

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 230 of 2010**

1. Nand Kumar Sahu, S/O Dashrath Lal Sahu, aged about 36 years, R/O Subhash Nagar, Dhamatari At Present R/O Dhobi Chowk, Tikrapara, Dhamtari, Police Station & Distt. Dhamtari (CG)

---- Appellant

Versus

1. State Of Chhattisgarh, through Police Station – Dhamtari, District – Dhamtari (Chhattisgarh)

---- Respondent

For Appellant	:	Mr. Dharmesh Shrivastava, Advocate
For Respondent/State	:	Mr. Roshan Dubey, P.L.

Hon'ble Shri Justice T. P. Sharma
Hon'ble Shri Justice Inder Singh Uboweja

Judgement**12/03/2015****Per T.P.Sharma, J.**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 24.02.2010 passed by the Additional Sessions Judge (F.T.C.), Dhamtari, in Sessions Trial No. 46/2009 whereby and whereunder after holding the appellant guilty for causing homicidal death amounting to murder of Lalita Nirmalkar, the trial Court convicted the appellant under Section 302 of the I.P.C. and sentenced him to life imprisonment with fine of Rs.1000/- and in default to undergo additional RI for one month.

2. Conviction of the appellant is impugned on the ground that without there being any iota of evidence, the Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per case of the prosecution, the appellant was having illicit relation with deceased – Lalita Nirmalkar. On 28.07.2009, deceased Lalita Nirmalkar went along with present appellant from Dhamtari towards Bastar Road by motorcycle. On second day, i.e., 29.07.2009 at about 8.15 am, her dead body was found near Kanta Pond. P.W.14 Mindhura @ Punau Ram went to Police Station Dhamtari and lodged F.I.R. vide Ex.P.17 and merger was recorded vide Ex.P. 16.

4. Investigating Officer left for scene of occurrence and after summoning witnesses vide Ex.P.4, inquest over the dead body was prepared vide Ex.P.5. Photograph of the dead body was taken and it was identified as dead body of deceased Lalita Nirmalkar vide Ex.P.1. Dead body was sent for autopsy to District Hospital vide Ex.P.11A. Team of Doctors consisting Dr.S. Wankhede and Dr. Smt. Asha Tripathi conducted autopsy vide Ex.P. 11 and found following injuries:

- I. Incised wound on chest of 5 x 2 x 5 cm.
- II. Incised wound on mid chest of 3 x 1 x 1 cm.
- III. Incised wound on right mandible of 5 x 1 x ½ cm.
- IV. Three abrasions over right side of neck of 8 x ½ cm, 11 x ½ cm and 8 x 1 cm respectively.
- V. Abrasion on left lower lip of ½ x 1 cm. Abrasion on right forearm of 2 x 2 ½ cm.
- VI. Incised wound on right upper arm of 8 x 2 ½ x 3 cm.
- VII. Abrasion on right elbow of 8 x ½ cm.
- VIII. Right hand thumb was cut off of 2 x ½ x 2 cm.

Mode of death was shock.

5. One currency note of Rs.100/-, pair of sandals (Chappals) stained with mud, necklace (artificial), one Tabeez and one knife were seized from the spot vide Ex.P.14. Bloodstained and plain soils, blade stained with blood, towel stained with blood, ladies underwear and handkerchief were seized from the spot vide Ex.P.15. Spot map was prepared vide Ex.P.19. One motorcycle used by the appellant was

seized vide Ex.P.6.

6. Appellant was taken into custody. He made disclosure statement of cloth stained with blood vide Ex.P.8. The same was recovered at his instance vide Ex.P.9. Seized articles were sent for chemical examination to F.S.L. vide Ex.P.21 and vide report Ex.P.22 blood found over the articles seized from the spot and from the cloth of the appellant was confirmed.

7. Statements of the witnesses were recorded under Section 161 of the Code of the Code of Criminal Procedure, 1973 (for short 'the Code').

8. After completion of investigation, charge sheet was filed before the Chief Judicial Magistrate, Dhamtari, who in turn committed the case the Court of Sessions Judge, Dhamtari. Learned Additional Sessions Judge (F.T.C.), Dhamtari, received the case on transfer for trial.

9. In order to prove the guilt of the appellant, prosecution examined as many as 15 witnesses. Accused person was examined under Section 313 of the Code, in which, he denied the circumstances appearing against him and innocence and false implication was claimed.

10. After providing an opportunity of hearing to the parties, learned Special Judge has convicted and sentenced the appellant as aforementioned.

11. We have heard learned counsel for the parties and perused the judgment impugned and record of Court below.

12. Mr. Dharmesh Shrivastava, learned counsel for the appellant, vehemently argued that conviction of the appellant is substantially based on the evidence of P.W.8 Gopiram relating to last seen theory, which does not inspire confidence and trustworthy. The evidence of last seen alone is not sufficient for basing conviction. Even he was not in a position to identify the appellant and deceased on account of

darkness. Except the evidence of P.W.8 Gopiram, the prosecution has failed to collect any other evidence to connect the appellant's involvement in crime in question. He further submits that in case of circumstantial evidence prosecution is required to prove the fact that the appellant was only author of the crime and none else and also to prove the possibility to exclude the innocence.

Learned counsel placed reliance in the matter of ***Dhaniya Bai vs. State of M.P., 2013 (5) M.P.H.T. 273 (DB)***, in which, High Court of Madhya Pradesh held that in absence of proof strangulation, the appellant was not under obligation to offer any explanation in terms of Section 106 of the Evidence Act. He further relied upon a judgment rendered by this Court in the matter of ***Sanni @ Satyanarayan vs. State of Madhya Pradesh, 2011 (2) M.P.H.T. 30 (C.G.)***, in which, Division Bench held that in absence of eye witness and conviction based on circumstantial evidence, abscondence of the appellant by itself is not strong circumstance. He also placed reliance in the matter of ***Somnath and another vs. State of M.P., 2012 (2) M.P.H.T. 1 (CG)***, in which, Division Bench of this Court held that in absence of any incriminating and admissible evidence against the appellants, conviction of the appellants is not sustainable under the law.

13. Per contra, Mr. Roshan Dubey, learned counsel for the State, opposed the appeal vehemently and made submission that as per evidence of P.W.1 Krishna Nirmalkar, father of deceased and P.W.8 Gopiram, the appellant was having illicit relation with deceased, even deceased was residing with the appellant during subsistence of her marriage at village Nawagaon for long time. On the date of incident, deceased was in active control of the appellant and appellant has taken her towards Bastar Road by motorcycle. Thereafter, she was not found alive. There was a dispute between the appellant and P.W.1 Krishna Nirmalkar, father of deceased, relating to such relation which led commission of offence.

14. In order to appreciate the arguments advanced on behalf of the parties, we

have to examine the evidence adduced on behalf of the prosecution. In the present case, homicidal death as a result of fatal injuries found over the vital parts of the body of Lalita Nirmalkar has not been substantially disputed on behalf of the appellant, but, on the other hand established by the evidence of P.W.1 Krishna Nirmalkar, P.W.2 Sunita Nirmalkar, P.W.5 Ajay Nirmalkar, P.W.6 Balaram Nirmalkar, F.I.R. Ex.P.17, P.W. 12 Dr. S. Wankhede and autopsy report Ex.P.11. Death of deceased was homicidal in nature.

15. As regards complicity of the appellant in crime in question, conviction of the appellant is substantially based on the evidence of P.W.8 Gopiram. In the present case, prosecution has failed to adduce any evidence of eye witness, but collected other evidence proving the chain of circumstances to connect the appellant in crime in question. Conviction of the appellant is based on circumstantial evidence and in case of conviction based on circumstantial evidence as held in the case of ***Kusuma Ankama Rao vs. State of A.P., 2008 AIR SCW 4669***, the prosecution is required to satisfy the following circumstances:

1. 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;
2. 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 the accused is guilty;
3. the circumstances should be of a conclusive nature and tendency;
4. they should exclude every possible hypothesis except the one to be proved; and
5. 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.

16. In the present case, prosecution examined P.W.8 Gopiram to prove the factum of last seen theory. Prosecution also examined P.W.7 Chandrahash to show that the appellant has taken motorcycle from him at 8.00 am and has returned the same at 10.30 pm on the date of incident. The prosecution further examined P.W.1 Krishna Nirmalkar, father of deceased – Lalita Nirmalkar to establish the illicit relationship of the appellant with deceased. As per unchallenged evidence of P.W.1 Krishna Nirmalkar, the appellant was having illicit relations with deceased. Even as per para 12 of his evidence deceased was residing with the appellant for long time at village Nawagaon. In para 13 he has further deposed that deceased entered into compromise with her husband before the Family Court, Dhamtari, thereafter her husband left her on way and came to the house of this witness and had to wait for her till 9 pm in the house of P.W.1 Krishna Nirmalkar but she did not come. P.W.8 Gopiram has specifically deposed that on 28.07.2009 at about 7.00 pm he went to Jodhapur Petrol Pump at Dhamtari to fill petrol in the tank of his motorcycle, where he saw that the appellant was going along with deceased by motorcycle towards Bastar road. On second day, he came to know about the death of deceased. Defence has cross-examined this witness at length and in his cross-examination, he has admitted that there is divider between the road. He further deposed that he did notice the colour of motorcycle and its registration number. He admitted that at that time when he saw the appellant there was darkness and he has seen the appellant going on at the distance of about 30 – 40 meters away. He also admitted that deceased was sitting on the motorcycle keeping her legs on one side but he has seen her back. He also admitted that deceased used to tie *Rakhi* to this witness. His detailed evidence reveals that although there was darkness but he had witnessed the appellant going on motorcycle towards Bastar road along with deceased. Nothing was suggested to say that the appellant has taken the deceased by motorcycle. This evidence shows that P.W.8 Gopiram has not only seen deceased along with appellant, inter alia, deceased was under active control of the appellant at about 7.00 pm at night. On second day morning, her dead body was noticed. As per evidence of P.W.7

Chandrasah, appellant has returned his motorcycle at 10.30 pm which shows that deceased was with the appellant before 10.00 pm on 28.07.2009.

17. In the aforesaid facts and circumstances of the case, heavy burden to explain that when he set free the deceased was upon the appellant but he failed to offer any such explanation. Evidence of P.W.1 Krishna Nirmalkar shows that there was strained relationship between deceased and her husband, which was also a great advantageous for the appellant. In absence of any explanation on behalf of the appellant as to when he set free the deceased and how the deceased came to be dead, that too, while she was under his control, the only inference is possible that the appellant was author of the crime and none other else.

18. As held in the case of ***Dhaniya Bai vs. State of M.P., 2013 (5) M.P.H.T. 273 (DB)***, in which, High Court of Madhya Pradesh held that in absence of proof strangulation, the appellant was not under obligation to offer any explanation in terms of Section 106 of the Evidence Act, but, in the present case homicidal death of deceased is not in disputed. As held in the matter of ***Sanni @ Satyanarayan vs. State of Madhya Pradesh, 2011 (2) M.P.H.T. 30 (C.G.)***, in which, Division Bench held that in absence of eye witness and conviction based on circumstantial evidence, abscondence of the appellant by itself is not strong circumstance, in the present case, the appellant was not absconded, inter alia prosecution led evidence of last seen. As held in the matter of ***Somnath and another vs. State of M.P., 2012 (2) M.P.H.T. 1 (CG)***, in which, Division Bench of this Court held that in absence of any incriminating and admissible evidence against the appellants, conviction of the appellants is not sustainable under the law, in the present case, prosecution has collected sufficient circumstantial evidence and even after completing the chain of circumstances the prosecution proved the fact that the appellant was author of the crime and none else and therefore, excluded the possibility of innocence.

19. After appreciating the evidence available on record, the trial Court has not

committed any illegality in convicting and sentencing the appellant. On close scrutiny of the evidence, we also do not find any illegality in the judgment impugned warranting interference by this Court.

20. Consequently, this appeal, being devoid of merit, is liable to be and is hereby dismissed.

JUDGE

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