

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 1113 OF 2001

1. Bholaram Dhruw, aged 29 years, S/o Birjhu, R/o Village Amlidih, P.S. Bhatapara Gramin.
2. Onkar Verma, aged 25 years, S/o Dukalha Verma, Village Sonbahra Khar.
3. Narayan, aged 35 years, S/o Kanshiram Dongre, Village Sasahali, P.S. Newra, District Raipur (C.G.)
4. Duklaha Verma, aged 72 years, S/o Shivilal Verma, Village Sonbahara Khar, P.S. Bhatapara Gramin, District Raipur.

... Appellants

Versus

State of Chhattisgarh, through P.S. Bhatapara Gramin, District Raipur (C.G.)

... Respondent

CRIMINAL APPEAL NO. 1203 OF 2001

Devesh Kumar Verma, aged 18 years, S/o Dukalha Verma, R/o Sonbarasa Khar, P.S. Bhatapara Gramin, District Raipur

... Appellant

Versus

State of Chhattisgarh

... Respondent

For Appellants	:	Ms. Nirupama Bajpai, Advocate.
For Respondent-State	:	Ms. Smita Ghai, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per NAVIN SINHA, C.J.

26/02/2016

1. The Appellants stand convicted under Section 396 IPC to life imprisonment with fine of Rs. 500/- each, failing which they were required to undergo six months further rigorous imprisonment and to five years rigorous imprisonment each under Section 201 IPC with fine of Rs. 200/- each, failing which they were required to undergo one month further rigorous imprisonment, as ordered on 6.9.2001 by the

Second Additional Sessions Judge, Balodabazar in Sessions Trial No. 54 of 2000.

2. The Appellant Bholaram is stated to have completed his period of custody and has been released. Learned Counsel for the Appellants submits that she has no further instructions with regard to him for pursuing the appeal.

3. The deceased, Shilanath Panda, a Priest by profession, was missing since 18.5.1999. His son-in-law, Umashankar, PW-10, lodged a missing persons report on 22.7.1999, Exhibit P-22, registered as Rojnamchasanha No. 947. The Head Constable, Ninnaji Warade, PW-14, who recorded it proved the same. Formal FIR, Exhibit P-19, was registered on 7.11.1999 by PW-22, G.P. Verma, Assistant Sub Inspector. The Appellants were taken into custody and their confessions recorded leading to recovery including the corpse of the deceased on 6.11.1999 from the fields of Appellant Duklaha. It was identified by PW-10, Umashankar. The body was in a highly decomposed state and adipocere had set in. Skin was not present on bones uniformly. Limbs were loose and the skull also detached. It was sent for forensic examination to FSL Chandigarh. The Inquest Report, Exhibit P-2, mentioned a Moonga necklace with two small stones and one sphatic white necklace with transparent stones on the skeleton which PW-10, Umashankar, identified as worn by the deceased.

4. The confession of Appellant Bholaram led to recovery of the dead body buried deep underground in the fields of Appellant Duklaha. On confession of Appellant Onkar, son of Duklaha, a statue of God Shankar, a Devi necklace and Mundri were recovered from the kitchen. Likewise, on confession of Appellant Narayan, a jacket, kurta and a blue bag belonging to the deceased are stated to have recovered from the

house of Appellant Duklaha. The confession of Appellant Duklaha led to the recovery of a bag and a Moorti for Pooja and a necklace from his house. The confession of Appellant Devesh, son of Duklaha, led to a recovery of Lota from the house with the name of the deceased etched on it. Appellant Duklaha and his sons, Onkar and Devesh, resided in the same house. Except for the Lota the other items said to have been recovered on confession were identified in TIP, Exhibit P-20 by Umashankar, PW-10.

5. Section 396 IPC creates a fiction that if five or more persons commit dacoity and murder is committed in the course of it, they will all be deemed to be liable for the same. But for this fiction to apply, there will have to be a minimum of evidence with regard to their participation and presence in the dacoity. If that fact itself is not established by the prosecution, the deeming fiction will not apply.

6. Learned Counsel for the Appellants submitted that there is no eyewitness to the occurrence and the entire case of the prosecution is based on circumstantial evidence primarily on basis of one or another recovery from each one of them. They may be corroborative evidence but cannot be substantive evidence for conviction without anything further to directly connect the Appellants to the crime. The missing persons report only stated that the deceased was wearing a dhoti-kurta. It did not mention that he was wearing a jacket, was riding a bicycle, was wearing any necklace or carrying a bag of blue colour with pooja items inside it.

7. PW-11, H.D. Mire, the Naib Tehsildar, has deposed that on confession of Appellant Bholaram when the fields of Appellant Duklaha were dug the first day nothing was recovered. Digging was again done the next day when the body is stated to have been recovered.

Therefore it cannot be said that the body was recovered on confession of Appellant Bholaram. It has also not been established by the prosecution beyond all reasonable doubt that the body was in fact of the deceased alone much less has it been established whether the body was of a male or female. The body was highly decomposed with patches of skin exposing the bones and skull. Facial identification by photograph or ocular evidence was not possible. Unless it is first established by scientific evidence including a DNA test of the bones, it cannot be said with certainty that it was the corpse of the deceased alone. The forensic result of the skull was never received. No reason has been furnished by the prosecution why DNA test was not done for identification of the body. The body was exhumed six months later. Adipocere had set in. If there exists slightest possibility of the body being of any other, benefit of doubt has to be given to the accused. Appellants Bholaram and Duklaha had taken the defence under Section 313 Cr.P.C that the corpse was of the elder brother of the latter who had been buried in the fields. The defense has not been properly appreciated and considered. There is no evidence that the deceased was last seen near the house of the Appellant Duklaha. Merely because the body may have been found in his fields behind his house it cannot lead to a presumptive opinion that they were involved in the dacoity and murder.

8. The recovery of other items stated to have belonged to the deceased were items of daily use by any priest. In any event, the TIP itself is vitiated in view of the statement of PW-18, Theerdas, regarding the presence of the police during the process. The recovery and identification are therefore inconsequential. The Lota stated to have been recovered on the confession of Appellant Devesh is

inconsequential for his individual guilt as recovery was not from any special or concealed place inside the house so as not to be known to other members of the house. The police has implicated Appellant Duklaha and his entire family falsely on a theory of recoveries from his house alone without any specific evidence against them. Without prejudice to the same it was submitted that the possibility of the name having been etched on the 'Lota' after seizure cannot be ruled out. The recovery of the cycle stated to be of the deceased from the possession of PW-15, Bhagirathi, is not relevant at all since he claimed that it had been given to him by one Neeraj who has not been examined.

9. It was lastly submitted that the post mortem report or statement of PW-23, Dr. Ulhas Gonnade does not express any conclusive opinion regarding a homicidal death. The possibility of a natural death cannot be ruled out. Any benefit of doubt has to be given to the Appellants.

10. Learned Counsel for the State opposing the appeal submitted that the case was based on circumstantial evidence. All the corroborative materials have to be seen taken together for arriving at any conclusion. No individual issue can suffice either for acquittal or guilt. If the materials collectively point irresistibly towards the guilt of the accused, inconsistent with the possibility of innocence and a false defence has also been taken, it becomes another incriminating factor against the accused and the charge can be said to have been established fully and conviction will call for no interference.

11. The deceased was missing for more than two months. The body has been exhumed after nearly six months. It is crucial to notice that the recovery of the body was from a deep ditch evident from the photographs exhibited during the trial, proved by the photographer PW-20, Moolchand Gupta. The fact that a body had been buried at that

very location could be known only to one who was fully aware of the fact. How the person had died and where the corpse was buried was therefore a fact specifically known to the accused alone. The onus was on them under Section 106 Evidence Act to explain how death had occurred and the corpse came to be buried deep in the earth at that location. The body was not lying in the open fields visible to all. The fact that a corpse was buried in the fields was well known to the two Appellants. A false and pretentious defence was taken that it was of the elder brother of Appellant Duklaha. The Trial Judge has adequately noticed that no death certificate was produced. Even the name of the elder brother has not been mentioned. Even though they said that they wanted to lead evidence in support of the same in defence, no such evidence was led. The body was recovered from the agricultural fields of Appellant Duklaha behind his house.

12. The body was located adjoining to the place dug the first day deposed by PW-11, H.D. Mire. Reliance was placed on the police statement of PW-25, Manmati, wife of Appellant Onkar and daughter-in-law of Appellant Duklaha, which establishes that the deceased had come to their house, stayed overnight when she did not see him the next morning and his bicycle was being taken away by Appellants Bholaram and Narayan.

13. It cannot be said from a conjoint reading of the post-mortem report and the evidence of PW-23, Dr. Ulhas Gonnade, that no cause of death could be ascertained. Decaying of the body and bones is quite different from the fractures found near the 2nd to 8th rib and 7th, 8th and 9th ribs and there was fracture of the thyroid cartilage on both sides. Death was opined due to traumatic asphyxia due to blunt injury on chest inflicted during lifetime.

14. The confession of the Appellants and the consequent seizure of the belongings of the deceased have all been fully proved and supported by the seizure witness, PW-2, Mohit Ram. No suggestion was made to the witness during cross examination that the Appellants had never made any confession or that there was no recovery pursuant to the same. The items of the deceased have been identified in the TIP by PW-10, Umashankar. Cumulatively if the evidence reveals that the dead body was recovered after six months on confession buried in the earth not known to anyone except the two Appellants and a false defence has been taken that the body was of another, the belongings of the deceased have been recovered from the house of the Appellant Duklaha, it cannot be conclusively held that other inmates of the family have been falsely implicated if there has been recovery on their confession also.

15. We have considered the submissions on behalf of the parties and also examined the evidence on record. The case of the prosecution is based solely on circumstantial evidence constituting recovery of the corpse and belongings of the deceased admissible to the extent permissible under Section 27 of Evidence Act upon the confession of the accused. The prosecution does not rely on the last seen theory. In a criminal trial, the prosecution has to prove the charges beyond reasonable doubt. It is the duty of the prosecution to lead evidence for establishing the charge. Section 25 of the Evidence Act prohibits admissibility of any confession before a police officer. Section 26 prohibits the consideration of any confession made while in police custody. The bar is lifted partially under Section 27 of the Evidence Act which provides that if there is any discovery in consequence of information received from the accused while in custody, it will be

admissible to the extent it relates to a fact discovered thereby and no more. It reads as follows :

“27. How much of information received from accused may be proved.—Provided that, when any fact is proved to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

16. The recovery so made is normally considered corroborative material which when considered along with other materials placed by the prosecution leads to the guilt of the accused. Mere recovery, normally may not be sufficient to establish guilt to base conviction. But considered cumulatively along with other corroborative material including the taking of a false defence which becomes an additional incriminating factor against the deceased are all relevant and have to have examined collectively for establishing if the charge has been proved beyond reasonable doubt leaving out any other possibility of innocence or false implication.

17. An FIR under section 154 Cr.P.C is not required to be encyclopedic in nature and need not contain every minute detail as was also observed in (2013) 3 SCC 462 (Vajresh Venkataray Anvekar v. State of Karnataka). If it discloses the commission of a cognizable offence Section 156 Cr.P.C. requires it to be investigated and report submitted under Section 173 Cr.P.C. The fact that it only mentions that the deceased left home wearing a dhoti-kurta alone is therefore not considered so materially relevant so as to doubt the whole prosecution case.

18. The deceased was missing for approximately two months before the missing persons report was lodged by PW-10, Umashankar. The recovery of the body was made on the confession of Appellant Bholaram from the fields of Appellant Duklaha, behind his house. It therefore displays knowledge by them of a dead body buried deep at a specific location. A false defence was then taken that it was of the elder brother of the latter. No name of the elder brother was mentioned let alone the date and cause of death or his age. Both of them under Section 313 Cr.P.C. said that they wanted to lead evidence on this defence but did not do so. The body was buried deep evidently to prevent discovery apparent from the photographs taken at the location by the photographer, PW-20, Moolchand Gupta. A body lying abandoned in a field in an open place is an entirely different matter. The confession and recovery of the dead body has been proved by PW-2, Mohit Ram. In cross-examination, no questions were asked to the witness in this regard. The onus was therefore on the Appellants under Section 106 of the Evidence Act to discharge how the body came to be buried there and how the deceased may have died as it was a fact specifically within their knowledge. In (2014) 5 SCC 509 (Dharam Deo Yadav v. State of U.P.), also a case of circumstantial evidence based on recovery of the dead body on confession buried in the house of the accused it was observed as follows :-

“20....The evidence of PWs 14 and 15 would indicate that they could recover the skeleton of Diana only on the basis of the disclosure statement made by the accused that he had buried the dead body in his house. The recovery of a dead body or incriminating material from the place pointed out by the accused, points out to three possibilities — (i) that the accused himself would have concealed it; (ii) that he would have seen somebody else concealing it, and (iii) he would have been told by another

person that it was concealed there. Since the dead body was found in the house of the accused, it is for him to explain as to how the same was found concealed in his house.”

19. Similarly in (2013) 12 SCC 383 (Anuj Kumar Gupta v. State of Bihar) conviction was based on confession leading to recovery of the dead body. It was observed :-

“17. From the above evidence of PW 9, supported by the version of PW 4, it has come to light that at the instance of the appellant and the co-accused Arun Mandal, the body of the deceased Chhotu was recovered from Maldiha Dhar (river stream)..... The said part of the confessional statement as recorded by PW 9 cannot be said to straightaway implicate the appellant and the co-accused to the killing of the deceased. Leaving aside the rest of the part of the admission, the identity of the place at the instance of the appellant and the co-accused, as to where the dead body of the deceased was lying, which was exclusively within the knowledge of the appellant, was certainly admissible by virtue of the application of Section 8, read along with Section 27 of the Evidence Act.

18. In such circumstances, in the absence of any convincing explanation offered on behalf of the appellant-accused as to under what circumstances he was able to lead the police party to the place where the dead body of the deceased was found, it will have to be held that such recovery of the dead body, which is a very clinching circumstance in a case of this nature, would act deadly against the appellant considered along with rest of the circumstances demonstrated by the prosecution to rope in the appellant in the alleged crime of the killing of the deceased. Therefore, once we find that there was definite admission on behalf of the appellant by which the prosecuting agency was able to recover the body of the deceased from a place, which was within the special knowledge of the appellant, the only other aspect to be examined is whether the appellant came forward with any convincing explanation to get over the said admission. Unfortunately though the above incriminating circumstance was put to the appellant in the Section 313 CrPC questioning where he had an opportunity to explain, except a mere denial there was no other convincing explanation offered by him.”

20. The fact that the body could not be located in the fields on the first day on basis of the confession by Appellant Bholaram but was recovered the next day is not considered relevant so as to doubt the very confession itself leading to recovery. PW-11, H.D.Mire, Naib Tehsildar has proved that it was recovered just adjacent to the place dug the previous day. Considering the long passage of six months since the burial it is considered natural. Human memory is not photographic and minor trivial variations are always possible.

21. Once it is established that the body was recovered exclusively on the confession of Appellant Bholaram and that Appellant Duklaha was aware of it having been buried in his agricultural fields, their taking of a false defence becomes another incriminating factor against them corroborating the earlier evidence for recovery of the corpse available against the accused. We are of the considered opinion that in the facts and circumstances of the case, the defence that it could not be said as to whose body it was does not merit any consideration. No defence was taken that it was the body of an unknown person or of a female. On the contrary, a specific defence was taken with regard to awareness of the presence of the body and a false defence taken that it was that of the elder brother of Appellant Duklaha which remained unsubstantiated. The body has been identified by Umashankar, PW-10, the son-in-law of the deceased, from the necklace found on the body as mentioned in the inquest report. The fact that the Forensic report of the skull was inconclusive compared from the photograph of the deceased because of the absence of skin is not considered so material as to doubt the very identity of the deceased in view of the other evidence available.

22. Undoubtedly a DNA test would have been more helpful in investigation. But in the facts of the case merely because it was not done cannot lead to a complete doubt about the identity of the deceased to warrant acquittal. That poor investigation could not be a ground to acquit if there was otherwise credible evidence available was considered in (1995) 5 SCC 518 (Karnel Singh v. State of M.P.) observing as follows :-

“**5.** Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.”

23. The taking of a false defence was an incriminating factor and that the prosecution was not obliged to disprove every hypothesis put forth by the accused was considered in (2012) 11 SCC 768 (Jagroop Singh v. State of Punjab) observing as follows :-

“**36.** Another aspect is to be taken note of. Though the incriminating circumstances which point to the guilt of the accused had been put to the accused, yet he could not give any explanation under Section 313 of the Code of Criminal Procedure except choosing the mode of denial. In *State of Maharashtra v. Suresh*, it has been held that when the attention of the accused is drawn to such circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for completing the chain of circumstances. We may hasten to add that we have referred to the said decision only to highlight that the accused has not given any explanation whatsoever as regards the circumstances put to him under Section 313 of the Code of Criminal Procedure.

37. From the aforesaid analysis, we are of the convinced opinion that all the three circumstances which have been established by the prosecution complete the chain. There can be no trace of doubt that the circumstances have been proven beyond

reasonable doubt. It is worthy to remember that in *Sucha Singh v. State of Punjab* it has been stated that:

“20. ... The prosecution is not required to meet any and every hypothesis put forward by the accused. ... A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect.”

24. The only material against Appellants Onkar and Narayan is the confession leading to recovery of the belongings of the deceased from the house of Appellant Duklaha. The recoveries have been proved by PW-2, Mohit Ram. But PW-10, Umashankar has not stated how he identified the common items of Puja as specifically belonging to the deceased alone by any distinguishing features during the TIP. In any event the TIP, Exhibit P-20, stands vitiated in view of the statement of PW-18, Theerdas, that the police remained present throughout the TIP.

25. The Lota with the name of the deceased etched on it is stated to have been recovered from the house of Appellant Duklaha on confession of Appellant Devesh. The recovery is not from any hidden or concealed place inside the house not known to other inmates but exclusively to the Appellant Devesh alone. A defence has been taken that the police has tried to implicate the whole family. Even if the Lota has been recovered from the house with the name of the deceased inscribed on it, without any other corroborative material against Appellant Devesh we do not consider it safe to uphold his conviction. The possibility of the police falsely implicating his two sons Appellants Onkar and Devesh by showing one or the other recovery from them cannot be entirely ruled out. Likewise in so far as the Appellant Narayan is concerned, even though he is not a family member, yet recovery from

him is also from the house of Appellant Duklaha. The recoveries do not inspire confidence in the Court given the common pattern in them to sustain the conviction of the three.

26. Resultantly, the appeal of Appellant Duklaha is dismissed. The appeal of Appellants Onkar, Narayan and Devesh are allowed giving them benefit of doubt.

27. Appellant Duklaha is directed to surrender and/or be taken into custody forthwith for serving out the remaining period of his sentence. We are informed that today he is approximately 87 years of age. It is directed that the Jail authorities shall take necessary steps to make his incarceration humane and provide all necessary assistance medical or otherwise.

28. The Appellants Onkar, Narayan and Devesh are required to execute necessary bail bonds in compliance of Section 437-A Cr.P.C.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge