

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 602 of 2011

- Ravi Joshi, S/o Satanand Joshi, aged about 26 years, R/o village Medesara, Thana Nandini Nagar, Distt. Durg (CG)

---- Appellant (In Jail)

Versus

- State Of Chhattisgarh, through Station House Office, Police Station- Nandini Nagar, District Durg (CG)

---- Respondent

For Petitioner:

Smt. Renu Kochar, Advocate

For Respondent:

Shri Vivek Sharma, Government Advocate

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

Judgement

Per P. Diwaker, J

27/04/2016

1. This appeal arises out of the judgment of conviction and order of sentence dated 4.7.2011 passed by the Sessions Judge, Durg in S.T. No.138/10 convicting the accused/appellant under Section 302 of the Indian Penal Code (for short 'the IPC') and sentencing him to undergo RI for Life & fine of Rs.500/-, in default to undergo S.I. for 2 months.
2. In the present case name of deceased is Labhchand, nephew of accused/appellant, and on the date of incident he was aged about 2½ years. It is alleged that on 3.4.2010 Trilokchand (PW-12) & Smt. Sunita Bhathri (PW-13), parents of the deceased, had gone to work at their workplace and in their absence the accused/appellant came to their house, consumed liquor and thereafter took the deceased along with him and committed his murder. When the deceased did not return, he was

searched and after some time he was found lying dead in the courtyard of Ramdayal Joshi. Both the legs of deceased turned to his stomach and face, stomach, legs & front part of forearm were completely burnt. Trilochan (PW-12) was telephonically informed about the death of deceased and on his arrival, merg intimation (Ex.P-6) was recorded at about 4.30 p.m. Inquest was conducted regarding the death of deceased and Ex.P-20 is the inquest report. After inquest, the body was sent for conducting post-mortem examination. Dr. N.C. Rai (PW-16) conducted autopsy and gave report of Ex.P-10 opining that the mode of death was syncope and cause of death was burn. On the basis of merg enquiry, First Information Report (Ex.P-14) was registered on 21.4.2010 against unknown person. During the investigation, it was found that it is the accused/appellant who committed the crime in question and accordingly he was arrested. On completion of investigation, charge sheet under Sections 302 & 201 was filed against the accused/appellant, however, the trial Court has framed the charge under Section 302 IPC against him.

3. To substantiate the charge against the accused/appellant, the prosecution has examined sixteen witness. Accused/appellant was questioned under Section 313 CrPC about the incriminating evidence and he denied all of them and pleaded innocence & false implication.
4. Upon consideration of evidence, the trial Court by the impugned judgment convicted & sentenced the accused/appellant as described above.
5. We have heard counsel for the parties and perused the impugned judgment and record of the trial Court.
6. Learned counsel for the accused/appellant submits that:
 - conviction of the appellant is substantially based on the circumstantial evidence i.e. last seen, and in the cases of circumstantial evidence the prosecution is required to prove that the

entire chain of circumstances is complete, but in the present case the quality of evidence is not as such on which basis it can be said that chain of circumstances is complete.

- evidence of Smt. Kunjwati Bai (PW-1) & Smt. Kaushalya Bai (PW-3), who have allegedly seen the deceased last time alive in the company of accused/appellant, do not inspire confidence and since the time gap between the last seen by these witnesses and recovery of dead body of deceased is so long, the possibility of any person other than the appellant being the author of crime cannot be ruled out. Further, diary statements of aforesaid witnesses under Section 161 Cr.P.C. were recorded on 21.4.2010 & 28.5.2010 respectively, but no satisfactory explanation has been offered by the prosecution for such delay.
- Trilochan (PW-1), father of deceased, has not made any allegation against the accused/appellant either in his statement recorded on 7.4.2010 nor in the FIR lodged by him, although according to him, he has informed by Kunjwati (PW-1) that it is the accused/appellant who took the deceased along with him.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of the accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
8. We have heard learned counsel for the parties and perused the material available on record.
9. Smt. Kunjwati Bai (PW-1) is the grandmother of deceased. She has stated that on the date of incident the accused/appellant came in drunken state and said that he would kill both her sons. She has stated that there exists a long-standing enmity between her sons and accused/appellant.

She has further stated that seeing the accused/appellant taking her grandson towards the kitchen garden of Ramdayal, she shouted. Hearing her shout, Kaushalya Bai (PW-3) came there but by that time the accused went away with the deceased. She has further stated that in the evening the deceased was found lying dead in the kitchen-garden of Ramdayal. It is relevant to note that diary statement of this witness was recorded on 21.4.2010 and if the same is compared with her Court statement, there appears material improvement in her court statement.

10. Smt. Anusuiya (PW-2) has not supported the prosecution case and turned hostile.

11. Smt. Kaushalya Bai (PW-3) has stated that her house is adjacent to the house of Trilochan (PW-12). On the date of incident when she was busy in domestic works, accused/appellant came to house of Trilochan and asked Kunjwati (PW-1) to cook food for him. When Kunjwati was cooking food for him, he was consuming liquor in the verandah. After consuming liquor, he left the house of Kunjwanti and just before him the deceased & Rukhmani have also left the house. At that time, Kunjwanti came shouting that accused/appellant is running away with the deceased. Thereafter she went in search of deceased but could not trace her whereabouts. After about 1-2 hours, two boys of the village saw the body of deceased lying dead in the kitchen-garden of Ramdayal. In Para-8 this witness has stated that deceased and Rukhmani left the house first and shortly thereafter the accused/appellant left the house. She has admitted that she is not aware as to who went in which direction. If the court statement of this witness is compared with her diary statement, there appears to be material contradictions.

12. Gendlal Joshi (PW-5) is the witness of seizure memo (Ex.P-3) by which certain articles were seized from the spot.

13. Shesh Narayan Patel (PW-6) is the Patwari who prepared the spot map Ex.P-4.
14. Chandra Sekhar Chouhan (PW-7) is the village Kotwar. He is witness of the spot map (Ex.P-4) prepared by the Patwari.
15. Rajendra Singh Rajput (PW-9) is the Head Constable who had recorded Merg Intimation (Ex.P-6) and helped in the initial investigation.
16. Hiralal Netam (PW-10) is the witness who took the body of deceased for post-mortem examination.
17. Trilochan (PW-12) is the father of the deceased and lodger of Merg Intimation. This witness has stated that on the date of incident he had gone to his workplace and having come to know about the death of his son, he immediately returned village and went to the kitchen-garden of Ramdayal along with some villagers. Body of the deceased was lying inside the wooden heap in burnt condition. He has further stated that he was informed by her mother Kunjwanti (PW-1) that the accused/appellant had killed the deceased. If the Court statement of this witness is compared with his diary statement (Ex.D-1), it is evident that in his diary statement he has not stated that he was informed by his mother (PW-1) that accused/appellant took the deceased along with him.
18. Smt. Sunita Bhathri (PW-13) is the mother of deceased and wife of Trilochan (PW-12). She has stated that on the date of incident she along with her husband had gone to work. Having been informed about the incident by one Avon Joshi, they returned at around 3.00 p.m. and Kunjwanti (PW-1) informed her that accused/appellant came to her house, consumed liquor, forcibly took the deceased and after committing his murder thrown the body in the kitchen-garden of Ramdayal. If the diary statement of this witness is compared with her Court statement, there appears material improvement in her court statement.

19. Sunil Dubey (PW-15) is the investigating officer. This witness has admitted in Para-8 that during merg enquiry statements of witnesses were recorded but the same have not been filed along with the charge sheet.
20. Dr. N.C. Rai (PW-16) is the witness who conducted post-mortem examination and gave report Ex.P-18, opining that the mode of death was syncope and cause of death was burn.
21. During pendency of this criminal appeal, counsel for the State has obtained the statements of the prosecution witnesses recording during merg inquiry. Statement of Smt. Kunjwantin Bai (PW-1) was recorded on 7.4.2010 in which there is no allegation against the accused/appellant to the effect that it is he who took the deceased with him. Similarly, merg statement of one Suman, sister of deceased and not examined by the prosecution, also reveal that she has not made any such statement against the accused/appellant. She has only stated that she had gone along with the deceased to the grocery shop for purchasing toffee and while returning from there they met one Nangu who took the deceased with him to drop him in the house. Thus it is apparent that till recording of merg enquiry there was no allegation against the accused/appellant. Furthermore, he has not been named in the FIR (Ex.P-14) lodged on 21.4.2010.
22. In every case based upon circumstantial evidence, in this case as well, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstance are complete as to rule out the possibility of innocence of the accused.
23. In the present case the prosecution mainly relied upon the circumstances that the accused/appellant took Labhchand (deceased) along with him despite making protest by Smt. Kunjwati Bai (PW-1) and thereafter body

Labhchand (deceased) was recovered from the kitchen-garden of Ramdayal in burnt condition and that the appellant has not offered plausible explanation for the death of Labhchand and the absence of explanation or untrue explanation offered by the accused point to his guilt. Undoubtedly, the last seen is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty, but this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and following the point of being so last seen.

24. In the case in hand the accused/appellant, who happened to be the cousin brother of the deceased, was alleged to have taken the deceased with him and subsequently his body was found lying inside the wooden heap in the kitchen-garden of one Ramdayal and Smt. Kunjwati Bai (PW-1) & Smt. Kaushalya Bai (PW-3) were cited as the witnesses of last seen.

25. According to Court statement of Smt. Kunjwati Bai (PW-1), on the date of incident accused/appellant came to her and took the deceased with him despite making protest by her. Whereas, as per her merged statement recorded on 7.4.2010, on the date of incident the deceased along with his sister Suman left the house for grocery shop to sell the bottle and immediately thereafter accused/appellant also left the house and returned after some time. She has further stated that after some time Suman also returned but the deceased was not with her. Evidence of Smt. Kaushalya Bai (PW-3) goes to show that on the date of incident accused/appellant was sitting in the verandah of the house of Kunjwanti (PW-1), he demanded food from her grandmother (PW-1) and when she was cooking food for him, he was consuming liquor in the verandah. She has further stated that deceased & Rukmani left the house followed by

accused/appellant. Diary statement of Suman, sister of deceased, is also available in the record and according to which, on the date of incident accused/appellant came to her house with a bottle of liquor and consumed liquor. Thereafter she along with the deceased had gone to the shop to sell the empty bottle of liquor and while returning from there, on the way she met with one Nangu to whom she asked to drop Lalchand at home and accordingly he dropped him at Neem tree situated near her house.

26. Keeping the above evidence and material on record in mind, we are of the opinion that in the present case though the prosecution has established the presence of accused/appellant in the house of deceased at the relevant time, but failed to establish in a conclusive manner the presence of appellant and victim together before the victim met with death. No doubt, Kunjwanti Bai (PW-1) & Kaushalya Bai (PW-3) have stated in their Court statements that they have seen the accused/appellant taking away the deceased with him, but this vital fact was not stated by any of them before the Investigating Officer when the investigating officer recorded their statements, which in our view, seriously affects the credibility of PW-1 & PW-3. This apart, statements of aforesaid witnesses were recorded with delay and no explanation for delay was furnished by the prosecution which also makes the prosecution case doubtful. Moreover, according to Suman, sister of deceased, while returning home along with the deceased, on the way she handed over the custody of the deceased to one Nangu but unfortunately the prosecution has not examined said Nangu who would have been fully capable of explaining the factual situation correctly i.e. under what circumstances he parted with the deceased. Since there is nothing to suggest that the deceased was last seen alive in the company of accused/appellant and immediately thereafter his dead body was recovered, it is not possible to hold that the

prosecution has led any satisfactory evidence to substantiate that it was the appellant alone who was lastly seen with the victim before his death. It is well settled that no one can be convicted on the basis of mere suspicion, though strong it may be and "fouler the crime higher the proof".

Yet another lacuna in the prosecution case is that there is no explanation as to why did Trilochan (PW-12), father of deceased, not make any allegation against the accused/appellant in his statement recorded under Section 161 Cr.P.C. or FIR (Ex.P-14) when it was within his knowledge that his son was being taken away by accused/appellant, as is evident from his Court statement wherein he has stated that on returning from workplace, Kunjwati (PW-1), mother of this witness, informed him that it is the accused/appellant who took the deceased with him.

Furthermore, the doctor conducting autopsy neither noticed any external or internal injury on the body of deceased which could demonstrate that he had been murdered nor did opine that the death was homicidal in nature and therefore the possibility of accidental death of the deceased by catching fire in the kitchen-garden of Ramdayal cannot be ruled out.

27. Thus the cumulative effect of the evidence adduced by the prosecution is that the prosecution has utterly failed to establish that it is the accused/appellant who was behind the death of the deceased and the Court below also does not appear to be justified in basing its conviction on the above circumstantial evidence. Since the prosecution has not been in a position to prove its case beyond reasonable doubts, the benefit of doubt has to go to the accused/appellant. It is held thus.

28. For the foregoing, the appeal succeeds. Conviction & sentence of the appellant under Section 302 IPC are hereby set aside and he is acquitted of that charge by extending him benefit of doubt. He be set at liberty forthwith unless required to be in custody in connection with any other case.

Sd/-

(Pritinker Diwaker)
Judge

roshan/-

Sd/-

(I.S. Uboweja)
Judge