

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 2685 of 2000**

Firoj Khan alias Sanju Khan S/o Shri Gulam Khan, aged about 25 years, R/o Noorani Chowk, Rajatalab, Raipur (C.G.)

---- Appellant

Versus

State of Madhya Pradesh (now Chhattisgarh),

---- Respondent

For Appellant : Mrs. Renu Kochar and Mr. A. N. Pandey, Advocates
For Respondent-State : Ms. Madhunisha Singh, Panel lawyer

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

C A V JUDGEMENT**Per P. Sam Koshy, Judge****24/02/2016**

1. The present Appeal has been directed against the judgment of conviction under Sections 302 and 364/34 of IPC sentencing the Appellant for life imprisonment with fine of Rs.500/- u/s 302 and rigorous imprisonment for seven years with fine of Rs.500/- u/s 364/34 with default stipulations, passed by the third Additional Sessions Judge, Raipur vide order dated 30.12.1999 in Sessions Trial No. 5/98.

2. The factual matrix of the case revolves around the death of Ku. Yasmin (hereinafter referred as 'the deceased') a minor girl aged about 9 years who went missing from 09.09.1997 and whose body was allegedly recovered on 15.09.1997 in a highly decomposed condition. The family history relevant to decide the case is that Noorbi was the first wife of Abdul Shakur who was the son of Abdulah. Abdul Shakur had two sisters namely Khairunbi and Mariambi. After death of Abdulah, the property belonging to Abdulah was

inherited by Abdul Shakur by way of a Will executed in his favour. Since Abdul Shakur from his first wife Noorbi PW-18 did not have any issue, he married another lady namely Fatimabi from Mahasamund. From this marriage also he did not have any issue and therefore he married another lady namely Ramjanbi, a divorcee having two sons namely Rashid and Rafiq at the time of marriage with Abdul Shakur. As such Rashid and Rafiq are the step sons of Abdul Shakur and from the marriage with Ramjanbi also he did not have any issue. The sister of Abdul Shakur namely Khairunbi had two sons Gulam and Salam and one daughter Kamrunisha. The son of Gulam is the present Appellant Firoj Khan and the grand daughter of Kamrunisha is the deceased Yasmin born from Noorjahan and Salim PW-3. It is said that during the lifetime of Abdul Shakur, he had executed a Will in favour of Noorbi in respect of his property situated at Baijnathpara and the rental income from the said property was being retained by Noorbi. After death of Abdul Shakur, his step sons i.e. the sons of Ramjanbi as well as the children of one of his sister Khairunbi had an eye on the property in possession of Noorbi at Baijnathpara since she was issueless. It is said that many years back, the Appellant had stayed with Abdul Shakur and Noorbi for 3-4 years and later on his father had taken him away. It is also said that the step sons of Abdul Shakur namely Rashid and Rafiq also had stayed with Abdul Shakur and Noorbi for about five years and subsequently Rafiq had also shifted to a different place with his family. It is said that subsequently deceased Yasmin i.e. the grand daughter of Kamrunisha was living with Noorbi who was taking care of Yasmin since she was about 1 ½ years old. During the intervening period, there was some altercation between Ramjanbi and her sons with Noorbi and at one stage, one of the accused Rashid went to the extent of threatening Noorbi of dire consequences in case Noorbi does not agree to keep accused Rafiq with her.

3. On 09.09.1997 at around 8 a.m. Yasmin as usual went to school (Govt. School) wearing her school uniform but she did not return home after the school got over at 12.30 p.m. Then, PW-18 Noorbi went to School and on enquiry the teacher informed that Yasmin had not come to school that day. Thereafter the family members started searching for Yasmin but could not trace her till evening and a missing report Exhibit D-2 was lodged at Police Kotwali at around 8.45 p.m.

4. On 15.09.1997 while PW-17 Ghasuram, a Forest Guard posted at village Parsada was taking a round in the forest found a dead body of a minor girl in a highly decomposed condition and strong foul smell. He immediately reported the matter to Police Station Mandirhasaud. The Police subsequently prepared a Panchnama and spot map Exhibit P-4 to which PW-17 was a witness. From the spot of the incident the Police had seized the school dress of the deceased, one shoe hanging from a tree and a school bag with some books which had the name of the deceased Yasmin on it. Accordingly, at the instance of PW-17, the merg Exhibit P-15 was lodged and subsequently FIR Exhibit P-18 was registered on the same day.

5. Since the body was in a highly decomposed condition, it could not be shifted and next day i.e. 16.09.1997 a team of doctors came to the spot and conducted postmortem Exhibit P-19.

6. During the course of investigation it is said that the Police authorities were told by PW-5 Chandrabhan that the accused Rashid had made an extra judicial confession to him of having taken the deceased on a bicycle and handed over her to accused Firoj who along with his brother took the girl on a motor cycle somewhere and killed her. Further the finger print expert also found certain finger prints on the shoe which was recovered from the spot belonging to the deceased matching with that of the present

appellant Firoj. Followed by the memorandum statement of the accused persons finally the Police Authorities filed a case against four accused persons namely Firoj Khan the Appellant, his brother Salam Khan, father Gulam Khan and son of Ramjanbi Rashid Khan.

7. After conclusion of trial, based upon the finger print expert's report and the alleged extra judicial confession made by the accused Rashid before PW-5, the Court below found the Appellant Firoj to be guilty of the offence under Sections 302 and 364/34 of IPC and accordingly sentenced him for the said offence. Accused Rashid was found to be guilty of the offence under Section 364/34 of IPC and sentenced to undergo RI for seven years with fine of Rs.500/- with default stipulations. However, the other two accused namely Salam and Gulam have been acquitted of the charges levelled against them.

8. According to the counsel for the Appellant, the entire conviction of the Appellant is based upon circumstantial evidence and that there is no direct evidence by which it could be established or safely inferred of the Appellant to have committed the said offence. It was submitted that the circumstance on the basis of which the conviction has been inflicted itself is of very weak foundation and that there is a great element of doubt on the credibility of the finger print report as also the testimony of the prosecution witnesses with which it could be said that the prosecution has been able to establish its case beyond all reasonable doubt. All the prosecution witnesses have been very shaky in nature so also the proof which the prosecution have adduced and as such, the conviction of the present Appellant could not be said to be proper, legal and justified.

9. Some of points which have been advanced by the counsel for the Appellant while seeking quashment of the judgment of conviction are that, the finger print of one shoe which is alleged to have been worn by the deceased

and recovered under a tree is a weak piece of evidence and there is no corroborative evidence to support the same linking the Appellant of having committed the offence. Secondly, there was no motive for the Appellant for killing the deceased Yasmin. According to the counsel for the Appellant, deceased Yasmin was not directly or indirectly a factor in the property which was in the name of PW-18 Noorbi to be the cause or motive for committing the offence. Further there was no direct enmity of the Appellant with PW-18 rather the deposition of PW-18 itself reflects that her relations with the Appellant was cordial and he was on frequent visiting terms with PW-18. It was submitted that there are more than a couple of witnesses who have categorically stated that it was rainy season and that it had been raining for the past few days as well as on the date when the body was recovered. If it was rainy season and it had been raining for few days, the possibility of getting a finger print on the shoe which was lying in open place is very near impossible. The evidence of the finger print expert further reveals that on the said shoe there were finger prints of more than one person in and around the place where the finger print of the Appellant was found as also on the other parts of the shoe which were not capable of identification, obviously due to the weather conditions. As such the conviction on the basis of the report of the finger print expert alone would not be justified without there being any corroborative piece of evidence. Lastly, it was contended that there is no direct or indirect evidence brought by the prosecution except for the finger prints on one of the shoes of the deceased so far as the Appellant is concerned and thus prayed for setting aside of the impugned judgment.

10. Per contra counsel for the State opposing the Appeal submitted that true it is that there are no direct evidence showing the Appellant to be the person who had assaulted the deceased. But the chain of circumstances connecting the commission of crime are so intricately connected to each

other by which it could be safely concluded that the offence could not have been done by any other person except for the Appellant. That the chain of circumstances has been proved by the prosecution beyond all reasonable doubts justifying the conviction of the Appellant.

11. It was submitted that there is a clear motive available for the Appellant for eliminating the deceased as is evident from the statement of PW-3 who has categorically said that the present Appellant was staying with Noorbi for a considerable longtime and that he had an eye over her property as she was issueless. It was also heard of the Appellant abusively stating to his wife that outsiders are in and insiders are out referring to the deceased. State counsel drew the attention to the extra judicial confession made by co-accused Rashid before PW-5. According to the State counsel, another vital factor in the chain of circumstances against the Appellant is the report of finger print expert Exhibit P-10 wherein the Expert has categorically stated that there were clear finger print of the Appellant on the shoe of the deceased which was found near the place of incident. Further there being no iota of even a suggestion being made to the finger print expert by which it could be said that the finger print expert was making a false report with an ulterior or mala fide intention implicating the Appellant. It was further submitted that there was no reason for the finger print expert who is an independent witness for making a false statement against the Appellant before the Court. State counsel relied upon the statement of PW-30, the Investigating Officer who had deposed before the Court below that during the relevant period, there was no rains and it had not rained at least for last one week which by itself would support the case of the prosecution of not to doubt on the report of the finger print expert and also dispels the defence theory of the weak possibility of having finger marks on the shoe because of rain. State counsel referring to the questions put to the Appellant submitted that the answers given by the Appellant under

Section 313 Cr.P.C give rise to a great element of suspicion of his conduct and the answers are excessive to the questions and are also totally unwarranted and at times were also evasive. She referred to question Nos. 81 and 97 to substantiate her contention. State counsel further referred to the statement of PW-27 to corroborate the extra judicial confession made by co-accused Rashid in presence of PW-5 by drawing attention to his Statement of having witnessed co-accused Rashid taking a girl aged about 11-12 years in school uniform on his bicycle. This evidence of PW-27 gets corroborated linking the Appellant of having involved in the case as the extra judicial confession reveals that Rashid had taken the deceased on his bicycle and given her to the present Appellant. This is an another link to the chain of events. According to the State counsel, the above stated events and the evidence which have been acquired by the prosecution complete the chain of events by which it could be safely held that the offence has been committed by the present Appellant along with co-accused Rashid who has been convicted under Section 364/34 of IPC and prayed for rejection of the Appeal.

12. Having heard the counsel for the parties and a perusal of the record would show that the undisputed fact is that the body which was traced on 15.09.1997 was of a young girl in highly mutilated and decomposed state and all the witnesses who had seen the deadbody have categorically stated that it was hard to recognize and identify the person who had died. However, the recognition of the deceased was made on the basis of the clothes which she was wearing at the time of incident, the school bag which was found near the deadbody as also the books which were found from the school bag wherein the name of the deceased, the school and the class were mentioned. All these articles as well as the school uniform have been identified by PW-18 with whom the deceased was staying and by PW-3, the father of the

deceased. For these reasons, there is no scope to doubt the identity of the deceased done on the basis of the uniform which she was wearing as well as the other articles found near the place of incident. Thus, the contention of the Appellant doubting the identity of the deceased is not sustainable.

13. Now, the other major factor and which has been the primary factor for convicting the Appellant is his finger print being found on the shoe recovered from the place of incident. While dealing with this issue, it is pertinent to note certain facts from the report of finger print expert that there were finger marks of more than one person on the shoe. Though the finger print of the Appellant is said to have matched the sample collected by the finger print expert, yet only on the basis of the report of the finger print expert it cannot be conclusively held that it was the Appellant who had committed the offence. The simple reason not to totally rely on the report of the finger print expert is that the prosecution could not establish the fact as to whether it was the Appellant himself who was the last person to have caught hold of the shoe of the deceased particularly when there are finger prints of more than one persons available on the shoe though the same could be faint or would have been got washed because of rains. It is difficult to hold that only the finger print of the Appellant remained unaffected by the weather while others got diminished.

14. So far as the extra judicial confession made by co-accused Rashid to PW-5 is concerned, if the evidence of PW-5 is minutely analyzed, it would clearly reflect that in fact, it cannot be said to be an extra judicial confession but at best could be only a exculpatory statement which cannot be given much weightage to. Even otherwise under the criminal jurisprudence it is settled law that an alleged extra judicial confession made by a co-accused cannot be taken as a vital factor for convicting another accused person. Another aspect to be borne in mind is that it was not a voluntary confession

but was made on an enquiry by PW-5. If the statement of PW-5 is taken in its true value, even then the only part which perhaps has to be taken into consideration is that the co-accused was taking the deceased on his bicycle and nothing beyond that. Beyond the fact of a girl being taken by Rashid on his bicycle, there is no further corroboration to the evidence of the Appellant having committed the offence. This fact would also get fortified from the deposition of PW-27 who has only stated if his version has to be accepted of the co-accused Rashid taking a girl in school uniform on his bicycle. A careful analysis of the evidence of PW-18 Noorbi, the person who is the fulcrum of the entire dispute would give clear indication of there being many other persons who were having an eye over the property in her name and possession situated at Baijnathpara. For instance, the sister of Abdul Shakur and her family members one among whom is the present Appellant had an eye and dispute with PW-18. Likewise, step sons of Abdul Shakur from earlier marriage of Ramjanbi namely Rashid and Rafiq of whom Rashid is one of the convicted accused also had an eye on the property.

15. Another factor giving rise to a element of doubt is that there is another Firoj directly related to PW-18 who was also taken into custody during the course of investigation. There is evidence adduced by the prosecution witnesses who would state that because of the political influence of the said Firoj, he was immediately released by the Police. Under the said facts and circumstances, it was all the more required for the prosecution to have further led strong, cogent and reliable evidence while implicating the present Appellant Firoj to the offence charged against him.

16. The aforesaid facts and reasons give rise to a great element of suspicion and doubt on the prosecution evidence. This also gives insufficient indication of the link attached to the chain of events to be complete for convicting a person on the basis of circumstantial evidence. In the instant

case there is sufficient indication to doubt the prosecution story firstly the body of the deceased has not been physically identified but the identification has been done only based on the certain articles that were seized from the scene of offence. Secondly, the report of finger print expert clearly indicates that on the single piece of shoe which was seized from the spot there were finger prints of more than one person. Thirdly, PW-5 before whom the alleged extra judicial confession was made also is a professional witness as he has accepted in his cross examination that he had been a witness of the Police in more than a dozen of cases which also would give rise to a great element of doubt on his credibility. Lastly there was absolutely no motive for the Appellant to eliminate the deceased Yasmin for the purpose of the alleged eye that he had on the property of PW-18. Under these facts and circumstances of the case the conviction of the Appellant is not sustainable.

17. Thus, for the foregoing reasons, we are unable to sustain the conviction of the Appellant. Accordingly, the impugned judgment dated 30.12.1999 passed by the third Additional Sessions Judge, Raipur in Sessions Trial No. 5/98 so far as the Appellant Firoj Khan is concerned deserves to be and is set aside.

18. The Appeal is accordingly allowed and the Appellant Firoj Khan is acquitted of the charges under Sections 302 and 364/34 of IPC. He is set at liberty subject to the conditions of Section 437A Cr.P.C.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE