

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 46 of 2004**

- Hira Lal son of Pandru Chik aged 30 years, resident of village Jamtoli Post Kolhenjhariya Police Station Fersabahal, Distt. Jashpur Chhattisgarh. **---- Appellant**

**Versus**

- State Of Chhattisgarh, Through S.O. Fersabahal. **--- Respondent**

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| For Appellant        | : | Shri Jagdish Singh Baraik, Advocate     |
| For Respondent/State | : | Shri Ashish Shukla, Government Advocate |

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**Hon'ble Shri Justice Prashant Kumar Mishra &  
Hon'ble Shri Justice Chandra Bhushan Bajpai**

**Judgment On Board by Prashant Kumar Mishra, J.****05/08/2016**

Appellant stands convicted under Section 302 of the I.P.C. for committing murder of deceased – Dhanpat Ram in between the period 14.03.2003 to 24.03.2003 and sentenced to life imprisonment with fine of Rs.1000/-.

2. The prosecution case, as emerging from the documents available on record, is that on 14<sup>th</sup> March, 2003, the appellant and the deceased had gone to village Aurijor to attend marriage in the house of one Tuleshwar. At this place, deceased Dhanpat Ram requested his sister Saraswati Bai to provide water. However, since water was not provided, the deceased slapped Saraswati Bai and was trying to run away from the place with his bag. Appellant tried to snatch the bag and in the process, the chain of the bag was broken. Appellant and the deceased thereafter

went to the house of one Baneshwar where they consumed liquor together and later on came to the house of the appellant at village Jamtoli. The appellant demanded money from the deceased for purchasing liquor, however, the deceased did not oblige, resulting in quarrel between them which further escalated wherein the appellant assaulted the deceased by means of hammer (*Kutasi*) and crowbar. The appellant thereafter took away the dead body on his shoulders and thrown it on the agricultural field near village Gajhiadih Sarna.

3. Ramsai (P.W.3) saw one dead body and suspected that it must be of the deceased Dhanpat Ram. He sent information in the village, on which, parents of the deceased came to the place and identified the dead body from his cloths. Thereafter, Karuram, father of the deceased lodged merg intimation Ex.P.12 at 10.00 AM on 25.03.2003 against unknown person.

4. During investigation, autopsy was carried by Dr. Sunil Kumar Xess (P.W.5), who found various injuries on the person of deceased over his parietal region carrying depressed fracture in right parietal bone. In his postmortem report Ex.P.6, he opined that the cause of death is head injury due to fracture of right parietal bone; mode of death coma; nature of death was homicidal and time since death approximately between 10 – 12 days. During further investigation, the prosecution recorded memorandum statement of the appellant on 01.04.2003 vide Ex.P.3 leading to recovery of the weapon of offence, i.e., hammer and crowbar vide Ex.P.4. The articles were sent for chemical examination, however, no report was submitted during the trial. F.I.R. was registered on 31.03.2003 vide Ex.P.15 against unknown person. After recording statement of other

witnesses, charge sheet was filed.

5. In the charge sheet filed against the appellant, 21 witnesses were named. In course of trial, the prosecution examined only 9 witnesses including Karu Ram (P.W.1), Sudarshan (P.W.2) and Ramsai (P.W.3).

6. The trial Court has convicted the appellant on the strength of evidence of last seen together and recovery of the weapon of offence on the memorandum statement of the appellant.

7. Shri J.S. Baraik, learned counsel for the appellant would submit that there is no cogent or reliable evidence on the aspect of last seen together and similarly mere recovery of weapon of offence on the memorandum statement of the appellant, may not be sufficient to convict the appellant in the absence of report of chemical examination.

8. Shri Ashish Shukla, learned State Counsel would support the impugned judgment by referring to the statement of witnesses, particularly, Karu Ram (P.W.1), Sudarshan (P.W.2) and Ramsai (P.W.3). He would submit that the appellant has not answered the question put to him in his examination under Section 313 of the Cr.P.C. to explain the circumstance of last seen together, therefore, his silence provides missing link and the appellant has rightly been convicted.

9. Before proceeding further to analyze the evidence available on record which the prosecution has adduced to bring home the charges against the appellant, it would be apt to refer to the settled legal position in respect of the nature of proof required to convict the accused in a case where the prosecution rests its case on circumstantial evidence.

10. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra**<sup>1</sup>, the Supreme Court has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-152 as under:

“152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in *Shivaji Sahebrao Bobade Vs. State of Maharashtra*, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and must be’ is long and divides vague conjectures from sure conclusions.”

(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.”

11. In the matter of **Sujit Biswas vs. State of Assam**<sup>2</sup> the Supreme

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1 AIR 1984 SC 1622

2 AIR 2013 SC 3817

Court held that suspicion, however, strong cannot take place of proof.

Para – 6 is relevant which reads as under :

“6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that ‘may be’ proved, and something that ‘will be proved’. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between ‘may be’ and ‘must be’ is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between ‘may be’ true and ‘must be’ true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between ‘may be’ true and ‘must be’ true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979)”.

12. In **Majendran Langeswaran vs. State (NCT of Delhi)**<sup>3</sup> the Supreme Court held that in a case of conviction based on circumstantial evidence, all circumstances must lead to conclusion that accused alone committed the crime and none else. Para – 21 is relevant which reads thus :-

“21. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down

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3 AIR 2013 SC 2790

by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else.”

13. It is thus fairly well settled that to sustain conviction on the evidence of last seen together, the chain of circumstantial evidence should be so complete to eliminate all other hypothesis of guilt except the conclusion that it is only the accused who could have committed the offence and none else. When considered on this touchstone, it is worth mention that Karuram (P.W.1) is not a witness of last seen together. He speaks about the company of the deceased with the appellant, on the information supplied by Baneshwar and one stationery shop owner. Therefore, it clearly appears that he has not seen the appellant and the deceased together. Similar is the state of evidence in respect of statement of Sudarshan (P.W.2). As a matter of fact, this witness has stated in para 3 of his examination-in-chief that after the quarrel in the house of Tuleshwar, the appellant and the deceased went on separate bicycles through different routes.

14. This leaves us to examine the only possible witness of last seen together, i.e., Ramsai (P.W.3). In his examination-in-chief, he would state that appellant had taken the deceased on his bicycle towards Jamtoli and thereafter the deceased did not return. However, in his cross-examination, he would state that when the appellant and the deceased were consuming liquor in the house of Baneshwar, he left their company, therefore, he is not aware as to what happened thereafter. This statement in cross-examination severely dilutes or rather evaporates the effect of his earlier statement in para – 2 of examination-in-chief. Thus, the state of evidence on record would not prove that the appellant was seen in the

company of deceased for the last time and thereafter, the deceased was not found. There is no such trustworthy evidence available on record of last seen together.

15. The circumstance of recovery of weapon of offence, i.e., hammer and crowbar has been proved by the prosecution, however, report of chemical examination to ascertain presence of bloodstains has not been produced by the prosecution. Hammer and crowbar are usually found in every house in villages. Therefore, it is not such circumstance which alone would be sufficient to sustain appellant's conviction for committing the murder of deceased.

16. Before parting, it is necessary to comment upon the state of affairs of sessions trials and the manner in which they are conducted by the prosecution.

17. The duty of a trial judge holding a criminal trial has been succinctly dealt with by the Supreme Court in the matter of **Mohd. Hussain Alias Zulfikar Ali v. State (Government of NCT of Delhi)**<sup>4</sup> wherein the following has been observed at para - 54 :

“54. The learned Judge in seisin of the trial forgot that he has an overriding duty to maintain public confidence in the administration of justice often referred to as a duty to vindicate and uphold the majesty of law. He failed to realise that for an effective instrument in dispensing justice he must cease to be a spectator and a recording machine but a participant in the trial evincing intelligence and active interest so as to elicit all relevant materials necessary for reaching the correct concluding, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community itself.”

18. Yet again in **Gurnaib Singh v. State of Punjab**<sup>5</sup> the Supreme Court had an occasion to consider the issue wherein the following has

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4 (2012) 2 SCC 584

5 (2013) 7 SCC 108

been held at para – 29:

“29. .... It is interesting to note that the cross-examination of PW 4 eventually took place on 2-8-2000. On a perusal of the dates of examination -in-chief and cross-examination and the adjournments granted, it neither requires Solomon's wisdom nor Aurgus-eyed scrutiny to observe that the trial was conducted in an absolute piecemeal manner as if the entire trial was required to be held at the mercy of the counsel. This was least expected of the learned trial Judge. The criminal-dispensation system casts a heavy burden on the trial judge to have control over the proceedings. The criminal-justice system has to be placed on a proper pedestal and it cannot be left to the whims and fancies of the parties or their counsel. A trial Judge cannot be a mute spectator to the trial being controlled by the parties, for it is his primary duty to monitor the trial and such a monitoring has to be in consonance with the Code of Criminal Procedure.”

19. In a more recent judgment rendered in the case of **Surya Baksh Singh v. State of Uttar Pradesh**<sup>6</sup> the Supreme Court had an occasion to reiterate the duty of the Judge of the trial Court. It is thus held at para – 25:

“25. .... It is the bounden duty cast upon the Judge not merely to ensure that an innocent person is not punished but equally not to become a mute spectator to the spectacle of the convict circumventing his conviction. (See *Stirland v. Director of Public Prosecutions*<sup>7</sup>, quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*<sup>8</sup>.) If the court is derelict in doing its duty, the social fabric will be rent asunder and anarchy will rule everywhere.”

20. In the case at hand, although the prosecution had cited as many as 21 witnesses in the charge-sheet and some of them like Ku. Saraswati Bai (sister of the deceased), Baneshwar, in whose house they consumed liquor and had probably assembled for the last time after which the deceased did not return to the house, Jayant Sai and Sumati, who could have thrown light and corroborate the evidence of other witnesses, have not been examined by the prosecution. It is not that the witnesses did not

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6 (2014) 14 SCC 222

7 1944 AC 315 : (1944) 2 All ER 13 (HL)

8 (2003) 11 SCC 271 : 2004 SCC (Cri) 135

appear despite having received the summons or have informed the Court that they are not willing to depose. The order sheet of the trial Court recorded on 11.09.2003 shows that witnesses Saraswati Bai, Sumati Bai, Baneshwar and Jayantsai were present but the Assistant Public Prosecutor conducting the trial for the State informed the Court that their examination is not necessary. The trial Court also did not look into the charge-sheet to ascertain as to whether their examination is necessary or not and straightaway acceded to the request made by the Assistant Public Prosecutor.

21. In this regard, Section 231 of Cr.P.C. would need reference which is reproduced hereunder:

**“231. Evidence for prosecution.----**(1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.”

22. Similarly, Section 311 of the Cr.P.C. is another provision which requires the trial Court to apply mind and use discretion to examine any person in attendance. The said provision is also reproduced for ready reference:

**“311. Power to summon material witness, or examine person present.---** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.”

23. A conjoint reading of the provision contained under Sections 231 and 311 of the Cr.P.C. would irresistibly conclude that it is the discretion of the trial Court to examine all the witnesses in attendance or produced by the prosecution in support of its case and whenever it is felt necessary, to summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Thus, the trial Court is obligated to apply its judicial mind and discretion in the facts of a particular case and particularly when the prosecution is giving up any witness, it is the duty of the Court to verify from the record as to whether such request of giving up any particular witness would affect the trial or hinder the Court in just decision of the case. The trial cannot be left at the mercy of the public prosecutor and it is not the discretion of the public prosecutor alone to examine or give up any witness. In course of trial, the trial Court cannot be mute spectator to work in a mechanical manner to accede to any kind of request made by the prosecution for non-examining any witness without assigning any reason. It is the duty of the trial Court to cull out the truth on the basis of evidence collected during investigation. If the trial Court permits the prosecution to give up material witnesses, the trial Judge is failing in its duty for which alone it holds the office. It is necessary to avoid collusion between the prosecution and the accused. It serves a social cause to unearth the truth and see that the guilty is punished. It would be different, if the prosecution fails to prove its case even after examining all the material witnesses but the accused cannot be let off only on the weakness or dereliction of the prosecution by not examining the material witnesses even though they are cited in the charge-sheet and were present in the Court being ready and willing to depose for the prosecution.

In our considered, view in the case in hand, the trial Court has neglected to perform its duty enjoined to it under the Code of Criminal Procedure.

24. For the foregoing, since the prosecution has failed to prove its case beyond all reasonable doubt, the appeal succeeds. The impugned judgment of conviction and order of sentence imposed on the appellant is set aside. The accused/appellant be set at liberty, if not required in any other case.

25. The appellant is on bail, his bail bond shall remain in operation for a period of six months from today, in view of the provisions contained under Section 437-A of the Cr.P.C. He shall appear before the higher Court as and when directed.

Sd/-  
Judge  
(**Prashant Kumar Mishra**)

Sd/-  
Judge  
(**Chandra Bhushan Bajpai**)

**HEAD NOTE**

If prosecution gives up any witness, the trial Court should not be mute spectator, it should use judicial discretion before allowing the prayer.