitan accused at her house. Jitan accused then made a disclosure statement about her burying the dead body of the deceased in the courtyard of her house with a piece of cloth in his mouth and another cloth round his neck. Recovery was then effected of the dead body in that condition from that courtyard in pursuance of the above statement. I see no cogent ground to disbelieve the evidence adduced in this respect. Besides that, we have the evidence of Badamo (P.W.) about motive. According to Badamo she had protested about 5 or 7 days before the present occurrence to Jitan accused against the visits of Ramji Lal accused to her house. The above evidence, taken along with the absence of any explanation by Jitan as to how the dead body of the deceased, who had been strangled, was buried in the courtyard of her house after she had taken him there, in my opinion, clearly goes to show that Jitan accused was responsible for causing the death of Govardhan deceased, and for also causing disappearance of his dead body.

So far as Ramji Lal accused is concerned, though there is evidence of Chawli, Gopi and Chuni (P.Ws.) that he was present at the house of Jitan at the time she took Govardhan deceased inside her house, I find that there is no evidence to show as to how long thereafter Ramji Lal came out of that house. In the circumstances it cannot be said with certainty that Ramji Lal was present inside the house when the deceased was strangled to death. The other piece of evidence on which the learned Sessions Judge has placed reliance against Ramji Lal, is the statement of Jitan that she and Ramji Lal had buried the dead body of the deceased in the courtyard. So far as the part of Jitan's statement is concerned that Ramji Lal had joined Jitan accused in burying the dead body, I am of the view that this part of the statement is not admissible under section 27 of the Evidence Act against Ramji Lal. The learned Sessions Judge in arriving at the conclusion that the disclosure statement of Jitan could also be used against Ramji Lal has relied upon Full Bench case of *Athappa Gaundan v. Emperor* (1). The

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(1) A.I.R., 1937, Mad., 618.

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above Full Bench case was, however, over-ruled by their Lordships of the Privy Council in *Pulukuri Kottaya and others v. Emperor* (2). A case practically on all fours is a Division Bench case reported in *Mathur Dhana v. State* (3), the relevant head-note of which reads as under :—

“Where the appellant made a statement in the presence of the panches that he and his brothers had buried the dead body and that he would point it out and the dead body was discovered from his field, the appellant himself joining in the digging, the statement so far as he involved himself, would be clearly admissible, though so far as the appellant involved his brothers, the statement would not be admissible.”

A similar view was taken by a Division Bench of Calcutta High Court in *Satish Chandra Seal and others v. Emperor* (4), Das J., as he then was and who wrote that judgment, observed that section 27 of the Evidence Act does not sanction the letting in of the statement of one person made to a police officer, while in police custody, as evidence against another person. I am, therefore, of the view that the learned Sessions Judge was in error in using the disclosure statement of Jitan against Ramji Lal accused.

It is no doubt true that on the material on record there arises a suspicion about the complicity of Ramji Lal accused, but it is well settled that suspicion, however strong, cannot take the place of positive proof. Ramji Lal's conviction must consequently be set aside. I, accordingly, accept the appeal of Ramji Lal, set aside his conviction and acquit him.

In view of the acquittal of Ramji Lal, Jitan's conviction is altered to that under sections 302 and 201, Indian Penal Code. As ordered by the learned Sessions Judge, she should undergo imprisonment for life on the former count and sentence of rigorous imprisonment for a period of five years on the latter count. the two sentences to run concurrently.

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D. FALSHAW, C.J.—I agree.

B.R.T.

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- (2) A.I.R. 1947, P.C., 67.  
(3) A.I.R., 1956, Bom., 393.  
(4) A.I.R., 1945, Cal., 137.