

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 151 OF 2008

1. Kalyan Singh Thakur, S/o Kedar Singh Thakur, aged about 20 years
 2. Manoj Kumar Dhivar, S/o Budhram Dhivar, aged about 19 years
- Both R/o Tekari, P.S. Dharsinwa, District Raipur (C.G.)

... Appellants

Versus

- State of Chhattisgarh, through Police Station Dharsinwa, District Raipur (C.G.)

... Respondent

For Appellants	:	Ms. Fouzia Mirza, Advocate.
For Respondent-State	:	Ms. Madhunisha Singh, Panel Lawyer.

Hon'ble Shri Deepak Gupta, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

C A V JUDGMENT

Reserved on : 11/08/2016

Delivered on : 31/08/2016

Per P. Sam Koshy, J.

1. By way of the present appeal, the Appellants have challenged the judgment of conviction and order of sentence dated 24.1.2008 passed by the 8th Additional Sessions Judge (F.T.C.), Raipur in Sessions Trial 147 of 2007, whereby the Appellants have been found guilty of having committed the offence punishable under Sections 302, 392, 397 and 398 of IPC and have been sentenced to undergo life imprisonment with fine of Rs.500/- for the offence under Section 302 of IPC and also have been sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.500/- under Section 392 of IPC and for 7 years rigorous imprisonment each for the offence under Sections 397 and 398 of IPC. In default of payment of fine amount, they were further required to undergo three months rigorous imprisonment each. All the sentences were directed to run concurrently.

2. The case of the prosecution in brief is that on 21.5.2007 an intimation was received at Police Station Dharshinwa, District Raipur from PW-1, Vineeta Pathak, informing that her brother, who was a salesman of cooking products and used to sell the products by going door to door, went missing on 20.5.2007 and in the course of the search on the next day i.e., on 21.5.2007, she was informed by one of the customers of her brother, namely, Hari Shankar Tiwari, that some incident has taken place near Tekari bypass and when they went to the said spot they found the dead body of Sushil Kumar Pathak, brother of PW-1, lying there. That there was a big stone with bloodstains found near the body. It was also intimated that the incident appears to be that of a loot as the motorcycle and mobile phone have all been taken away by the accused persons. On the basis of the said intimation, *Merg* (Exhibit P-2) was registered and later on FIR (Exhibit P-11) was registered in Crime No. 200 of 2007 on the same day i.e., 21.5.2007 against unknown persons.

3. During the course of investigation, it was found that on 20.5.2007 in the morning when the deceased was at home he received a few phone calls in between 7 to 10 a.m. informing the deceased that the caller was from Mandhar, Raipur and was interested in purchase of certain cooking products which the deceased used to sell. On the basis of the said clue, the police authorities tried to trace down the numbers which were called on the mobile phone of the deceased in the morning of 20.5.2007 and in the process the Appellants were suspected and taken into custody on 24.5.2007. During investigation, the Appellants is said to have given memorandum statements and in the said memorandum statements in addition to having made a statement accepting the commission of the crime it was stated by the Appellant, Manoj that they had removed the number

plate of the motorcycle and had taken it away. In addition, it was also stated by the Appellant, Manoj that the *gupti* that was a weapon used for commission of the crime and the shirt which the Appellant, Manoj, was wearing have been hidden near the Shiv Mandir at Baroda pond. Likewise, it was stated by the Appellant, Kalyan that the motorcycle which was looted was parked near the Railway colony and the mobile phone of the deceased was also hidden at the bushes near the place where the motorcycle was parked. It was also stated by the Appellant, Kalyan, that the SIM which was used by the deceased was thrown at a place in between Village Sargaon and Dhardehi which according to them they would provide to the investigating team. Later on, on the basis of the said memorandum statements, recoveries were made and at the instance of the Appellant, Manoj, from the place that he had stated in the memorandum statement a shirt having blood like stains on it and a *gupti* was recovered. Likewise, at the instance of Appellant, Kalyan, motorcycle and mobile set belonging to the deceased was recovered.

4. After the completion of investigation, charge-sheet was filed before the Court below and the matter was put to trial before the 8th Additional Sessions Judge (F.T.C.) Raipur. In the course of trial, the prosecution examined as many as 16 witnesses. The defence did not examine any witness. After completion of the trial, the Court below found the charges levelled against the Appellants to have been proved beyond all reasonable doubts and held them guilty for the offences and ordered to undergo the sentence as has been enumerated in the beginning of this judgment, leading to the filing of the present appeal by the Appellants.

5. Learned Counsel for the Appellants submits that it is a case where the Sessions Court has not properly appreciated the evidence which has

been adduced by the prosecution and has blindly relied upon the evidence of the prosecution and in a mechanical manner found the Appellants to be guilty and convicted them for having committed the alleged offence. According to the Counsel for the Appellants, it is a case where there is no eye-witness to the commission of the alleged offence and the entire case revolves around the circumstantial evidence and the circumstances do not complete the chain of links so as to hold, that from the evidence which has come on record the charges stand proved beyond all reasonable doubts. According to the Counsel for the Appellants, it is a case where there is no eye-witness to the commission of the offence and the entire case revolves around the recovery and seizure made on the basis of the memorandum statement recorded of the two Appellants. She further submits that it is also the case where a link to the chain of circumstances is the phone calls made on the mobile phone of the deceased on the morning of the date of incident which however does not in any manner connect the Appellants in the commission of the offence nor has the prosecution been able to prove the said phone calls in accordance with the provisions of the Evidence Act.

6. Learned Counsel for the Appellants further submitted that the prosecution has not examined any independent witness in support of its case and that all the witnesses who have been examined in the instant case were some way or the other connected to the deceased and as such they were interested witnesses and the Appellants cannot be held guilty of the offence only relying upon the evidence of these interested witnesses. The prosecution has failed to adduce evidence of the local residents of the place of incident as also the witnesses who reside nearby the spot from where recoveries were made which also creates a great element of doubt on the prosecution case.

7. As per the Counsel for the Appellants, so far as the evidence of the call details collected by the prosecution which has also been taken as an incriminating factor for convicting the Appellants is concerned, it has not been proved as is required under Section 65 of the Evidence Act and is also contrary to the legal pronouncements made in this regard, relying upon a judgment of the Supreme Court in **Anvar P.V. Vs. P.K. Basheer & Others, 2014 (10) SCC 473.**

8. It was further contended by the Counsel for the Appellants that so far as the case of the Appellant, Manoj is concerned, the only incriminating factor against him is the recovery of bloodstained shirt as well as *gupti* allegedly used in the commission of the offence. The prosecution has failed to collect the FSL report of the knife; nor is there any report of the serologist by which it could be proved that the knife and the bloodstained shirt were the same which were used and worn by the accused at the time of commission of the alleged offence or that the bloodstains matches with that of the deceased. In the absence of FSL report as well as serological report, the case of the prosecution so far as Appellant, Manoj is concerned stands totally disproved.

9. Next contention of the Counsel for the Appellants is that in a case where the evidence available is only circumstantial evidence then there has to be a chain of links by which it could be said that the links in the chain of circumstantial evidence are so interconnected that the conclusion which could lead to clearly indicate that the offence could not have been committed by any other person but the accused Appellants themselves. According to the Counsel for the Appellants, there are many broken links in the circumstances created by the prosecution in the course of collecting evidences.

10. It was also contended by the Counsel for the Appellants that the recovery part also has not been properly proved and established before the Court below inasmuch as the recovery and the seizure at the instance of the Appellants becomes doubtful for the reason that the witnesses of the memorandum statement as well as the witnesses to the recovery and seizure are the same and there was no independent witness examined to prove the same and that the witness who have been examined to prove the recovery and seizure, namely, Sudhir Kumar Soni, PW-11, is an interested witness as he is distantly related to the family of the deceased. Thus, for the aforesaid facts and grounds the Appellants prayed for setting aside the impugned judgment of conviction by acquitting them from the charges levelled.

11. Per contra, learned Counsel for the State opposing the appeal submitted that it is a case where the prosecution has in fact adduced sufficient evidence by which it could be said that the charges leveled against the accused persons have been proved beyond all reasonable doubts. According to the Counsel for the State, the memorandum statement of the two accused persons to the extent of the recovery and seizure made at their instance is an admissible piece of evidence and taking into consideration the recoveries that have been made at the instance of the Appellants sufficiently proves the offence for which they have been charged with. The State Counsel further tried to emphasis on the fact that from the recovery and the seizure made at the behest of the two Appellants if the seizure memo and the other related documents are seen it would reflect that it is not from any open place but from the place which was known only to the Appellants and therefore the recovery and the seizure becomes a vital piece of evidence.

12. It was further contended by the Counsel for the State that another incriminating piece of evidence is the call details which have been provided by PW-12, Libi Varghese. According to the State Counsel, if the case of the prosecution is taken into consideration it would clearly reveal that the chain of circumstances and the links connecting the chain, leads to the only possible conclusion of the Appellants alone to be guilty of the offence. That there is no plausible explanation given by the Appellants on the issue as to how the seized articles were either in their possession or as to how it was only they who knew the place where the seized articles were kept. In the absence of a proper explanation and justification the only inference which can be drawn is that these articles have been looted from the deceased after murdering him and kept in exclusive possession of the Appellants or after having committed the offence they have tried to destroy the evidence so far as the articles used in the course of commission of the offence.

13. Having considered the rival contentions put forth on behalf of either side, if we look into the evidence which has come before the Court below it reveals that PW-1, Vineeta Pathak, sister of the deceased, is the prime witness on behalf of the prosecution. As per the prosecution case, the entire investigation started after PW-1, Vineeta Pathak had lodged a report with the police authorities in respect of her brother going missing on 20.5.2007. Another important aspect which is derived from the deposition of PW-1, Vineeta Pathak is the fact that she had witnessed her brother receiving repeated calls from the place near Mandhar asking her brother, the deceased, to reach Mandhar so that the caller can purchase the kitchen items which were sold by the deceased. She has also informed the investigating agency that the next day morning when she had gone to Mandhar along with PW-11, Sudhir Kumar Soni and PW-2, Rahul Kumar

they had met a person named Hari Shankar Tiwari, PW-7 who informed them that some untoward incident had occurred near Tekari bypass and thereafter it is said that PW-1, Vineeta Pathak along with other persons accompanying her had gone to the said place and found the dead body lying there and near the body was a large stone and near the spot the articles which the deceased used to sell were also found to be lying on the road.

14. Likewise, PW-2, Rahul Kumar also has deposed before the Court that at the instance of the sister of the deceased i.e., PW-1, Vineeta Pathak, he along with Sudhir Kumar Soni (PW-11) had gone to the CCI colony at Mandhar where they met with Hari Shankar Tiwari (PW-7) who initially could not provide some clue but later on intimated the PW-2, Rahul Kumar and other persons accompanying him about some alleged incident that took place near Tekari bypass. Accordingly, when PW-2, Rahul Kumar along with PW-1, Vineeta Pathak and PW-11, Sudhir Kumar Soni visited Tekari bypass they found Sushil Kumar Pathak lying in a pool of blood and his products were scattered near the place.

15. PW-3, Sanjeev Kumar Pathak is the elder brother of the deceased, Shushil Kumar Pathak as well as PW-1, Vineeta Pathak. He had deposed before the Court below about the fact that he was informed by PW-1, Vineeta Pathak about his brother, the deceased, going missing on 20.5.2007 and that he had in the morning informed of going towards CCI colony at Mandhar. He further stated that upon receiving the intimation from his sister (PW-1) he has asked his brother-in-law, Sudhir Kumar Soni (PW-11) and also PW-2, Rahul Kumar to accompany his sister (PW-1) in searching his brother, Sushil Kumar Pathak. He also deposed before the Court below that the investigating agency had recovered the motorcycle,

Bajaj Discover, belonged to the deceased in his presence and he was a witness of the seizure memo (Exhibit P-3) prepared. He also brought before the Court below the credit bill in respect of purchase of a Nokia mobile phone belonging to the deceased. He had categorically deposed that the mobile phone which was in possession of the deceased at the time of incident was one which was purchased by him (PW-3) and the receipt of which was Exhibit P-5.

16. The next important witness on behalf of the prosecution is PW-7, Hari Shankar Tiwari. He in his deposition has deposed before the Court below about the fact that he was contacted by PW-1, Vineeta Pathak in respect of her brother going missing. In this regard, after trying to contact the deceased on his mobile it was found to be switched off. Thereafter, he contacted one of the betel shop owners at the spot who informed that near the bypass road a murder has taken place and then the said witness along with the betel shop owner went to that spot and found a dead body lying there with electronic stove lying near the body at which the said witness doubted the dead body being that of Sushil Kumar Pathak. He tried to contract the Sarpanch and Deputy Sarpanch but they were untraceable.

17. Similar statement has also been made by PW-11, Sudhir Kumar Soni who again is said to have met PW-1, Vineeta Pathak at the instance of PW-3, Sanjeev Kumar Pathak and when he along with the sister of the deceased i.e. PW-1, Vineeta Pathak had gone to met Hari Shankar Tiwari (PW-7) they were informed about some incident that took place near Tekari bypass. Thereafter, when they went to the said spot they found the body of Shushil Kumar Pathak lying on the road and beside his body there was a large stone and in addition the products which the deceased used to sell and his slippers, pen etc., were found lying near the body. He has also

proved the seizure memo (Exhibit P-4) which was the receipt of the motorcycle made available by PW-3, Sanjeev Kumar Pathak. Likewise, he also had proved the memorandum statements (Exhibits 12 and 13) made by the two accused persons. In addition, the said witness (PW-11) had also deposed before the Court of being witness to the seizure (Exhibits P-14 and P-15) by which at the instance of the accused, Manoj articles like bloodstained shirt, gupti were seized. He was also witness of the seizure memo (Exhibit P-16) by which the recovery of the motorcycle and the Nokia mobile phone both belonging to the deceased was made.

18. PW-12, Libi Varghese is a witness who has tried to bring the call details made into the mobile number belonging to the deceased, i.e., 98937-48450. All the other witnesses were departmental witnesses like PW-13, Dr. Vikas Kumar Dhruw who had conducted the post-mortem and PW-15, U.K. Chandrawanshi who is the Investigating Officer.

19. This being the evidence if we analyze the evidence which has come on record what is clearly reflected is that except for memorandum statements and the recovery and seizure of articles at the instance of the accused Appellants, there is no other material available in the hands of the prosecution to bring home and proving of the charge against the accused Appellants.

20. So far as Appellant No.1, Kalyan is concerned, the recovery from his possession and his instance was a motorcycle and a mobile set. Both these articles which have been recovered belonged to the deceased, Shushil Kumar Pathak. As far as the fact whether the said motorcycle and the mobile phone belonged to the deceased or not, the prosecution has been able to amply prove its case. The evidence in this regard which has been adduced by the prosecution is the evidence of PW-3, Sanjeev Kumar

Pathak who has proved before the Court below a registration certificate as well as insurance policy of the motorcycle which was found in the possession of Appellant No.1, Kalyan. Likewise, PW-3, Sanjeev Kumar Pathak has also proved the bill by which the mobile phone which was being used by the deceased wherein the name of Sanjeev Kumar Pathak (PW-3) was reflected as the purchaser and his deposition he has stated that after purchase he had given the said mobile set to his brother Shushil Kumar Pathak, the deceased. Thus, so far as the proof in respect of the property recovered and seized at the instance of Appellant No.1, Kalyan stands fully established that these articles were in the possession of the deceased on the date of incident. Further, there is no plausible and satisfactory explanation given by Appellant No.1, Kalyan as to how he was aware of the fact that the motorcycle as well as the mobile set was hidden at a place quite far away from the place of incident. In the absence of any justification or plausible explanation on the part of Appellant No.1, Kalyan, the chain of circumstances clearly indicates of the Appellant No.1, Kalyan being actively involved in the commission of the offence and in addition looting the property belonging to the deceased.

21. So far as the call details are concerned, though PW-12, Libi Varghese has been examined on behalf of the prosecution who has tried to support the case of the prosecution in establishing the phone calls being made to the mobile phone of the deceased. He has also proved the phone calls of being made from the house of the uncle of Appellant No.2, Manoj. The said statement of PW-12, Libi Varghese also has been corroborated by the evidence of PW-15, U.K. Chandrawanshi, the Investigating Officer. However, the Supreme Court in a recent decision made in the case of **Anvar P.V.** (*supra*) has very categorically laid down the manner in which

evidence under Section 65 of the Evidence Act has to be examined particularly if it relates to the phone calls etc. For ready reference, relevant paragraphs of the said judgment is reproduced herein under :

“14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

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20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.”

In view of the said principles of law laid down by the Supreme Court, we have no hesitation in holding that the prosecution so far as proving the call details part is concerned has not been able to prove the same in the manner as has been enunciated by the Supreme Court in aforesaid judgment and therefore the evidence so adduced by the prosecution particularly of PW-12, Libi Varghese would not be an admissible piece of evidence for holding the Appellants guilty.

22. However, even if the call details part has been found to be not proved and established as is required, but the fact still remains that there is this recovery and seizure made at the instance of Appellant No.1, Kalyan, the articles which was used belonging to the deceased. It cannot be said that the articles were recovered from a place which had access to the general public at large. Rather, the recovery and seizure was made from a spot which was isolated. Further, it is only Appellant No.1, Kalyan who knew about the fact as to where the vehicle as well as the mobile set had been

kept. It is also a case where the mobile set was rather hidden in bushes near the railway colony, which clearly indicates that it was Appellant No.1, Kalyan alone who knew about the place where either of the two articles were hidden. In view of this incriminating factor against Appellant No.1, Kalyan this Court has no hesitation in holding that the conviction so far as Appellant No.1, Kalyan is concerned by the Court below is said to be proper, legal and justified and does not warrant any interference.

23. However, so far as the evidence against Appellant No.2, Manoj is concerned the only incriminating factor which the Court below had taken into consideration is the recovery of a bloodstained shirt vide Exhibit P-14 and a Gupti vide Exhibit P-15. However, the fact which cannot be ignored is that the prosecution in the instant case has not been able to establish the fact that whether the deceased had in fact received any injury from the said Gupti which has been seized at the instance of Appellant No.2, Manoj. At the same time, the prosecution also has not been able to establish the fact that whether the shirt which has been recovered at the instance of Appellant No.2, Manoj was in fact that of Appellant No.2, Manoj and that it was the very same shirt which he was wearing on the date of incident. More important is the factor that the prosecution has not been able to lead evidence to also establish the fact that whether the blood like stains found on the Gupti as well as on the shirt which allegedly the Appellant No.2, Manoj had used and worn at the time of commission of the offence had matched the blood of the deceased, Shushil Kumar Pathak. In the absence of this vital evidence which was otherwise required to be established by the prosecution particularly for the reason that the entire case is based on circumstantial evidence, then it was all the more necessary for the prosecution to have proved its circumstantial evidence beyond doubt. Thus,

in the opinion of this Court, Appellant No.2, Manoj cannot be convicted only on the basis of the said recovery and Gupti as well as the bloodstained shirt. The Supreme Court in the case of **Mani Vs. State of Tamil Nadu, 2009 (17) SCC 273**, in paragraph 26 has held under :

“**26.** The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...”

24. Thus, in the light of above given factual circumstances of the case, we have no hesitation in holding that the prosecution has failed to establish the charge levelled against Appellant No.2 beyond reasonable doubt and the benefit of doubt which has been created in the mind of the Court should go in favour of Appellant No.2, Manoj. Therefore, the conviction so far as Appellant No.2, Manoj is concerned the same cannot be sustained and is liable to be set aside.

25. For the foregoing reasons, the appeal in respect of Appellant No.1, Kalyan is dismissed. He is stated to be on bail. His bail-bonds are cancelled and he is directed to surrender forthwith and/or be taken into custody for serving out the remaining period of his sentence. The appeal in respect of Appellant No.2, Manoj is allowed. The conviction of Appellant No.2, Manoj for the offences under Sections 302, 392, 397 and 398 of IPC is set aside and he is acquitted of the charges subject to compliance of Section 437-A CrPC.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE