

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 877 of 2010

- Girdhari Sahu, age 37 years, son of Babli Sahu, R/o Village Gadhabhatha, Distt. Kabirdham (CG)

---- Appellant

Versus

- State Of Chhattisgarh through District Magistrate, Kabirdham (CG)

---- Respondent

For Appellant : Shri A.K. Yadav, Advocate.

For Respondent/State : Shri Ashish Shukla, Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

Judgment on Board by Justice Pritinker Diwaker

02/05/2016

This appeal arises out of the judgment of conviction and order of sentence dated 11.10.2010 passed by the Sessions Judge, Kabirdham (Kawardha) in S.T.No.36/2009 convicting the accused/appellant under Sections 364, 302 on two counts and 201 of IPC and sentencing him to undergo RI for 10 years, fine of Rs.1000/-; imprisonment for life, fine of Rs.5000/- (two times); and RI for 7 years, fine of Rs.1000/- with default stipulations respectively.

02. As per prosecution case, deceased Rukmanibai was wife of the accused/appellant, however, on account of dispute between them, Rukmanibai was living separately with her brother Dhansingh (PW-2). She had initiated proceedings against the appellant under Section 125 of Cr.P.C. for grant of maintenance before the Court of Judicial

Magistrate First Class, Pandaria, Kabirdham. Initially, a sum of Rs.700/- was awarded in her favour as maintenance, which was later on enhanced to Rs.800/-. As the appellant failed to give maintenance amount regularly to the deceased Rukmani, she filed an appropriate application before the concerned Magistrate and on 25.4.2009 when the case was listed before the Magistrate, the appellant deposited Rs.5100/- and in turn, the same was handed over to Rukmanibai. Further case of the prosecution is that after the Court proceedings, the accused/appellant took Rukmanibai and her nephew Ritesh, aged about 5 years, who had come to the Court along with Rukmanibai, on his motorcycle on the assurance of dropping them at their village and on the way, he stopped his vehicle near one brook and committed their murder by assaulting them with a big stone. According to the prosecution case, after committing murder of both the persons, the appellant in order to cause disappearance of the evidence, set them ablaze, took Rs.5100/- from Rukmanibai and fled from there. It is also the case of the prosecution that when the appellant was assaulting the deceased persons and setting them ablaze, he too suffered injury by stone on his middle finger and some superficial burn injury, for which he was medically examined vide Ex.P/20. When deceased Rukmani and Ritesh did not return to their house, a missing report (Ex.P/21) was lodged by PW-2 Dhansingh, father of deceased Ritesh. During investigation, the appellant was apprehended and on interrogation, he confessed that he committed murder of Rukmani and Ritesh vide his memorandum Ex.P/1 recorded on 29.4.2009. Dehati merg intimation Ex.P/22 in relation to death of Rukmani and Dehati merg intimation in respect of death of Ritesh Kumar were recorded on 25.4.2009.

Thereafter, Dehati Nalishi Ex.P/24 was recorded and numbered merg intimations (Ex.P/25 & P/26) were also recorded. FIR (Ex.P/27) was registered on 29.4.2009 against the appellant under Sections 364, 302 and 201 of IPC.

03. On the basis of memorandum Ex.P/1 of the appellant, two human skeletons (Ex.P/2) and one lacerated skull of child, bones of thigh, ribs, hand, jaw, collar bones (Ex.P/3) were seized. From the place of occurrence where skeleton of deceased Rukmani was found, plain and bloodstained soil, bloodstained blouse and petticoat, slipper, silver anklet, nose-pin, silver ring, silver clip, four pieces of burnt bangles, one black handkerchief, one comb, bloodstained nine pieces of small and big stone, were seized vide Ex.P/4. From the place of incident where skeleton of deceased Ritesh was found, plain and bloodstained soil, bloodstained pieces of stone, burnt shoes of a child, burnt underwear, shirt and goggle of deceased Ritesh, were seized vide Ex.P/5.

04. Identification memo Ex.P/6 was prepared and Dhansingh (PW-2) on the basis of articles collected from the scene of occurrence, duly identified the deceased as Rukmanibai and Ritesh. Pursuant to the missing report lodged by PW-2, recovery panchanama Ex.P/7 was prepared. Likewise, vide Ex.P/14, the motorcycle used by the appellant in commission of the offence and cash amount of Rs.5100/-, which was given by the appellant to deceased Rukmani as maintenance amount in the Court, was seized from the house of the appellant. The accused/appellant was medically examined vide Ex.P/20 by PW-7 Dr. Narendra Golan, who noticed abrasion over right middle finger of size

2 x 1 cm and superficial burn on the left middle finger, which were simple in nature.

05. Inquest over the skeletons of deceased Rukmani and Ritesh were prepared vide Ex.P/10 and P/11. As only pieces of bones were recovered, postmortem could not be performed. However, the seized articles were sent for chemical examination to FSL and as per FSL report (Ex.P/16 & P/17), it has been opined by PW-6 Dr. Shivnarayan Manjhi that on examination of bones of deceased Ritesh, it was found that skull was without mandible, left scapula, left humerus, radius, ulna, scapula were joined, some part of mandible bone was present, right clavicle, four long bones, in which soft tissues were joined, foul smell was emanating. The bones were further examined after being boiled and it was found that frontal suture of skull had attached whereas there was gap in other sutures, maxilla nasal bone and stieloid bone were absent, skull was of male, there were three teeth in left side of jaw, molar tooth was growing and scapula bone was of male.

On the same day he had preserved the soft tissues in salt solution and advised for chemical examination and also advised for DNA of one bone preserved by him. In his opinion, all the bones were of one child of about five years and cause of death as well as duration of death could not be ascertained. Bones show broken effect and gnawing effect which were caused by hard and blunt object but whether they were caused during life or after death could not be determined but if they were caused during life, the same were sufficient to cause death in ordinary course of nature.

On the same day i.e. 2.5.2009, he examined the bones of deceased Rukmani which were received in two parts - (i) right sided scapula, humerus right side right clavicle, (ii) skull vertebra, ribs, pelvis and both femur. These bones were connected with each other through soft tissues. Skull and mandible bones were typically female in character, sagittal suture anterior 1/3 x post 1/3 near to obliterated white middle 1/3 partly united. Coronal suture upper 1/3 near to obliterated x lower 1/3 partly united. Attrition effect was present in teeth from early to medium. Both pelvis bones were present, female in character, Iliac bones upper part partly broken with gnawing effect present, pubic symphysis shows glittering effect, sacrum bone female in character, wide upper segment fused, both femur bones present, light smooth, female in character, lower ends broken and broken parts missing, both are devoid of soft tissues loosely attached. Right humerus, right radius and ulna present, female in character, both ends are broken and missing, right side 10 ribs and left side 9 ribs were present, broken piece was present in right scapula. The soft tissues of the bones were preserved in salt solution and he had advised for chemical examination of the same and also advised for DNA examination of one bone preserved by him.

In his opinion, the bones were of human bearing characteristics of female of about 35 years (plus-minus five years). Cause of death and duration of death could not be ascertained. Bones show broken effect and gnawing effect which were caused by hard and blunt object but whether they were caused during life or after death could not be determined but if they were caused during life, the same were sufficient to cause death in ordinary course of nature.

06. After completing investigation, charge sheet was filed against the appellant under Sections 364, 302, 201 of IPC and accordingly, charges were framed by the trial Court.

07. So as to hold the accused/appellant guilty, the prosecution examined as many as 9 witnesses. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. In defence, he examined five witnesses.

08. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned convicted and sentenced the appellant as mentioned in para-1 of this judgment.

09. Learned counsel for the appellant submits as under:

- that the appellant has been convicted solely on the basis of circumstantial evidence but they are not of such a nature which could be made basis for his conviction.
- that in the facts and circumstances of the case, the possibility of some third person committing murder of the deceased cannot be ruled out.
- in absence of postmortem report, merely on the basis of skeleton or few bones, it cannot be ascertained that Rukmani and Ritesh were killed.
- that there is no incriminating circumstance against the appellant connecting him with the crime in question.

10. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

- that on 25.4.2009 both the appellant and deceased Rukmani were present in the Court where the appellant paid Rs.5100/- to the deceased as maintenance and this fact has been duly proved by the prosecution vide order dated (Ex.P/30) of the concerned Court, which bears signatures of both the appellant and deceased Rukmani.
- that on 25.4.2009 when deceased Rukmani and Ritesh did not return, on the next day a missing report was lodged by Dhansingh (PW-2).
- that in his statement under Section 313 of Cr.P.C. the accused/appellant has admitted that he was required to pay maintenance to deceased Rukmani, which was paid by him and that he had attended the Court on 25.4.2009 where deceased Ritesh was also present.
- that based on the memorandum Ex.P/1 of the appellant, recovery of various articles, including skeletons and bones of the deceased persons, was made vide Ex.P/2 to P/5.
- that the articles including clothes of the deceased persons were duly identified by PW-2 Dhansingh vide Ex.P/6 to be that of the deceased persons.
- that recovery of articles vide Ex.P/7 also proves that those articles were of the deceased persons.
- that recovery of Rs.5100/- vide Ex.P/4 from the appellant further proves his involvement in the crime in question as it was the same money which was given by him in the Court to deceased

Rukmani on 25.4.2009 as maintenance.

- while causing injuries to both the deceased by a big stone and setting them ablaze, the appellant also suffered injuries on his finger and superficial burn injury, which has been proved by the prosecution vide his MLC Ex.P/20 and the appellant failed to offer any probable explanation in this regard in his statement under Section 313 of Cr.P.C.
- it was within the special knowledge of the appellant that both the skeletons are lying at a particular place and at his instance only, the same were recovered, therefore, the question of somebody else, including the police, coming to know about those skeletons does not arise unless it was disclosed by the appellant.
- further, the plea of alibi taken by the appellant has also not been proved by him as required under the law.

11. Heard counsel for the respective parties and perused the material on record.

12. PW-1 Angadram Sahu, relative of the appellant and the deceased, has stated that on 25.4.2009 when after attending the Court, deceased Rukmani and Ritesh did not return, brother of deceased Rukmani namely Dhansingh (PW-2) called him and enquired about them and thereafter, he too searched the deceased but they were not found. On the next day, a missing report was lodged by PW-2. He is also a witness of memorandum Ex.P/1 of the appellant. While supporting the prosecution case he has proved seizure Ex.P/2 to P/5. He has also proved identification memo Ex.P/6, recovery panchanama Ex.P/7, inquest Ex.P/10 & P/11, spot map Ex.P/12 and seizure Ex.P/13 & P/14

whereby clothes and motorcycle of the appellant as well as the amount of Rs.5100/- were seized from the possession of the appellant. In cross-examination he remained very firm and nothing could be elicited from him to render his evidence untrustworthy or doubtful, on the contrary, he has further elaborated the prosecution case.

13. PW-2 Dhansingh, brother of deceased Rukmani and lodger of missing report, has duly supported the prosecution case by stating the when on 25.4.2009 the deceased persons did not return from the Court, he searched them and then a missing report was lodged on the next day. He has also proved the fact that the appellant was required to pay Rs.700-800/- as maintenance to deceased Rukmani. He is also a witness to identification memo Ex.P/6, inquest Ex.P/10 & P/11.

14. PW-3 Ku. Mamta Sahu, daughter of the appellant and deceased Rukmani has stated that the accused/appellant used to beat her mother and that is why they were living separately along with Dhansingh. PW-4 Genduram Meravi, Patwari, prepared the spot map Ex.P/15. PW-5 Narayan Sahu had gone to the place of occurrence along with police where skeletons and other articles were lying.

15. PW-6 Dr. Shivnarayan Manjhi, examined the bones collected by the prosecution vide Ex.P/16 & P/17. On examination of bones of deceased Ritesh, it was found that skull was without mandible, left scapula, left humerus, radius, ulna, scapula were joined, some part of mandible bone was present, right clavicle, four long bones, in which soft tissues were joined, foul smell was emanating. The bones were further examined after being boiled and it was found that frontal suture

of skull had attached whereas there was gap in other sutures, maxilla nasal bone and stieloid bone were absent, skull was of male, there were three teeth in left side of jaw, molar tooth was growing and scapula bone was of male. On the same day he had preserved the soft tissues in salt solution and advised for chemical examination and also advised for DNA of one bone preserved by him.

In his opinion, all the bones were of one child of about five years and cause of death as well as duration of death could not be ascertained. Bones show broken effect and gnawing effect which were caused by hard and blunt object but whether they were caused during life or after death could not be determined but if they were caused during life, the same were sufficient to cause death in ordinary course of nature.

On the same day i.e. 2.5.2009, he examined the bones of deceased Rukmani which were received in two parts - (i) right sided scapula, humerus right side right clavicle, (ii) skull vertebra, ribs, pelvis and both femur. These bones were connected with each other through soft tissues. Skull and mandible bones were typically female in character, sagittal suture anterior 1/3 x post 1/3 near to obliterated white middle 1/3 partly united. Coronal suture upper 1/3 near to obliterated x lower 1/3 partly united. Attrition effect was present in teeth from early to medium. Both pelvis bones were present, female in character, Iliac bones upper part partly broken with gnawing effect present, pubic symphysis shows glittering effect, sacrum bone female in character, wide upper segment fused, both femur bones present, light smooth, female in character, lower ends broken and broken parts missing, both are devoid of soft tissues loosely attached. Right humerus, right radius

and ulna present, female in character, both ends are broken and missing, right side 10 ribs and left side 9 ribs were present, broken piece was present in right scapula. The soft tissues of the bones were preserved in salt solution and he had advised for chemical examination of the same and also advised for DNA examination of one bone preserved by him.

In his opinion, the bones were of human bearing characteristics of female of about 35 years (plus-minus five years). Cause of death and duration of death could not be ascertained. Bones show broken effect and gnawing effect which were caused by hard and blunt object but whether they were caused during life or after death could not be determined but if they were caused during life, the same were sufficient to cause death in ordinary course of nature.

16. PW-7 Dr. Narendra Gola, apart from helping the prosecution for sending the skeletons and bones so collected for chemical examination, also medically examined the accused/appellant vide Ex.P/20 and noticed abrasion over right middle finger of size 2 x 1 cm and superficial burn on the left middle finger, which were simple in nature.

17. PW-8 William Toppo, investigating officer, has duly supported the prosecution case.

18. DW-1 Ramlal has stated that about 1 ¼ year prior to the date of incident the accused/appellant had come to his house for giving invitation card of marriage of his daughter and nephew on motorcycle and thereafter, went away. However, no such card was produced by

this witness. Similar is the statements of DWs-2, 3 & 4. DW-5 Ghurau has stated that he met the accused/appellant in a beetle shop and thereafter, he left the said place.

19. Admittedly, there is no direct evidence against the appellant connecting him with the crime in question and his conviction is based on circumstantial evidence.

20. It is by now well settled that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

21. Keeping in mind the aforesaid principles of law relating to circumstantial evidence, on close scrutiny of the entire evidence it emerges that relations between the appellant and deceased Rukmani were strained, they were living separately, deceased Rukmani was living with her brother Dhansingh (PW-2) and that she had initiated proceedings against the appellant under Section 125 of Cr.P.C. for

grant of maintenance. In connection therewith, deceased Rukmani along with deceased Ritesh had gone to the Court of concerned Magistrate on 25.4.2009 where the appellant paid arrears of maintenance to the tune of Rs.5100/- to deceased Rukmani. After the Court proceedings, when both the deceased persons did not return home, they were searched by PW-2 Dhansingh along with others, but they could not be found, hence a missing report was lodged by PW-2 and on suspicion, the appellant was interrogated by the police. Upon disclosure statement of the appellant (Ex.P/1), two human skeletons, some pieces of bones and other articles belonging to the deceased persons, including bloodstained blouse and petticoat, slipper, silver anklet, nose-pin, silver ring, silver clip, four pieces of burnt bangles, one black handkerchief, one comb, bloodstained nine pieces of small and big stone, burnt shoes of a child, burnt underwear, shirt and goggle of deceased Ritesh, were seized from the place of occurrence vide Ex.P/2 to P/5. PW-1 Angadram Sahu has duly proved memorandum Ex.P/1 of the appellant and seizure of certain articles made in pursuance thereof vide Ex.P/2 to P/5. On the basis of articles collected from the scene of occurrence, Dhansingh (PW-2) duly identified the deceased as Rukmanibai and Ritesh. PW-1 and PW-2 have proved the identification memo Ex.P/6. Further, as per evidence of PW-6 Dr. Shivnarayan Manjhi, who separately examined the bones collected by the prosecution, the bones were of child of about five years and female of about 35 years vide Ex.P/16 & P/17 respectively. The evidence of this witness in his cross-examination with regard to identification of the dead bodies remained unchallenged.

22. This apart, vide Ex.P/13 & P/14, clothes and motorcycle of the appellant used in commission of the offence as well as the amount of Rs.5100/-, which was given by him to deceased Rukmani in the Court towards maintenance, were seized from the possession of the appellant. These documents have also been duly proved by PW-1. Moreover, in his memorandum Ex.P/1, which has been proved by PW-1, the appellant has stated that while assaulting the deceased and setting them ablaze, he also suffered injury on his right hand middle finger. This fact finds corroboration from MLC (Ex.P/20) of the appellant, wherein PW-7 Dr. Narendra Golan, noticed abrasion over right middle finger of size 2 x 1 cm and superficial burn on the left middle finger, which were simple in nature.

23. Yet another aspect of the case is that in his statement recorded under Section 313 of Cr.P.C., the appellant instead of offering any plausible and satisfactory explanation to the incriminating circumstances appearing against him in the prosecution case, has merely made bald denial of the same. He has even denied his MLC (Ex.P/20). This circumstance points towards the guilt of the appellant and provides a missing link in the chain of circumstances.

24. As regards the plea of alibi, though the appellant has taken a defence in his statement under Section 313 of Cr.P.C. that on the date of incident he had gone to the place of his relatives for inviting them to the marriage of his daughter and nephew, and also examined witnesses in this regard, but no such invitation card has been produced by him or his witnesses nor any of them have specifically stated about the date of such marriage.

25. It is well settled principle of law that onus to prove alibi is on the accused as it is a matter within his special knowledge, when such plea is taken by the accused, it must be conclusively proved by him. Accused pleading alibi must lead evidence to show that at the relevant time he was so far off from the place of occurrence that he could not have committed the offence. Once the appellant has taken such a plea in his defence, he was required to prove the same by leading cogent and reliable evidence in this regard ruling out every possibility of he being present at the scene of occurrence at the relevant time. In the case in hand, it has come in the evidence of the prosecution witness that on the date of incident i.e. 25.4.2009, the appellant and the deceased were present in the Court at Pandaria and the appellant has also admitted this fact in his statement under Section 313 of Cr.P.C. This apart, no such plea was taken by the appellant at the earliest point of time when charges were framed against him by the trial Court. Thus, in view of the overall facts and circumstances of the case and the conduct of the appellant, the said plea of alibi appears to be an afterthought and stands falsified, thereby further pointing towards his guilt.

26. On the basis of aforesaid analysis, we are of the considered opinion that the prosecution has been successful in proving involvement of the appellant in the crime in question based on the circumstantial evidence and the trial Court was fully justified in convicting him under Section 302 on two counts and 201 of IPC. However, in the facts and circumstances of the case and the nature of evidence on record, conviction of the appellant under Section 364 of

IPC appears to be illegal and as such, liable to be set aside.

27. In the result, the appeal is allowed in part. While maintaining conviction of the appellant under Sections 302 on two counts and 201 of IPC and the sentence imposed thereunder, he is acquitted of the charge under Section 364 of IPC. He is reported to be in jail, therefore, no further order regarding his surrender etc. is required.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(I.S. Uboweja)

Judge

Khan