

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 545 of 2012**

- Haneef Khan S/o Rafique Aged About 20 Years R/o Village - Jhalmala, P.S. Sipat Distt. Bilaspur Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through : Police Station Simga, Distt. Raipur Chhattisgarh

---- Respondent

And**CRA No. 717 Of 2012**

- Sarkar Ali @ Dilawar Ali S/o Darbar Ali Aged About 22 Years R/o Jhalmala , P.S. Seepat, Distt. Bilaspur C.G.

---- Appellant

Vs

- State Of Chhattisgarh . S/o Through - The Incharge Arakshi Kendra Simga, Distt. Raipur C.G.

---- Respondent

For appellant in Cr.A. No. 545/2012	: Ms. Fouzia Mirza, Advocate
For appellant in Cr.A. No. 717/2012	: Mr. Gautam Khetrapal, Advocate
For Respondent/State	: Mr. Vivek Sharma, Govt. Advocate

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Chandra Bhushan Bajpai

Judgment**Per Chandra Bhushan Bajpai, J****17/11/2015**

1. By this judgment, Criminal Appeal No. 545/2012 and Criminal Appeal No. 717/2012 are being disposed of jointly.
2. Both these appeals arise out of judgment of conviction and order of sentence dated 30-6-2012 passed by the Additional Sessions Judge, Bhatapara, Distt. Raipur in S.T. No.18/2009 convicting both the accused/appellants under Sections 302 and 397 of the Indian Penal Code (in brevity 'IPC') and sentencing both of them to undergo life imprisonment

on two counts and to pay fine of of Rs. 100/- + Rs. 100/- under Section 302, IPC and to undergo RI for 7 years with fine of Rs. 100/- under Section 397 of the IPC with default stipulation. All the sentences are directed to run concurrently.

3. Brief facts of the case are that on 17-11-2008, Santosh, the driver and Deepak, the cleaner of truck bearing regd. No. CG 04 ZC 0657 along with iron rod proceeded from Raipur to Bankimongra and did not reach to their destination i.e. Bankimongra. On 21-11-2008 an unidentified body of a male aged about 30 to 32 years was noticed about 5.30 am at the field of K.D. Lal Isai near road at village Dhekuna. The matter was reported to Simga police by Mansingh Sahu (P.W. 3), police registered merg at 7.15 pm and after giving notice to witnesses, conducted inquest and prepared document Ex. P-3. Police also seized from pocket of full pant of unidentified deceased a purse containing a driving licence of Santosh, son of Kanhaiya, address Dafai No. 1, PO Bhairavtal, PS Bankimongra, Distt. Korba, one small note book in which phone number was mentioned in a piece of paper, regdn. no. CG 04 ZC 0657 and one card mentioning Manesh Motors, Bilaspur Road, near Mahamaya Petrol Pump, Ratanpur, proprietor Rajesh Agrawal 9425548294-RMO 9425546554 etc., 5 notes of Rs. 100/- denomination were kept. Police made seizure vide Ex. P-4. During investigation, police also seized blood stained soil and plain soil from the spot vide seizure memo Ex. P-6. The dead body was sent to C.H.C., Simga. As the body already got decomposed, doctor referred the body to Medical College Hospital, Raipur for post mortem. P.W. 25 Dr. S. N. Manjhi conducted post mortem on the body which was later identified as body of Santosh Sahis vide identification memo Ex. P-17. Autopsy surgeon opined that the death was due to strangulation by ligature, duration of death within 17 to 20 hrs. prior to examination. Death was homicidal in nature.
4. On 29-11-2008, another unidentified dead body was noticed at village Damakheda Kanhar Khar in the field of Kabir Ashram. P.W. 1 Lakhanlal informed Simga police who in turn registered merg Ex. P-1 after notice to witnesses, prepared inquest on dead body vide Ex. P-8. On 30-11-2008, the dead body was identified as of Deepak Sahis vide identification memo Ex. P-18. Police seized one handkerchief, piece of towel and one nylon rope. Piece of shirt and hairs of the deceased vide seizure memo Ex. P-16 were seized. The dead body of Deepak Sahis was sent for post mortem. P.W. 25 Dr. S.N. Manjhi conducted post mortem and opined that cause of death could not be determined as the body already got decomposed. As per

autopsy surgeon, age of the deceased was 19 years. The truck was seized from one Naresh Agrawal. During investigation, appellant Sarkar Ali was taken into custody. On the basis of disclosure statement Ex. P-10, police seized 5 bundle TMT 10 mm bar of Goel company weighing 4 quintals 85 kg. from co-accused Hussain and prepared seizure memo Ex. P-11. Police also seized 2 bundle Goel TMT bar of 8 mm weighing 2 quintals, Goel TMT bar 10 mm 5 bundles weighing 5 quintals vide Ex. P-13 from co-accused Sheikh Ahmad. Police also seized vide Ex. P-12 a black colour Motorola mobile model – C-261 bearing SIM 9827897182 EMI No. 359416002195020 from Hanif Khan vide Ex. P-12. Haneef gave disclosure statement vide Ex. P-16 and at his instance, one more mobile of Nokia company was seized from accused Sarkar Ali vide seizure memo Ex. P-14. Police also seized cash of Rs. 5,000/-, two mobiles of Nokia company models 5200 and 1208 from Niyaz Ahmed. Cash amount of Rs. 5,000/- was given to Niyaz Ahmed by the appellant Sarkar Ali. Police recorded statement of witnesses under Section 161 of the Code of Criminal Procedure (in brevity 'Cr.P.C.'). After completion of investigation charge sheet was filed before the Judicial Magistrate First Class, Simga, who in turn committed the case to the court of Sessions, Raipur. Learned Additional Sessions Judge, Bhatapara received the case on transfer for trial.

5. Charge sheet was filed against 5 accused. Other three are absconding. The Trial Judge framed charges under Sections 302 and 397 of IPC against the accused/appellants. Both the appellants denied the charges and prayed for trial.
6. So as to hold the present accused/appellants guilty, the prosecution examined as many as 31 witnesses. Statements of both the appellants were recorded under Section 313 of the Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case and pleaded innocence and false implication in the crime in question.
7. The trial Court after hearing respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellants as mentioned in para 1 of this judgment.
8. Learned counsel for the appellants contended that there is no eye-witness in the case. Prosecution's case is based on circumstantial evidence i.e. memorandum of appellants and seizure on the basis of disclosure statement given by both the appellants. Witnesses of disclosure statements and seizure are P.W. 10 Santosh Sen and P.W. 18 Vikas Sahis. P.W. 10 is brother-in-law of deceased Santosh and P.W. 18 is brother-in-law of

deceased Deepak. Though they supported the memorandum and seizure but the appellants have been convicted on the basis of circumstantial evidence. The circumstantial evidence is not such as it can be made the basis of conviction of the accused appellants. In the present case, as per P.W. 14 Raju Sahu he had sold Motorola mobile model C-220 to PW 10 Santosh Sen who purchased the same for deceased Santosh Sahis but on the contrary the Motorola mobile seized from appellant Hanif is of model C-261. Hence prosecution failed to prove that mobile sold to P.W. 10 Santosh Sen for deceased Santosh Sahis is the same mobile which was recovered from appellant Haneef Khan.

9. It is submitted that P.W. 8 Balram Maurya, insurance advisor has deposed that as per information, only 1.5 ton bar was stolen from the truck, on the other hand, TMT bar seized at the instance of disclosure statement of fact is 11.85 quintals. It goes to show that there is huge difference noticed after recovery of truck with remaining bar. Learned counsel for the appellants further submitted that if for the sake of argument, entire memorandum and seizure are taken into consideration, even then there is nothing to connect the appellant with the murder of deceased Santosh Sahis and Deepak Sahis. No call detail is duly proved as required. In absence of any circumstantial evidence which could connect the appellants with the crime, conviction is without any foundation.
10. On the other hand, learned counsel for the State supported the impugned judgment and submitted that conviction of appellants is strictly in accordance with law and there is no infirmity in the findings recorded by the trial Court.
11. We have heard learned counsel for the parties and perused the material available on record.
12. P.W. 1 Lakhan Lal Kotwar has deposed that he saw an unidentified body on 29-11-2008 and reported the matter to the police. The dead body was later identified as of Deepak. At the instance of this witness, merg was registered. P.W. 2 Manharan Sahu is the witness of summons of inquest Ex. P-3. P.W. 3 Mansingh Sahu is the witness of merg intimation Ex. P-5 regarding the information that a dead body was lying in the field. He is also witness of seizure memo Ex. P-6 and the purse recovered from full pant of deceased Santosh. P.W. 4 Anil Masih, P.W. 5 Tek Singh and P.W. 6 Santan Das are witnesses of inquest Ex. P-3. P.W. 7 Narendra Mishra is witness of inquest Ex. P-8. P.W. 8 Balram Maurya, insurance advisor, is witness of the fact that both the deceased were driver and cleaner of vehicle No. CG 04 ZC 0657

and they after taking bar in the truck had proceeded to Raipur and when the deceased were not traceable then he along with others went for their search. He is also witness of seizure memo Ex. P-9. P.W. 9 Ramdayal is witness of seizure of blood stained and plain soil from the spot. P.W. 10 Santosh Sen and P.W. 18 are witnesses of memorandum of both the appellants and property seized at the instance of disclosure statements. Both the witnesses are brother-in-law of both the deceased. They supported the documents Ex. P-10 to Ex. P-15. P.W. 11 Gyani Das is witness of inquest Ex. P-8 and he admitted his signature on seizure memo Ex. P-16 though not supported seizure. P.W. 12 Kanhaiyalal, father of deceased Santosh Sahis identified his signature in the identification memo Ex. P-17 and also identified decomposed body of deceased Deepak and admitted his signature on Ex. P-18. P.W. 13 Santosh Manikpuri is also witness of inquest Ex. P-8 and the notice Ex. P-7. He admitted his signature on seizure memo Ex. P-16 though denied seizure. P.W. 14 Raju Sahu has deposed that he sold his Motorola mobile model C-220 to P.W. 10 Santosh Sen for his brother-in-law. P.W. 15 Tulsidas is witness of seizure memo Ex. P-9. P.W. 16 Umesh Kumar is also witness of notice Ex. P-7 and inquest Ex. P-8. P.W. 17 Ramesh Sagar is father of deceased Deepak. He identified belongings of deceased Deepak and his nephew Santosh. P.W. 19 Niyaj Ahmed has turned hostile and has not supported prosecution case. P.W. 20 M.L. Diwakar Patwari has prepared spot map Ex. P-20 and also prepared spot inspection report Ex. P-19. P.W. 21 Mukesh Shukla, Patwari, also prepared spot map Ex. P-23. P.W. 22 Ravi Kaushik has turned hostile and has not supported prosecution case. P.W. 23 Dogendra Verma, constable took dead body for post mortem. P.W. 24 Gangaram, son of Baburam Sagar is witness of identification memo Ex. P-18. P.W. 25 Dr. S.N. Manjhi conducted autopsy of deceased Santosh and Deepak. P.W. 26 Gangaram, son of Rujharam Satnami gave information Ex. P-28. P.W. 27 Teerath Das also took the dead body for post mortem to Medical College Hospital, Raipur. P.W. 28 Gurinder Jeet is agent of the vehicle. As per him, deceased Santosh was his driver and Deepak was cleaner in the truck. He got the truck loaded with TMT Bar and both the deceased left for Bankimongra from Raipur and thereafter they were not traceable. P.W. 29 Pawan Kumar Verma, Constable went to collect post mortem report to Medical College Hospital, Raipur. P.W. 30 S.D. Sahu, sub-inspector and P.W. 31 A.K. Khan conducted investigation and supported the prosecution case.

13. As regards the complicity of the appellants in crime in question, conviction of

the appellants is substantially based on circumstantial evidence. In case of conviction based on circumstantial evidence, as held by the Supreme Court in the matter of **Kusuma Ankama Rao v. State of A.P**¹, the prosecution is under obligation to satisfy the following tests:

- the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established.
- The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that accused is guilty;
- the circumstances should be of a conclusive nature and tendency;
- they should exclude every possible hypothesis except the one to be proved; and
- there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

14. A minute examination of entire evidence makes it clear that there is no eye-witness in the case. Case of the prosecution is solely based on circumstantial evidence i.e. memorandum of seizure at the instance of both the appellants. So far as seizure of Motorola mobile from appellant Haneef Khan is concerned, there is difference in model number. Also there is nothing to connect appellant Haneef with the seizure of any such mobile in possession of deceased Santosh prior to his death. No call detail is duly proved as required as to connect the appellant with the crime.
15. So far as seizure of TMT bar from the co-accused is concerned, there is no evidence as to how much TMT bar was less than the bilty and even otherwise there is significant difference in the quantity as deposed by P.W. 8 Balram Maurya. Further the seizure of TMT bar in no way connects the present appellants with the crime. Besides this, there is no such circumstantial evidence which could connect the appellants with the crime. We are of the considered view that the prosecution has utterly failed to prove the circumstances against the appellants. On the basis of the evidence adduced, the appellants cannot be held guilty for murder of deceased Deepak and Santosh and loot of TMT bar, mobiles and cash from

1 2008 AIR SCW 4669,

them. Prosecution has failed to prove any circumstance by which the appellants can be held guilty for the offence.

16. Consequently, the appeals filed by both the appellants are allowed. Conviction and sentenced passed against both the appellants are set aside. They are in jail. They be set at liberty forthwith, if not required in any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Chandra Bhushan Bajpai)
Judge