

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 899 of 2011

- Nawab Khan alias Danny alias Baba Khan, S/o Babbu Khan, aged about 20 years, R/o Kukripara, Laxminarayan School Gali, PS Purani Basti, Raipur, District – Raipur (C.G.)

---- Appellant

Versus

- State of Chhattisgarh, Through – Station House Officer, (S.H.O.) Police Station, Purani Basti, District – Raipur (C.G.)

---- Respondent

For Appellant : Mr. Arvind Shrivastava, Advocate.
For Respondent/State : Mr. Adil Minhaz, Panel Lawyer

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

CAV JUDGMENT

Delivered on : 18/02/2016

Per, I.S. Uboweja, J.

1. Challenge in this appeal is to the judgement of conviction and order of sentence dated 15.07.2011 passed by the Sessions Judge, Raipur in Sessions Trial No. 182 of 2010, whereby and whereunder the trial Court after holding the appellant guilty for causing homicidal death amounting to murder of Durganand Chowdhury, convicted him under Section 302 of the IPC and him sentenced to undergo imprisonment for life and to pay fine of Rs.1000/-, in default of payment of fine amount to further undergo R.I. for two months.
2. Conviction is impugned on the ground that without there being an iota of evidence, the trial Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per case of the prosecution, deceased Durganand Chowdhury was working as a Sales Officer in M/s. Jullandhur Motor Agency, Raipur. On 10.06.2010 the deceased left his house for duty as per his normal routine and never returned back. Since he did not come back till late night, his children started enquiring about him. Next day morning the deceased was found dead in Khet-badi, Kukripara nearby his house. Near the dead body, the scooter of the deceased was found besides his broken briefcase and Rs.1,800/- was missing from the same which was taken as advance by the deceased from his office towards tour advance and ATM card was also missing. After hearing the news that one dead body was lying near the field, son of deceased went there and found the dead body as his father's dead body. He lodged the complaint (Ex.P-1) at Police Station, Purani Basti against the unknown person, on the basis of which FIR (Ex.P-2) was registered.
4. The Investigating Officer left for scene of occurrence and after summoning the witnesses, inquest over the dead body of the deceased was prepared vide Ex.P-3. Bloodstained and plain soils were seized from the spot vide Ex.P-9. One scooter, pieces of three stones, one briefcase, official papers, one pair of chappal and a receipt book were seized from the spot vide Ex.P-8. During the course of investigation police came to know that the deceased and accused/appellant were last seen in the night at Samaru Pan Shop, near the temple. Accused/appellant was taken into custody, he made

disclosure statement of cash amount of Rs.310/-, ATM Card and official papers vide Ex.P-6 and the same were recovered at his instance vide Ex.P-7. Dead body of the deceased was sent for autopsy to Dr. Ambedkar Hospital, Raipur, where a team of Dr. Shivnarayan Manjhi (PW-4) and Dr. R.K. Verma conducted autopsy on the dead body of the deceased vide Ex.P-4 and found following injuries and symptoms :

- (i) Contusion present in upper lip mid part 1 cm diameter two in number, underneath red colour ecchymosis present;
- (ii) Contusion present in lower lip slightly left to mid line 1.5 x 1 cm transverse, underneath red colour ecchymosis present;
- (iii) Contusion present in left arm anterior aspect 3 x 2 cm vertically, underneath red colour ecchymosis present;
- (iv) Contusion present in left arm anterior aspect 2 cm diameter just above injury No. (iii), underneath red colour ecchymosis present;
- (v) Red colour ecchymosis present in left parietal temporal region 8 x 6 cm coronally. Temporalis muscle ecchymosed. Injuries are caused with hard and blunt objects and not sufficient to cause death. Injuries are ante-mortem in nature.
- (vi) Post-mortem wound present in right side orbital margin and zygomatic 6 x 2 cm transverse, underneath no red colour ecchymosis present.

The doctors opined that cause of death was due to asphyxia as a result of strangulation by ligature and death was homicidal in nature.

5. Internal organs of the deceased were seized vide Ex.P-10 and same were sent for chemical examination to FSL, Raipur and report was received vide Ex.P-13. Patwari prepared stop map vide Ex.P-12.
6. 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, Raipur, who in turn committed the case to the Court of Sessions Judge, Raipur.
7. In order to bring home the charges of the accused/appellant, the prosecution examined as many as seven witnesses. Accused /appellant was examined under Section 313 of the Code, in which he denied the circumstances appearing against him and pleaded innocence and false implication in crime in question.
8. After providing opportunity of hearing to the parties, learned Sessions Judge convicted and sentenced the appellant as aforementioned.
9. We have heard learned counsel for both the parties and perused the judgment impugned including the record of court below.
10. Learned counsel for the appellant vehemently argued that the appellant has been falsely implicated in the case and he has not committed any offence. He further argued that conviction of the appellant is substantially based on the evidence of Samaru (PW-11) and Jafar Ali (PW-14) relating to last seen theory, which was not itself sufficient for conviction of the appellant in absence of other

corroborative evidence. Even otherwise, the circumstances explained by the appellant in his memorandum statement was not considered by the trial Court, therefore, conviction of the appellant is not sustainable under the law. He also argued that if the Court holds that incident was done by the accused/appellant then it must be considered that on self-defence of appellant it was occurred and the appellant is entitled for acquittal from charge.

11. Learned counsel for the appellant placed reliance in the matter of **Murli alias denny v. State of Rajasthan**, reported in **1995 Supp (1) SCC 39**, in which Hon'ble Supreme Court has held that it cannot be used for any purpose in favour of the prosecution and against the accused. However, admission in favour of accused can be taken into account to examine whether the case falls under Exception 1 to S. 300 particularly when there is no evidence disclosing as to how the quarrel ensued and attack took place. He further placed reliance in the matter of **Darshan Singh v. State of Punjab and another**, reported in **(2010) 2 SCC 333** in which Honb'le Supreme Court has held in para 58 as under :-

“58. The following principles emerge on scrutiny of the following judgments :

- (i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-

defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

12. On the other hand, learned State counsel opposed the appeal and submitted that conviction of the accused/appellant is substantially based on the evidence of Samaru (PW-11) and Jafar Ali (PW-14) and articles of the deceased were recovered from accused and no explanation was offered by him, it was also incriminating evidence against him, there were cogent, reliable and trustworthy evidence. Therefore, aforesaid circumstances are sufficient for conviction of the appellant.
13. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.
14. In the present case, homicidal death of deceased Durganand Chowdhury as a result of fatal strangulation has not been substantially disputed on behalf of the appellant. On the other hand, it is also established by the evidence of Dr. Shivnarayan Manjhi (PW-4), autopsy report (Ex.P-4), Merg Intimation (Ex.P-1), FIR (Ex.P-2) and Inquest (Ex.P-3).
15. Case of the prosecution is based on circumstantial evidence. In ***Dhananjoy Chatterjee -Vs- State of W.B. (1994) 2 SCC 22*** the Supreme Court held "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.”

16. In ***Bodh Raj alias Bodha and others -Vs- State of Jammu and Kashmir, AIR 2002 SC 3164***, the Supreme Court laid down 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.

17. In ***Manjunath Chennabasapa Madalli v. State of Karnataka***, AIR 2007 SC, 2080, it was held vide para 11 as under :

“It has been consistently laid down by this Court that where a case rests squarely on 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 or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan* (AIR 1977 SC 1063); *Eradu and Ors. v. State of Hyderabad* (AIR 1956 SC 316); *Earabhadrapa v. State of Karnataka* (AIR 1983 SC 446); *State of U.P. v. Sukhbasi and Ors.* (AIR 1985 SC 1224); *Balwinder Singh v. State of Punjab* (AIR 1987 SC 350); *Ashok Kumar Chatterjee v. State of M.P.* (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt”.

18. Ravi Prakash (PW-1), son of deceased has stated that his father was working at Jullandhur Motor Agency for the last 13 years. On 10.06.2010 as usual deceased went to his duty at about 9.30 a.m., he did not come back upto 9-10 p.m., then he started searching, but did not find him. He received information through the office of his father by telephonic call that his father had taken advance of Rs.1700/- to 1800/- for tour programme and left the office. Next day he saw the public gathering behind his house then he rushed there and saw the dead body of his father lying in a ditch, one stone was on the head and briefcase was in broken condition. Scooter was also fallen there. He reported complaint vide Ex.P-1 and P-2 before the police.
19. Smt. Saraswati Bai (PW-2), wife of the deceased, stated that her husband Durganand as usual went to office in the morning, but did not come back from his office, her husband used to drink liquor oftenly with the accused, next day morning behind her house near the field dead body of her husband was found.
20. Anil Kumar (PW-3) is the landlord of the deceased. He stated that his neighbours intimated him that one dead body was lying in the field behind his house, he saw the dead body and found it as dead body of Durganand. Inquest (Ex.P-3) was prepared and he signed on it.
21. Dr. Shivnarayan Manjhi (PW-4) has stated that he has conducted autopsy and noticed injuries and symptoms as aforementioned vide Ex.P-4.

22. Ramnarayan (PW-5) who is the colleague of the deceased has stated that he had given Rs.1800/- advance to the deceased towards tour, thereafter, they left the office, next day he heard about his murder and saw the dead body near pond.
23. Ajay Pradhan (PW-6) is the Assistant Manager in ICICI Bank, Branch at Civil Line Raipur. He confirmed the ATM vide Ex.P-5 and stated that ATM was issued in the name of deceased.
24. Imtiyaz Ali (PW-7) stated that six month back in the night he met the accused near Vazir Betel shop and on next day he came to know about the murder.
25. Jaiprakash Kushwaha (PW-9) is the witness of Exs.P-8 & P-9, he supported the prosecution case and stated that police had seized broken briefcase, scooter and 2-3 pieces of stone from the spot and blood was oozing from the head of the deceased.
26. Samaru Yadav (PW-11) is the witness of last seen theory. He stated that prior to some month accused and deceased came to his betel shop at about 8.00 – 8.30 p.m. for taking cigarette and gutka, both were sitting there. Thereafter, he closed the shop and left for his house. He was declared hostile and cross-examined by the prosecution on some points. He admitted in cross-examination that deceased and accused left his shop together before closing his shop, he also admitted that both persons also came together to his shop and were seated there. Further this witness was cross-examined by the defence, but none of the fact has come that both persons

departed from there. His evidence is intact on this point that deceased and accused were seen together in the incident night and they were not departed.

27. Mohammad Kasim (PW-12) is a hostile witness. He has not supported the prosecution case.
28. Patwari T. Kanoongo (PW-13) stated that he has prepared the spot map vide Ex.P-12.
29. Jafar Ali (PW-14) is the witness of last seen theory. He stated that on incident night he saw the deceased and accused seating near the temple. He was not cross-examined on that point and his evidence is also intact on that point.
30. B.P. Tiwari (PW-16) is the Investigating Officer. He stated that he registered Merg Intimation (Ex.P-1), FIR (Ex.P-2) and Inquest (Ex.P-3), seized articles from the spot and prepared seizure memos Exs.P-8 & P-9. He also stated that after taking the appellant into custody he prepared his memorandum vide Ex.P-6 and at his instance recovered cash Rs.310/-, ATM card and papers and prepared seizure memo Ex.P-7. His version was fully supported by memorandum and seizure witness Tarun Kumar (PW-15). Other witness Suresh Yadav (PW-8) has not supported, but he admitted his signature on Exs.P-6 & P-7. He has not offered any explanation as to why he put his signature on those documents, therefore, it is clear that he was intentionally not supporting the case of the prosecution.

31. On close scrutiny of the evidence of Samaru Yadav (PW-11) and Jafar Ali (PW-14), it is clear that on 10.06.2010 after 8.00 to 8.30 p.m. deceased and accused were seen together in a company and no one had seen them departing. According to them, they were last seen together in a company, thereafter on the next day morning dead body of deceased was found in injured condition and he was murdered by strangulation.
32. 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. In the matter of **State of U.P. v. Satish reported in (2005) 3 SCC 114**, the Hon'ble Supreme Court has held thus:-

“22. The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in

those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs3 and 5, in addition to the evidence of PW-2”.

Similarly, in the matter of **Sahadevan & another v. State of Tamil Nadu reported in (2012) 6 SCC 403**, the Hon'ble Supreme Court has held as under:-

“28. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and the deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt.”

33. In the present case, last seen theory is proved beyond doubt and the time gap between the last seen and finding of dead body of deceased is not longer. Articles belonging to the deceased were recovered at the instance of accused/appellant, but he has not offered any explanation as to how that articles were found in his possession.
34. In a case based on circumstantial evidence, the basic principles are that the circumstances set-forth by the prosecution should be fully established. The circumstances so established should be of conclusive nature and tendency and none of the circumstances should be capable of being explained and the chain of circumstantial evidence also must be complete.

35. In the instant case, the circumstances set-forth by the prosecution were fully established, they were of conclusive nature and tendency, all the circumstances were not capable of being explained and chain of circumstantial evidence is also complete. Material on record does not show that accused/appellant was in danger or harm to his body or any assault with the intention of gratifying unnatural lust by deceased, it was made story by the accused in his memorandum statement (Ex.P-6) before the police, but there was no defence at the stage of charge and further stages under Sections 233(2), 313, 313(5) and 315 of the Cr.P.C. Therefore, non-admissible fact of the memorandum statement of accused (Ex.P-6) cannot be accepted as a private defence of body. Therefore, the aforesaid case laws cited by the appellant do not support the defence case.
36. The prosecution has proved that accused was last seen in the company of deceased and there is not a single evidence explaining departing the company, there is no long time gap between last seen of the appellant in company of deceased and recovery of dead body. ATM card, cash and official papers of deceased was recovered on disclosure statement of accused. After death of deceased Durganand, no explanation was given by accused. Therefore, it can be safely inferred that the person, who was found in possession of the ATM, official papers and cash of the deceased, has committed the murder of the deceased.

37. We are of the view that the learned Sessions Judge has not erred in law in resting the conviction of the appellant on the above set of circumstantial evidence and the same is therefore confirmed
38. Accordingly, the appeal being devoid of merit is liable to be and is hereby dismissed. Conviction and sentence awarded to the appellant is upheld.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(I.S. Uboweja)
JUDGE