

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 2077 of 1999

1. Laxman S/o Gursay, aged about 28 years.
2. Santosh S/o Umendi Sahu, aged about 23 years.
3. Puneet S/o Nakchhed Sahu, aged about 23 years.
4. Vinod S/o Mahettar alias Kodhana, aged about 20 years.

All residents of Gram Limha, Thana Mungeli, District Bilaspur.

---- Appellants

Versus

State of Madhya Pradesh (now Chhattisgarh)

---- Respondent

For Appellants	:	Shri Surendra Singh, Senior Advocate along with Shri Neeraj Kumar Mehta, Advocate
For Respondent-State	:	Smt. Smita Ghai, Panel lawyer

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

C A V JUDGEMENT

Per P. Sam Koshy, Judge

01/02/2016

1. The Appellants in the present Appeal have challenged the judgment dated 13.07.99 passed by the Additional Sessions Judge, Mungeli, District Bilaspur in Sessions Trial No.192/96 convicting the Appellants under Sections 302/34 and 201/34 of IPC and sentencing them to undergo life imprisonment with fine of Rs.1,000/- u/s 302/34 and rigorous imprisonment for two years with fine of Rs.500/- u/s 201/34 with default stipulations.

2. As per the prosecution, a meeting of the village youths was held on 25.02.1996 for making collections for charitable reasons and in the said meeting Appellant No.1 Laxman was carrying a Tabal and the other Appellants had Lathi in their hands. Deceased Sanjay Sahu (hereinafter referred as 'the deceased') was also a member of the said meeting. After the meeting was over the

deceased did not reach his home. Next morning, the family members thought that he must have gone back to his workplace and therefore did not look for him. Since the deceased did not turn even after three days, his father Tiharu (PW-1) started enquiry. PW-1 approached PW-2 Aditya Mishra enquiring about his son and in turn PW-2 called upon his worker Thanuram (PW-11) to enquire whereabouts of the deceased and also asked him to enquire because the latter's brother Puneet Appellant No.3 was said to have been present in the meeting held on 25.02.1996. Later on, PW-11 came back and informed PW-2 that he was told by his brother i.e. Appellant no.3 about the incident and Appellant No.1 having murdered the deceased with a Tabal and the fact that out of fear Appellant No.3 had not disclosed it to anybody. Thereafter, a missing report was lodged at PS Mungeli on 28.02.1996 by PW-1. During the course of investigation, Appellants are said to have made memorandum statement that after the meeting was over on 25.02.1996 at around 11 p.m. they took the deceased on the pretext of purchasing some medicine towards the field of one Nathuram Sahu and near the Canal it is said that Appellant no.1 assaulted the deceased with Tabal and the other Appellants also with Lathi. Thereafter, the deceased was carried to the field of one Pramod Mishra where Appellant No.1 is said to have decapitated the head of the deceased and threw it under a tree in the field of one Dhirendra Mishra. It is said that the clothes of the deceased were buried in another field. All the Appellants then returned to their home and washed their clothes, Lathis and Tabal used for the assault. On the basis of memorandum statements recovery of Lathis and Tabal were made from the Appellants. Subsequently, the inquest was prepared by PW-20, the Investigating Officer marked Exhibit P-1 in presence of the witnesses. The body was sent for postmortem which was conducted by Dr. N. S. Chandel (PW-12) and R. Bhattacharya PW-14 A who gave the postmortem report Exhibit P-22. The doctors also suggested for getting the forensic report in respect of the same. The matter was subsequently registered as Crime No. 60/96 for the

offence under Sections 302, 201 and 34 IPC on 28.02.1996.

3. During the course of trial, the prosecution examined as many as 20 witnesses and the defence examined two witnesses. On the basis of the evidence, the trial Court vide impugned judgment dated 13.07.1999 found the Appellants to be guilty of the offence under Sections 302/34 and 201/34 of IPC and accordingly sentenced them under the said sections.

4. According to the counsel for the Appellants, the entire case of the prosecution is based on circumstantial evidence as there is no eye witness to the incident and that primarily the trial Court convicted the Appellants based on the alleged extra judicial confession made by Appellant No.3 Puneet in presence of PW-2 Aditya Mishra and PW-8 Bhagwat Vaishnav. In addition, the conviction is also based on the alleged recovery of the articles i.e. Chappal, clothes etc. belonging to the deceased at the instance of the Appellants. It was submitted that the statement of PW-2 Aditya Mishra regarding the admission made by Appellant No.3 in respect of the commission of the offence is inadmissible in as much as the same cannot be considered to be an extra judicial confession rather it is exculpatory for which he relied upon AIR 1998 SC 201 (Kalpnath Rai v. State (through CBI)).

5. According to the counsel for the Appellants, the prosecution has failed to prove the motive for the Appellants to kill the deceased. It was submitted that after the meeting was over on 25.02.1996, the Appellants were in company of the deceased has not been proved or established by the prosecution so as to invoke the last seen theory. Similarly, the conviction is also based upon the finding of the trial Court in respect of the alleged recovery of the clothes and Chappals belonging to the deceased whereas the prosecution has not been able to establish the fact that these articles recovered from the field in fact belonged to the deceased. Counsel for the Appellants raised serious doubt on the prosecution story in respect of the Chappals being buried in the ground and

submitted that if the trunk and head were lying separately in the open field so was the clothes of the deceased also then why would somebody hide the Chappals belonging to the deceased. In the absence of any conclusive evidence directly leading or attributing the commission of the offence by the Appellants except for the alleged confessional statement made by the Appellant No.3, the memorandum statement and subsequently recoveries made at the behest of the appellants, the chain of circumstances do not get complete the links in the commission of the offence by the Appellants as there are material factors missing interconnecting the links attached to the commissioning of the offence from the time the meeting was held on 25.02.1996 till the body was recovered on 28.02.1996. It was further submitted that though there is a FSL report stating that there were blood stains found on the Tabal recovered from Appellant No.1 yet there is no Serological report to prove it to be that of the deceased or the same to be human blood. In absence of which only on the ground that there were blood stains on the Tabal alone cannot lead to the conviction of the appellants. Thus, Counsel for the Appellants prayed for setting aside of the impugned judgment of conviction. He placed reliance on 2015 AIR SCW 5324 (Vijay Shankar v. State of Haryana) and 2007 (2) SCC 310 (Amitsingh Bhikamsingh Thakur v. State of Maharashtra) so far as the conviction based on recovery is concerned.

6. Per contra, State counsel submitted that admittedly it is a case where the conviction is solely based on circumstantial evidence. In the absence of any direct evidence if the circumstantial evidence which has been collected during the course of the investigation is taken into consideration collectively, the only inference that can be drawn is that of the Appellants alone to have committed the offence. According to the State counsel, Appellant No.3 has made an confessional statement based upon which the subsequent memorandum statements given by the other accused persons recoveries were made

particularly the blood stained Tabal from Appellant no.1 and blood stained clothes and a pair of Chappals buried underneath the earth which were dug out at the instance of the Appellants leads to the only conclusion that it was the Appellants alone who have committed the offence. So far as the motive is concerned, it is said that the deceased was having an affair with the wife of Appellant No.1 and for which reason the Appellants had conspired to eliminate him.

7. Having heard the arguments advanced by the counsel appearing on either side and on perusal of the records what is culled out from the finding of the trial Court as well as from the evidence which has come on record is that admittedly on 25.02.1996 there was a meeting of the village youths for taking a decision pertaining to collection of funds for charitable purpose. The meeting culminated at around 11 p.m. and then all the members gathered there disbursed and went to their respective homes.

8. The first alleged link leading to the commission of the offence was the statement of PW-2 Aditya Mishra. Since Appellant No.3 Punit was one of the members in the meeting held on 25.02.1996, PW-1, father of the deceased wanted PW-2 to ask his servant Thanuram (PW-11) who happens to be the brother of Appellant no.3 to enquire whereabouts of the deceased who was missing since 25.02.1996. PW-11 thereafter came and informed PW-2 that Appellant No.3 had told him about the incident. From the evidence of PW-2 it is evidently clear that Appellant No.3 Puneet had never made any statement voluntarily to PW-2. Whatever PW-2 was stating was based upon the statement of PW-11 who turned hostile and denied having been told anything by Appellant no.3. Hence, the statement of Appellant No.3 relied upon by the prosecution cannot be treated as an extra judicial confession. Rather it is an exculpatory statement which is otherwise not admissible under the provisions of the Evidence Act against co-accused.

9. So far as the last seen theory is concerned, on perusal of the statement of PW-9 Santram, PW-10 Virendra Kumar Sahu, PW-14 Manharanlal and PW-15A Raj Kumar Vaishnav it is evident that none of these witnesses have stated to have seen all the accused persons in company of the deceased after the meeting disbursed. Rather the witnesses go to prove the fact that all the persons gathered in the meeting had gone to their respective homes. None of these witnesses have stated to have seen the Appellants moving around along with the deceased on the night of 25.02.1996. Thus, the last seen theory is not conclusively established. The body was discovered three days later. The time gap cannot rule out the possibility of intervening circumstances, the benefit of which doubt has to be given to the accused. Therefore, the said evidence also cannot be taken as a link to the chain of circumstances upon which the conviction of the Appellants could have been made.

10. So far as the seizure made on the memorandum statement of the Appellants are concerned, the same is also not admissible under Section 25 of the Evidence Act. As per the legal position, the memorandum statement and the seizure is admissible to the extent of the recovery made at the behest of the accused persons. All that is admissible is the recovery of an article from a place of which the exclusive knowledge was with the accused alone and that it was not easily visible to a passerby or a bystander nor was it on an open place where there was access to the public at large. In the instant case, all these facts are missing except for the hidden pair of Chappals which are alleged to be of the deceased. This again is highly improbable story on behalf of the prosecution for the reason that except for the pair of Chappals, there was no other article found buried. If no other articles were buried, there was no reason why the accused persons buried only a pair of Chappals belonging to the deceased. The evidence, to the extent admissible under Section 27 of the Evidence Act is corroborative in nature and not substantive evidence by itself on

which conviction can be based.

11. So far as the discovery of articles in consequence of the information received from the accused is concerned, the Supreme Court in the case of *Amitsingh (Supra)* has held that the recovery of crime object on the basis of information given by accused only provides some link in the chain of circumstances and cannot exclusively be the foundation of the prosecution case. Only the portion of information which relates to the fact discovered is admissible and if the discovery is made from the open space, the confession so made cannot be of any consequence. Only that portion of information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

12. Similarly, the discovery of articles Exhibit P-8 would show that the pant, shirt and Banian of the deceased were recovered from the open field allegedly at the instance of the accused Appellants but there is no cogent evidence that these articles belonged to the deceased. No blood grouping was done. The only material in favour of the prosecution is the memorandum statement made before the Police Authorities which otherwise is not admissible under the law.

13. So far as the discovery under Section 27 of the Evidence Act is concerned it appears to be from open space. In that context the observations of the Supreme Court in *Anter Singh v. State of Rajasthan*¹ need to be noted. The Scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in *Pulukuri Kotayya v. King Emperor*² and in *Prabhoo v. State of U.P.*³.

14. Recently relying upon these two judgments the Supreme Court in *Amitsingh Bhikamsingh Thakur v. State of Maharashtra*⁴ in paragraphs 18, 19 & 20 held as under:

“18. At one time it was held that the expression “fact discovered” in

1 (2004) 10 SCC 657

2 (1946-47) 74 IA 65

3 AIR 1963 SC 1113

4 (2007) 2 SCC 310

the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Pulukuri Kotayya case and in Uday Bhan v. State of U.P.

19. The various requirements of the section can be summed up as follows:

(i) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(ii) The fact must have been discovered.

(iii) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(iv) The person giving the information must be accused of any offence.

(v) He must be in the custody of a police officer.

(vi) The discovery of a fact in consequence of information received from an accused in custody must be proved to.

(vii) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

20. As observed in Pulukuri Kotayya case it can seldom happen that information leading to the discovery of a fact forms the foundation of the prosecution case. It is one link in the chain of proof and the other links must be forged in manner allowed by law."

This view has further been reiterated by the Supreme Court in Vijay Shankar v. State of Haryana reported in 2015 SCW 5324.

15. Keeping in view the proposition of law laid down in the aforesaid judgments if we look into the memorandum statements of the accused persons and the recoveries made thereupon it would clearly reflect that the memorandum statement and the alleged seizure made thereafter cannot be said to be an admissible piece of evidence.

16. The prosecution case does not show that the dead body of the deceased was recovered at the behest of the accused persons. From the overall facts and circumstances of the case it clearly reflects that the entire conviction of the Appellants was based upon the alleged recovery of the articles recovered during

the course of investigation. The fact that the prosecution has not been able to prove its case on the motive makes it necessary for the prosecution to lead cogent evidence to prove its case that the Appellants have committed the said offence. The prosecution first has to establish the last seen theory for drawing an inference against the accused persons for giving a finding of guilt against them. Yet another factor relied by the Court below for convicting the Appellants is the alleged exculpatory statement of PW-2 who it is said to have been informed by PW-11 Thanuram of being informed by appellant No.3 about the commissioning of the offence and the presence of Appellant No.3 at the place and time of occurrence. The Supreme Court in the case of Kalpnath Rai (Supra) in paragraph-74 has held as under :

“74.It should be remembered that under Sections 25 and 26 of the Evidence Act no confession made by an accused to a police officer, or to any person while he was in police custody could be admitted in evidence, and under Section 162 of the Code no statement made by any person during investigation to a police officer could be used in a trial except for the purpose of contradiction.But it is well to remember that other confessions which are admissible even under the Evidence Act could be used as against a co-accused only upon satisfaction of certain conditions. Such conditions are stipulated in Section 30 of the Evidence Act.”

17. Like wise in paragraph-75 again it was categorically held that:-

“The first condition is that there should be a confession i.e. inculpatory statement. Any exculpatory admission is not usable for any purpose whatsoever as against a co-accused. The second condition is that the maker of the confession and the co-accused should necessarily have been tried jointly for the same offence. Third condition is that the confession made by one accused should affect himself as well as the co-accused. In other words, if the confession absolves himself from the offence but only involves the co-accused in the crime, while making the confession, such a confession cannot be used against the co-accused.”

18. It cannot be accepted that the Statement of PW-11 to be an extra judicial confession rather it is an exculpatory statement which would not be admissible to the extent of being taken as a prime factor for holding the guilt against the Appellants. Even otherwise, the law as it stands today and as has been settled by the Supreme Court is that the extra judicial confession by itself is a weak

piece of evidence and it has to be examined with great care and caution by the Court and it should also inspire sufficient confidence in addition to it being made voluntarily. The extra judicial confession must be supported by a chain of cogent circumstances corroborated by other prosecution evidence. For an extra judicial confession to confirm the basis of conviction it should not suffer from any material discrepancies and inherent probabilities.

19. In view of the above proposition of law laid down by the Supreme Court the statement of PW-2 firstly cannot be said to be an extra judicial confession and secondly the same is not admissible. Thus, reliance by the trial Court on this evidence of PW-2 for convicting the Appellants to that effect is bad in law.

20. So far as the circumstantial evidence is concerned, admittedly, the present case is based on circumstantial evidence. The circumstantial evidence is an evidence which is not direct but consists of evidences of various other facts which are so closely associated with the facts in issue that taken together they form a chain of circumstances from which the existence of the principle fact can be legally informed or presumed. In a case of circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. To prove the guilt of the accused by circumstantial evidence it is necessary to establish that the circumstances from which a conclusion is drawn should be fully proved, the circumstances should be conclusive in nature, all the facts so established should be consistent only with the hypothesis of the guilt and inconsistent with the innocence. The cumulative effect of the circumstances must be such as to negate the innocence of the accused and to bring home the offence beyond any reasonable doubt.

21. But in the instant case the prosecution has not been able to complete the chain of circumstances of proving the case of the prosecution beyond all reasonable doubts and therefore the conviction of the Appellants stands on a

weak footing as the alleged chain of circumstances is not sustainable in the eye of law. On the issue of circumstantial evidence, the Supreme Court in Vijay Shankar (supra) in Paragraph-7 has held as under:

“7. The normal principle is that in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

22. For establishing a case under circumstantial evidence the prosecution has to first prove the motive and the last seen theory and second the alleged extra judicial confession. In the instant case, the motive and the last seen theory have not been established at all. The prosecution has miserably failed to establish these two facts. In the absence of these two, the conviction solely based upon the alleged extra judicial confession would not even otherwise sustain as it is always considered to be a weak piece of evidence in the absence of any supporting evidence. For this reason also, the finding of the trial Court would not be sustainable.

23. Thus, the alleged extra judicial confession, if it considered to be so, is an inadmissible and exculpatory statement. Further, recovery of the articles alone would not by itself conclusively prove the presence of the accused persons at the place and time of incident nor does it give a strong, cogent and reliable evidence of the Appellants being in company with the deceased immediately before the incident or for that matter to establish the last seen theory. Further the chain of circumstances not being complete and there being broken links at regular intervals, the nature of evidence becomes shaky and it would be unsafe for convicting a person in the light of shaky nature of evidence adduced by the prosecution. The prosecution has failed in proving the chain of circumstances

so as to fasten the guilt of the accused leaving no room for doubt. The chain of circumstances consisting of various circumstances should be complete to form a chain pointing to the guilt of the accused and when such facts are proved, it must lead to the only inference of the guilt of the accused persons.

24. Thus, in the facts and circumstances of the case, the alleged exculpatory statement, the recovery of the articles and the extra judicial confession being inadmissible cannot be the basis of the conviction. Accordingly, the impugned judgment dated 13.07.1999 passed by the Additional Sessions Judge, Mungeli in Sessions Trial No. 192/96 is set aside. The Appellants are acquitted of the charges under Sections 302/34 and 201/34 of IPC. They are set at liberty subject to the conditions of Section 437A Cr.P.C.

25. The Appeal is allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE