

NAFR

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

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

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

C A V Judgment

Reserved on : 31.08.2016

Delivered on : 22.09.2016

Per P. Sam Koshy, J.

1. The present appeal has again come up for hearing in the peculiar facts and circumstances of the case. Originally the appeal was preferred by four accused, namely, Bholaram Dhruw, Onkar Verma, Narayan and Duklaha Verma. There was a fifth accused also, namely, Devesh Kumar Verma, who had filed a separate appeal i.e., Criminal Appeal No. 1203 of 2001.

2. Both these appeals together came up for final hearing on 26.2.2016 and during the course of hearing, Ms. Nirupama Bajpai, learned Counsel appearing for the Appellants, made a submission that since Appellant No.1, Bholaram Dhruw, in the present appeal, has undergone the entire period of custody, she has no further instructions

with regard to pursuing the appeal further so far as Appellant No.1, Bholaram Dhruw, is concerned.

3. On the said submission of the learned Counsel for the Appellants, the Division Bench proceeded to decide the appeal of the other Appellants in the present appeal as well as the Appellant in the other connected appeal. Finally, the appeals were decided and the conviction of Appellant No.4, Duklaha Verma, in the present appeal, was maintained and the appeals so far as the other Appellants, namely, Onkar Verma, Narayan and Devesh Kumar Verma were allowed and they were acquitted of the charge granting benefit of doubt.

4. Subsequently, a petition under Section 482 of CrPC was filed before this Court, which was registered as Criminal Misc. Petition No. 515 of 2016, wherein Counsel for Appellant No.1, Bholaram Dhruw, made a submission that he in fact had not undergone the entire sentence as had been stated at the time of the final hearing of the appeal and it was a wrong information passed on to the Counsel which she had made before the Court and submitted that he was on bail, and therefore the appeal so far as Appellant No.1, Bholaram Dhruw, is concerned had to be and therefore prayed to be decided on its merits.

5. This Court vide its order dated 11.8.2016 allowing the said Criminal Misc. Petition had ordered for registering of the present appeal for final hearing and the matter was finally heard on 31.8.2016.

6. The brief necessary facts for the adjudication of the appeal is that Appellant No.1, Bholaram Dhruw, stood convicted for the offence under Section 396 IPC to undergo life imprisonment and to pay fine of Rs. 500/- with default stipulation as well as for the offence under Section 201 IPC to undergo five years rigorous imprisonment and to pay fine of Rs.200/- with default stipulation, as ordered on 6.9.2001 by the Second

Additional Sessions Judge, Balodabazar in Sessions Trial No. 54 of 2000. The case of the prosecution was that a priest (pujari), namely, Shilanath Panda, went missing since 18.5.1999. A missing report in this regard was lodged on 22.7.1999 by the son-in-law of the missing person, PW-10 Umashankar. The said report was registered in the Rojnamchasanha by PW-14 Ninnaji Warade, the Head Constable, who during the course of trial has also proved the same. A formal FIR was also lodged by PW-22 G.P. Verma, the Assistant Sub Inspector, marked as Exhibit P-19, on 7.11.1999. On the basis of suspicion, the Appellant was taken into custody and during the course of investigation confessional statement was recorded of the Appellant and on the basis of the confessional statement, the body of the deceased was recovered on 6.11.1999 from the fields of co-accused Duklaha Verma. The body was in a highly decomposed state as it had reached the state of adipocere but the body was identified to be that of the deceased by his son-in-law, PW-10 Umashankar based upon the Moonga necklace with two small stones and one sphatic white necklace with transparent stones that was found around the neck of the body of the deceased. Thus the body in fact was recovered on the statement made by Appellant Bholaram Dhruw and it was also found buried deep into the ground in the field of co-accused Duklaha Verma.

7. The confession of Appellant Bholaram Dhruw led to recovery of the dead body buried deep underground in the field of Appellant Duklaha Verma. Later on the confession of the Appellant Onkar Verma, son of Duklaha Verma, 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 Verma. The confession of Appellant Duklaha Verma also led to the recovery of a bag and a Moorti for Pooja and a necklace from his house. Further the confession of Appellant Devesh Kumar Verma, son of Duklaha Verma, led to a recovery of a Lota from the house with the name of the deceased etched on it. Appellant Duklaha Verma and his sons, Onkar Verma and Devesh Kumar Verma, 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.

8. So far as the case related to other Appellants are concerned it stands already decided and except for Appellant Duklaha Verma whose conviction has been maintained, the other Appellants, namely, Onkar Verma, Narayan and Devesh Kumar Verma have already been acquitted of the charge getting benefit of doubt.

9. Ms. Nirupama Bajpai, learned Counsel for the Appellant, submits that it is a case where the facts so far as Appellant Bholaram Dhruw is concerned are similar to those Appellants who have already been acquitted by this Court and therefore he be also granted acquittal on the ground of parity. She further submits that the entire conviction of the Appellant is based on circumstantial evidence as there was no eye-witness of the occurrence. According to her, circumstantial evidence also primarily was the recovery of the body at the instance of the Appellant and also the recovery of certain articles allegedly to be belonging of the deceased which it is alleged to have been carried by the deceased on the date of incident.

10. According to the Counsel for the Appellant, so far as recovery of other articles are concerned those were against the other Appellants and which has not been accepted by this Court to have been proved

beyond reasonable doubt and this Court has already granted benefit of doubt to the other Appellants and so far as the present Appellant Bholaram Dhruw is concerned the only incriminating factor which has come is that of the recovery of dead body at his instance. But, the evidence which has come would show that in fact the prosecution did not get the body at the site which was shown by the present Appellant Bholaram Dhruw. Neither was it also recovered on the same day. According to the Counsel for the Appellant, in fact the dead body was recovered on the subsequent day and by digging at a different place. Thus, it cannot be said that the recovery was made at the instance of the present Appellant and the benefit of doubt therefore ought to have been granted to him.

11. Learned Counsel for the Appellant further submits that so far as Appellant Bholaram Dhruw is concerned the chain of circumstantial evidence is not complete as there are vital missing links in the chain and therefore the decision of the Trial Court would be unsustainable. It was also alleged that the entire conviction is based on inadmissible piece of evidence as the Trial Court has heavily relied upon the memorandum statement recorded of Appellant Bholaram Dhruw after being taken into custody and therefore it would not be admissible as per Section 27 of the Evidence Act. It was also argued on behalf of the Appellant that the prosecution has also not been able to adduce sufficient medical evidence firstly to establish that the corpse recovered was that of Shilanath Panda as admittedly the body had been recovered almost about six months from the date he went missing and it was found in a highly decomposed state. Skin was not present on bones uniformly, limbs were loose and the skull was also detached and the doctors have made a statement that it had reached the state of

adipocere. Thus, the identity of the body itself is doubtful. In addition, it was submitted that the Court has not properly taken into consideration the defence of the Appellant that the elder brother of the co-accused Duklaha Verma had died in the recent past and was buried in this field and therefore the body could have also been of the brother of the co-accused Duklaha Verma.

12. It was lastly submitted by the learned Counsel for the Appellant that since the recoveries made at the instance of the co-accused persons have already been disbelieved by this Court in its earlier order, the same would also be applicable in the case of the present Appellant and the fact that the medical evidence also does not establish it to be the body of the deceased Shilanath Panda or whether it was a body of a male or a female is also not established, the benefit of all these should be given to the Appellant and he should be acquitted of the charge levelled against him. Learned Counsel for the Appellant in support of her contentions has also relied upon the judgment of the Supreme Court rendered in the case of **Kanhaiya Lal Vs. State of Rajasthan [2014 (II) CCR 22 (SC)]**.

13. Ms. Smita Ghai, learned Counsel for the State however opposing the appeal submitted that in fact the case of Appellant Bholaram Dhruw is identical to that of the co-accused Duklaha Verma whose appeal has already been rejected by this Court and whose conviction also has been maintained. She further submits that it is a case where the materials collected during the course of investigation corroborated with each other and if all these materials collected in the course of investigation are clubbed together, the circumstance leads to the only conclusion of the act to have been committed by the present Appellant Bholaram Dhruw along with the co-accused Duklaha Verma.

14. Learned Counsel for the State further submitted that it is a case where the Appellant has not been able to establish the false defence that he had taken which itself becomes an incriminating factor against the present Appellant. So far as the present Appellant is concerned, it is at his instance that the body of the deceased was found from the place where he had disclosed. It is further a case of the State that the case against the present Appellant also stands established from the fact that the dead body was recovered after digging the field deep and the said place could not have been known to any other person except the person who would have placed the body there. It would have been a different circumstance had the body been recovered from an open field. The case of the prosecution so far as Appellant Bholaram Dhruw is concerned stands proved from the recovery of the dead body at his instance and so far as the recovery of the body at the instance of the accused the same would be an admissible piece of evidence under Section 27 of the Evidence Act and thus prayed for the rejection of the appeal so far as Appellant Bholaram Dhruw is concerned.

15. Having considered the rival contentions put forth on behalf of either side and on a perusal of the record as also the evidence which has come on record what clearly reflects is that it is the memorandum statement of the present Appellant Bholaram Dhruw which was first recorded and wherein he has in addition to the confessional statement of having killed the deceased and looted him of his articles have buried the body in the field behind the kitchen garden of the house of the co-accused Duklaha Verma.

16. So far as the role of the present Appellant Bholaram Dhruw is concerned, this has already been discussed by a Division Bench of this Court in which one of us (P. Sam Koshy, J.) was also a member, while

deciding the criminal appeal so far as the other Appellants are concerned on 26.2.2016. It would be apposite at this juncture to quote the relevant portion of the said judgment passed in the case of the other Appellants and which are also relevant for the adjudication of the present appeal so far as Appellant Bholaram Dhruw is concerned :

“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.”.”

17. Based on the said finding already given by the Division Bench passed in the case of other Appellants, this Court is inclined to take the same view and hold that so far as the case of the Appellant Bholaram Dhruw is concerned it is a case which falls on parity to the case of the co-accused Duklaha Verma whose appeal has already been dismissed

by this Court vide its earlier order dated 26.2.2016. The Appellant in the instant case also has not been able to adduce something substantive for this Court to take a different view than the view taken by the Division Bench deciding the case of the co-accused Duklaha Verma. In fact, as far as the case of the present Appellant Bholaram Dhruw is concerned it is an admitted position that it was the memorandum statement of the present Appellant which was recorded first and on the basis of which body of the deceased was recovered from the spot disclosed by Appellant Bholaram Dhruw and all other memorandum statements of the other accused persons and the recoveries made are much after the recovery of the dead body made at the instance of the present Appellant Bholaram Dhruw. Thus, the prosecution in fact has been able to establish its case beyond reasonable doubts so far as the present Appellant is concerned.

18. However, the fact that vide the earlier order dated 26.2.2016 passed by this Court three of the accused persons, namely, Onkar Verma, Narayan and Devesh Kumar Verma, have been acquitted of the charge under Section 396 of IPC, the question of conviction of the present Appellant for the offence under Section 396 of IPC would not be sustainable. But, since the offence of murder of the deceased Shilanath Panda stands established from the evidence which has been adduced by the prosecution and since the other accused persons have been acquitted from the offence under Section 396 of IPC, the only offence which could be made out against the present Appellant is that of an offence under Sections 302 and 201 of IPC. Therefore, the order of the Court below so far as the conviction of Appellant Bholaram Dhruw for the offence under Section 396 of IPC stands quashed/set aside and he

is found guilty for the offence under Sections 302 and 201 of IPC. The sentence part however stands maintained.

19. So far the case of *Kanhaiya Lal* (supra) cited by the learned Counsel for the Appellant is concerned, the facts of the said case are entirely different when compared to the facts of the present case. There the conviction was based on the theory of last seen and the non-explanation provided on the part of the accused therein which are not the facts of the present case. So far as Appellant Bholaram Dhruw is concerned it was the recovery of the corpse of the deceased itself, that too after digging the earth quite deep at the instance of the Appellant and therefore the principle of law laid down by the Supreme Court in the case of *Kanhaiya Lal* is quite distinguishable.

20. Resultantly, the impugned judgment of conviction of Appellant Bholaram Dhruw stands quashed/set aside so far as offence under Section 396 of IPC is concerned, however, he is held guilty for the offence under Sections 302 and 201 of IPC. The sentence part however stands maintained. He is directed to surrender and/or be taken into custody forthwith for serving out the remaining period of his sentence.

Sd/-
(Deepak Gupta)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge