

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 135 of 2011

1. Gopal Ram S/o Shiv Kumar Sahu, aged about 19 years, R/o Gorakhpur
2. Manoj Sahu, S/o Konda @ Mansharam Sahu, aged about 22 years, R/o Village Gorakhpur
3. Taran Sahu S/o Shobhitram Sahu, aged about 21 years, R/o Gourmati,

All are resident of P.S. Sahaspur Lohara, Distt. Kabirdham (C.G.)

---- Appellants
(In Jail)

Versus

1. State of Chhattisgarh Through - P.S. Saja Distt. Durg (C.G.)

---- Respondent

and

CRA No. 155 of 2011

1. Nikhil @ Nikhilesh S/o Gyanchand Jain, aged about 21 years, R/o Jaistambh Chowk, Khamariya, P.S. Khamariya, District – Durg (C.G.)

---- Appellant

Versus

1. State of Chhattisgarh Through the Police Station Saja, Distt. Durg (C.G.)

---- Respondent

For Appellants in Cr.A. No. 135/2011 : Mr. Alok Nigam, Advocate.

For Appellant in Cr.A. No. 155/2011 : Mrs. Sofia Khan and
Mrs. Renu Kochar, Advocates

For Respondent / State : Mr. Mahesh Mishra, P.L.

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

C A V JUDGMENT

Passed on : 27/04/2015

Per I.S. Uboweja, J

1. Both the Criminal Appeal Nos.135 & 155 of 2011 directed against the common judgment of conviction and order of sentence dated 29.01.2011 passed by the Additional Sessions Judge, Bemetara in Sessions Trial No. 26/2009 are being disposed off by this common judgment.
2. These appeals are directed against the judgment of conviction and order of sentence dated 29.01.2011 passed by the Additional Sessions Judge, Bemetara in Sessions Trial No. 26/2009, whereby the appellants have been convicted and sentenced in the following manner with a direction to run the sentences concurrently :-

	Conviction	Sentence
Accused/Appellants in Cr.A.135/2011	U/s 302 read with Section 34 of the IPC	R.I. for Life and fine of Rs. 500/- in default of payment of fine additional R.I. for 2 months each.
	U/s 392 read with Section 34 of the IPC	R.I. for 10 years and fine of Rs. 500/- in default of payment of fine additional R.I. for 2 months each.
	U/s 120-B of the IPC	R.I. for Life and fine of Rs. 500/- in default of payment of fine additional R.I. for 2 months each.
	U/s 201 of the IPC	R.I. for 5 years and fine of Rs. 300/- in default of payment of fine additional R.I. for 1 month each.
Accused / Appellant in Cr.A. 155/2011	U/s 411 of the IPC	R.I. for 1 month and fine of Rs. 2,000/-, in default of payment of fine additional R.I. for 1 month.

3. The facts, briefly stated, are as under :-

3.1 Deceased namely, Mahesh Kumar, was working as a driver of vehicle TATA Ace bearing registration No. CG-04/JB/4217. On 20.05.2009 at about 12 noon, while the deceased was in the business of delivery of goods at Pandri market, Raipur, he met with Santosh Kumar Sahu (PW-4), owner of vehicle, then he was instructed to deliver the goods at Indigo Paint Company. On the same day, at about 2.00 p.m., he went to Gudhiyari and again the deceased informed Santosh Kumar Sahu (PW-4) that he met with one new party and at about 8.00 p.m. the deceased reported that he was taking dinner. When the deceased reached near Samta Garage, Pandri, then the two accused met with him for transporting Sofa set from Saja and fare was decided at Rs.1,200/- and at that time Vikash Patel (PW-5) was also present there. Vikash Patel (PW-5) and one accused seated in the vehicle of deceased and one other friend of accused was driving motor cycle and he followed the vehicle, near Pandri, Raipur. Vikash Patel (PW-5) and conductor of the vehicle left the vehicle, thereafter, the deceased came to his house and demanded meals. Since the dinner was not prepared, therefore, he took his vehicle and went away.

3.2 Three accused persons namely, Gopal Ram, Manoj Sahu and Taran Sahu prepared plan for robbery of Tata Ace vehicle, which was being driven by the deceased. They followed the

vehicle of the deceased by their motorcycle and when vehicle reached near village Harduva, at about 12.00 to 1.00 am at midnight they stopped the vehicle and murdered the deceased by strangulating with the help of rope and looted TATA Ace vehicle bearing No. CG-04/JB/4217, they also looted one mobile phone and cash Rs.70-80 from pocket of the deceased. Thereafter, they fled away with that looted Tata Ace vehicle. On 21.05.2009, when the vehicle was being driven by accused Gopal Ram then that vehicle met with accident at *Tipani* curve, Gopal Ram and some other persons were injured, thereafter, they left the vehicle and ran away.

3.3 When the deceased did not come to his house, then family members searched for him and thereafter, they lodged the missing report. Dead body of the deceased was found in a field near village Harduva. Dead body was identified by family members, thereafter, Merg (Ex.P-4) and Dehati Nalishi (Ex.P-31) were lodged. FIR was registered vide Ex.P-28. Spot map was prepared vide Ex.P-5. Patwari prepared spot map vide Ex.P-6. One black plastic chappal was seized from the spot vide Ex.P-11. Dead body of the deceased was sent for autopsy to Community Health Centre, Saja. Dr. Jyoti Dhruw (PW-23) conducted autopsy vide Ex.P-26 and found following injuries and symptoms :

- (i) Rigor mortis absent all over the body;
- (ii) Face swollen and bluish in colour;
- (iii) Both eyes were coming out;

- (iv) Conjunctiva was congested with reddish in colour;
- (v) Blood froth oozing from mouth and nostrils;
- (vi) One long nylon rope found over neck, shoulder and chest. Body was tied with rope;
- (vii) Ligature mark over neck below thyroid cartilage of 2 cm and two more ligature marks below first ligature mark;
- (viii) Abrasion near ligature mark;
- (ix) Hyoid and thyroid bone were fractured;
- (x) Contusion of 18 x 16 cm over chest;
- (xi) Fracture of 5th & 6th ribs on right side;
- (xii) Fracture on left side of 6th & 7th ribs;
- (xiii) 3rd contusion of 3 cm over left cheek;
- (xiv) Clotted blood present with cut marks.

Mode of death was asphyxia due to shock and death was homicidal in nature.

4. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'the Code'). After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Saja, who in turn committed the case to the Court of Sessions Judge, Durg, from where learned Additional Sessions Judge received the case on transfer for trial.
5. In order to prove the guilt of the accused/appellants, the prosecution has examined as many as thirty witnesses. Accused persons were examined under Section 313 of the Code, in which they denied the circumstances appearing against them and innocence and false implication in crime in question is claimed.

6. After providing opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellants as aforementioned.
7. We have heard learned counsel for the parties and perused the judgment impugned and record of trial Court.
8. Mr. Alok Nigam, learned counsel for the appellants in Cr.A. No. 135 of 2011, vehemently argued that evidence adduced on behalf of the prosecution is not sufficient to punish the appellants in crime in question. Conviction of the appellants is based on the circumstantial evidence, but the prosecution had failed to prove the complete chain of circumstances, sufficient for leading irresistible inference that only the appellants are the authors of crime in question and none else. In absence of such evidence, conviction and sentence of the appellants are not sustainable under the law. The appellants were not found in possession of looted vehicle. Articles seized have not been properly identified by the witnesses. Test Identification Parade (TIP) was not conducted according to law. There are material contradictions between the evidence and statements of the witnesses recorded previously.
9. Mrs. Sofia Khan and Mrs. Renu Kochar, learned counsel for the appellant - Nikhil in Cr.A. No. 155 of 2011, have vehemently argued that possession of mobile has not been properly proved.

IP number of the mobile was also not proved, therefore, appellant Nikhil is entitled to be acquitted from the charges.

10. On the other hand, learned State counsel opposed the appeal and submitted that the conviction of the appellants is based on the circumstantial evidence and the prosecution had proved the complete chain of circumstances sufficient for leading irresistible inference that the appellants are the author of crime in question and none else.
11. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.
12. In the present case, homicidal death of deceased – Mahesh Kumar as a result of fatal injuries found over the dead body has not been substantially disputed on behalf of the appellants, they have also not disputed that dead body was found near field of village Haduva. Even otherwise, it is also established from the evidence of Revti Bai (PW-1), Mahrim Bai (PW-2), Samokhan Baghel (PW-3), Santosh Kumar Sahu (PW-4), Vikash Patel (PW-5), Merg (Ex.P-4), Dehati Nalishi (Ex.P-31) FIR (Ex.P-28), Dr. Jyoti Dhruw (PW-23) and autopsy report (Ex.P-26) that the death of deceased – Mahesh Kumar was homicidal in nature.
13. As regards the complicity of the appellants in crime in question, the appellants were not known to the deceased and conviction is

based on the circumstantial evidence. In order to convict an accused on the basis of circumstantial evidence as held by the Supreme Court in ***Bodh Raj alias Bodha and others -Vs- State of Jammu and Kashmir***¹, that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are :

- 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 circumstance should be of 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.

14. Santosh Kumar Sahu (PW-4), the owner of vehicle TATA Ace bearing No. CG-04/JB/4217, has stated that deceased – Mahesh Kumar was driver of his vehicle and on unfortunate day he went to Saja for bringing some article which was booked by a party. When Mahesh Kumar was not returned from Saja, then he went to Saja with the advice of Pandri police. At Saja he saw the dead body of

¹ AIR 2002 SC 3164

Mahesh in Mortuary, he identified the dead body as Mahesh and disclosed this fact that booking for Saja was done before Vikash Patel (PW-5).

15. While dealing with the question of Test Identification Parade, the Supreme Court in the matter of **R. Shaji v. State of Kerala**² has held in para 33 that the evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. The identification parade is conducted by the police. The actual evidence regarding identification, is that which is given by the witnesses in court. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. Holding a test identification parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper direction.
16. In **Ramanbhai Naranbhai Patel and others v. State of Gujarat**³ in a case where identification of accused for the first time in court by eyewitnesses when they did not know him earlier and when no test identification parade had been held and such evidentiary

² AIR 2013 SC 651

³ (200) 1 SCC 358

value, although may be treated to be a weak nature, the Supreme Court has held that it is not totally irrelevant or inadmissible. Real credence of such evidence would depend upon the facts and circumstances of each case.

17. While dealing with the evidentiary value of TIP the Supreme Court further in the case of **Jayawant Dattatray Suryarao v. State of Maharashtra**⁴ has held in para 56 thus :

“56 We would also reiterate that substantive evidence of a witness is his evidence in Court. Identification parade is not primarily meant for the court but is meant for investigation purposes. It serves two purposes, namely, to enable the witness to satisfy that prisoner whom he suspects is really the one who was seen by him in connection with the commission of the crime and for satisfying the investigating authority that suspect is the real person whom the witness had seen in connection with the said occurrence. In case when the evidence is cogent, consistent and without any motive, it is no use to theoretically imagine that as the witness has seen the accused for few minutes it would be difficult for him to identify. It always depends upon one's capacity to recapitulate what he has seen earlier. Power of perception and memorising differs from man to man and also depends upon situation. Finally, appreciation of such evidence would depend upon the strength and trustworthiness of witness”.

18. In **Sampat Tatyada Shinde v. State of Maharashtra**⁵ the Supreme Court has held in para 16 as follows :

“16. The evidence of test identification is admissible under Section 9 of the Evidence Act; it is, at best, supporting evidence. It can be used only to corroborate the substantive evidence given by the witnesses in court regarding identification of the accused as the doer of the criminal act. The earlier identification made by the witnesses at the test

⁴ AIR 2002 SC 143

⁵ AIR 1974 SC 791

identification parade, by itself, has no independent value. Nor is test identification the only type of evidence that can be tendered to confirm the evidence of a witness regarding identification of the accused, in court, as the perpetrator of the crime. The identity of the culprit can be fixed by circumstantial evidence also.”

19. Vikash Patel (PW-5) stated that when he was booking his consignment for Dhamtari, at that time two persons came in red colour Bajaz company motorcycle, they booked Tata vehicle of deceased for bringing material from Saja, thereafter, he himself & one person seated with conductor in that vehicle and another person followed the running vehicle by motorcycle, which was being driven by the deceased, he left the vehicle near his office. Conductor of the vehicle also left that vehicle, then deceased went with his vehicle. He identified those two persons, who booked the Tata vehicle for Saja, in test identification parade at Saja. In his cross-examination, he admitted that identification was conducted in police station, it shows that this identification cannot be said that this was independent and free identification, but this witness has identified two accused persons in Court dock with touch to them. The two persons were accused Gopal Ram and Manoj Sahu, they were identified as they have booked Tata vehicle for Saja and one was seated with him in Tata vehicle and one another was following the Tata vehicle by driving the motorcycle. Defence has cross-examined this witness at length, but has not been able to elicit anything to discredit his testimony.

20. Faguram (PW-11) has stated that accused Gopal Ram brought Tata vehicle, he was along with accused Taran Sahu and three other persons, in which one Dakwar (PW-6) was also seated in that vehicle, vehicle was being driven by accused Gopal Ram, that vehicle was mishap two kilometres away from village Khamhariya.
21. Dakwar (PW-6) also stated that fact and substantially supported the evidence of Faguram (PW-11). This fact shows that which Tata Ace vehicle was being driven by deceased was occupied by accused persons and his friends and they were in possession of that vehicle.
22. Kamtibai (PW-12) has stated that accused Taran is his nephew, she identified three accused namely Gopal, Manoj and Taran, who were in custody and she has not identified accused Nikhil. According to her statement identified accused persons came to her house with small four wheel vehicle and they brought down one motor cycle from that vehicle and motorcycle was run away by accused Manoj. Hemu (PW-13) has also supported the evidence of Kamtibai (PW-12). Above evidence shows that accused Gopal, Manoj and Taran were using the vehicle which was being driven by deceased before his murder.
23. Kuntibai (PW-15) has stated that accused Gopal is her cousin, who is having red colour motorcycle. This fact was unchallenged

in her cross-examination. Ghanshyam (PW-16) has also corroborated the statement of Kuntibai (PW-15), it shows that accused Gopal was using the red colour motorcycle at the time of incident. Jhadu Singh (PW-30) proves by his evidence that Tata Ace vehicle bearing No. CG-04/JB/4217 was mishap near the village Tipani, and case was registered on 22.05.2009 in Crime No.30/2009 under Sections 279 and 337 of IPC. Above evidence shows that after murder of the deceased, his vehicle Tata Ace bearing No. CG-04/JB/4217 was in possession of accused Gopal, Manoj and Taran, thereafter, that vehicle was mishap near the village of Khamariya and Tipani.

24. Investigating Officer R.S.Sahu (PW-29) has deposed that accused Gopal Ram was taken into custody, he made disclosure statement Ex.P/14. He disclosed that co-accused Taran brought mobile of deceased and gave him and he sold out that motorola mobile in Khamariya. At his instance, that looted mobile was seized from other co-accused Nikhil by seizure memo Ex.P-17. Memorandum and seizure witness Devendra Sharma (PW-18) fully corroborated the statement of R.S. Sahu (PW-29).
25. Evidence led by the prosecution is sufficient for drawing an inference that accused Gopal Ram, Manoj and Taran have entered into conspiracy for committing murder and looting the articles in sharing common intention. Accused Gopal Ram and Manoj met with deceased and booked his vehicle for loading the

goods from Saja. They were in possession of that vehicle and near Khamhariya and Tipani village accused Gopal, Manoj and Taran have murdered the deceased Mahesh Kumar and looted his vehicle Tata Ace No.CG-04/JB/4217 and mobile of motorola company. Many persons have seen the Tata Ace vehicle in possession of accused Gopal, Manoj, and Taran, that vehicle was ultimately mishap near the village Khamhariya – Tipani. It is also clear by the evidence that looted motorola mobile of deceased was sold by accused Gopal Ram to other accused Nikhil, and accused Nikhil has purchased that looted mobile without any enquiry or proper paper, he knew this fact that he was taking and possessing the stolen article.

26. In the present case, accused Gopal Ram and accused Manoj were lastly seen with the deceased before his death and they have not offered any explanation that how they have departed from his company. Evidence available on record is sufficient to establish the fact that Tata Ace vehicle of the deceased was seen in possession of the appellants for which they have not offered any explanation, which is further sufficient to establish that especially the accused Gopal Ram, Manoj and Taran have committed robbery of the articles purchased by the deceased at the time of his death. Even otherwise, the appellants were under obligation to offer explain that how they came into possession and using of the Tata Ace vehicle, possessed by the deceased at the

time of his death. In case of the articles forming part of robbery with other offences like murder i.e. integral part of the same transaction, it may be presumed that the appellants in whose possession the articles have been seen and recovered after mishap of that vehicle in Crime Case No.30/2009 which was registered under Sections 279 and 337 of the IPC.

27. Accused Nikhil has also not given any explanation that why he has purchased looted and stolen mobile from the accused Gopal Ram, when he knew that that Mobile was stolen property.
28. On the basis of evidence adduced on behalf of the parties the trial Court has convicted and sentenced the appellants as aforementioned.
29. On close scrutiny of the evidence, we do not find any illegality and infirmity in the judgment impugned.
30. Consequently, Criminal Appeal No.135 of 2011 filed on behalf of appellants Gopal Ram, Manoj Sahu and Taran Sahu and another Criminal Appeal No.155 of 2011 filed on behalf of accused Nikhil are liable to be dismissed and are hereby dismissed.

(T.P.Sharma)
JUDGE

(I.S. Uboweja)
JUDGE