

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 552 of 2005

1. Jan Bai, w/o Andra Das, aged about 36 years
2. Binod Das, S/o Ananda Das, Aged about 18 years (since deceased, name deleted)
3. Aghan Das, S/o late Dhirsay, aged about 50 years
All residents of Village Birda, Korba, (CG)

---- Appellants (In jail)

Versus

- State of Chhattisgarh through SHO Kotwali, Korba (CG)
---- Respondent

For Appellants : Shri Arvind Kumar Dubey, Advocate

For Respondent/State : Shri Majid Ali , PL

**Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Shri Justice Anil Kumar Shukla**

Judgment on Board by Prashant Kumar Mishra, J.

22.11.2016

- 1) Appellants Janbai, Binod Das (since dead) and Aghan Das have called in question their conviction under Sections 302 and 201 read with Section 34 of the IPC and sentence of life imprisonment and RI for five years respectively for each of the offence with usual default clause. While appellant-1 Janbai is the mother of the deceased, appellant- 2 Binod Das is brother of the deceased. This appellant has died on 08.03.2014 during the pendency of the appeal, therefore, appeal on behalf of this appellant has abated. Appellant- 3 Aghan Das is the maternal uncle of the deceased being brother of appellant- 1, Jan Bai.

- 2) Case of the prosecution, in brief, is that deceased Ashok Das. aged about 20 years was habitual drunkard. He used to come back to the house in a state of intoxication and abuse appellants- 1 and 2. He used to demand money for consuming liquor. On the date of incident also the deceased reached the house at about 11 pm in the night and started demanding money on which appellant- 1 Jan Bai and appellant- 2 Binod Das assaulted him and committed murder by causing injuries to the deceased by means of stone. The dead body was later on buried in an agricultural field with the assistance of appellant- 3, Aghan Das. Although the deceased was missing from 23.04.2004, the police was not informed.
- 3) As per the morgue intimation lodged by Kotwar Shiv Das (PW-1), accused Binod Das informed him that deceased Ashok Das had left the house two/three days back and his dead body is lying in the agricultural field. In Court statement, Shiv Das stated that one Madhav informed him about the dead body of the deceased. In the post-mortem report (Ex.P/22) conducted by Dr PS Kunwar (PW-14), he could not give any definite opinion about the cause of death. During further investigation, the police recorded the memorandum statement of appellant- 1 Jan Bai vide Ex.P/6 leading to recovery of axe vide Ex.P/9. Similarly memorandum statement of appellant- 3 Aghan Das was recorded vide Ex.P/7 leading to recovery of bicycle which was used for taking the dead body to the agricultural field vide seizure memo Ex.P/10. Memorandum statement of Binod Das, appellant- 2 was recorded

vide Ex.P/8 leading to recovery of stone and burnt ashes of *Gudadi* (home made blanket) vide Ex.P/12. The accused persons have allegedly made extra judicial confession before Cheduram (PW-10), Mohandas (PW-9), Heeralal (PW-13) and Mohanlal (PW-16).

- 4) During the forensic investigation, the axe, stone, *Gudadi* etc., were sent for examination, report whereof was submitted vide Ex.P/26, finding presence of blood on article- A full pant of the deceased, article-B polythene, recovered from accused/appellant Jan Bai, article- D stone, recovered from Binod Das and article-E *Gudadi* and burnt ashes recovered from accused/appellant Binod Das. However, blood was not found on article- C axe, recovered from Jan Bai.
- 5) At the end of trial, the appellants have been convicted mainly on the evidence of Cheduram (PW-10), before whom the appellants have allegedly made extra judicial confession.
- 6) Shri Arvind Kumar Dubey, learned counsel for the appellants would submit that there is absolutely no reliable and cogent evidence to connect the appellants with the offence of murder, therefore, conviction being based on surmises and conjectures deserves to be set aside.
- 7) Per contra Shri Majid Ali, learned State counsel would support the impugned conviction.
- 8) There being no ocular evidence of the crime and the case of the prosecution resting solely on the circumstantial evidence like

seizure of articles, FSL examination and the alleged extra judicial confession, this Court has to remind itself about the nature of evidence required to sustain the conviction based on circumstantial evidence.

- 9) In **Sharad Birdhichand Sarda VS State of Maharashtra**¹ the Supreme Court has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-152 as under:

“152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in Shivaji Sahebrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

‘certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and must be’ is long and divides vague conjectures from sure conclusions.’

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

¹ AIR 1984 SC 1622

- (3) the circumstances should be of a conclusive nature and tendency.
 - (4) they should exclude every possible hypothesis except the one to be proved, and
 - (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”
- 10) In the case in hand, the prosecution relies on three circumstances to connect the appellants with the commission of crime. We shall deal with the circumstances one-by-one.
- 11) **The first circumstance** is of memorandum statement and seizure of articles from the appellants. The memorandum statements Ex.P/6, P/7 and P/8 have been recorded in the presence of witnesses Mohandas (PW-9) and Hiralal (PW-13). However, both of them turned hostile and have not supported the case of the prosecution. They are the witnesses to the seizure memo Ex.P/9, P/10, P/11 and P/12. They have not supported the seizure of the articles also. Thus, neither the memorandum statement nor the seizure have been proved by the prosecution in accordance with law.
- 12) **The second circumstance** is of finding of blood on the articles A, B, D and E. Article-A is full pant of the deceased on which presence of blood is natural. Article-B is polythene, recovered from appellant-1 Jan Bai, however, the memorandum statement and the seizure memo leading to recovery of polythene from Jan Bai has not been proved by the prosecution. No blood was found

on article-C, axe. Although blood has been found on article- D and E, but the seizure of these two articles have not been supported by the witnesses.

- 13) **The third circumstance** is of making of extra judicial confession by the accused persons before the witnesses Cheduram (PW-10), Mohandas (PW-9), Hiralal (PW-13) and Mohanlal (PW-16). Except Cheduram, the other witnesses have turned hostile. They have not stated anything significant while they were cross-examined by the prosecution or by the defense counsel. Therefore, the statement of these three witnesses is of no assistance to the prosecution. This leaves this Court to consider the all important evidence of Cheduram (PW-10) to examine whether conviction only on the basis of statement of Cheduram (PW-10) is possible or not. According to him, the Police reached the village in course of investigation. The Police met the accused persons in the school building and thereafter, the Police instructed him and other villagers to interrogate or enquire from the accused persons about the commission of crime. The Police specifically instructed them to move to the other side of the school building, so that the Police personnel are not visible to the accused persons or to the witnesses when they proceed to enquire from the accused persons about the commission of crime.
- 14) On cursory reading it would appear that the Police was not present at the time when the villagers enquired from the accused persons about the commission of crime. However, when the statement is read as a whole it would appear that the Police

personnel including the Investigating Officer was present in the same school building though on the other side and before interrogation by the villagers took place, the Police had already met the accused persons. Thus, the accused persons were well aware of the presence of the Police in the school premises, even if they may not be actually visible when the villagers enquired them about the incident. It appears, to avoid the rigor of Section 26 of the Evidence Act, the Police deliberately chose to be not visible though they had already interrogated the accused persons just prior to their interrogation by the villagers. Since the accused persons were well aware about the presence of the Police in the village that too in the premises itself, where the villagers enquired asked them about the incident, it cannot be said that the statement was made voluntarily. In such a situation, it always remains in the mind of the accused persons that the Police persons are present in the premises.

- 15) In view of the above and more so when the case is based on the alleged extra judicial confession made to Cheduram (PW-10), which by itself is a weak type of evidence, it would not be safe to convict the appellants only on the basis of such extra judicial confession which was made by the accused persons when the Police personnel were present in the vicinity and in the same premises, where the interrogation by PW-10 took place.
- 16) There being no other cogent and reliable evidence except the above discussed three circumstances, we are definite in

concluding that the prosecution has failed to prove the case against the appellants beyond all reasonable doubt.

- 17) The appeal succeeds and is allowed. The impugned conviction is set aside. Appellant- 1 Jan Bai is acquitted of the charge framed against her for the offences punishable under Sections 302 and 201 read with Section 34 of IPC and appellant- 3 Aghan Das is acquitted of the charge under Section 201 IPC.
- 18) It is stated that the appellants are on bail, their bail bonds shall continue for a further period of 6 months in view of Section 437A of the Code.

Sd/-
Judge
Prashant Kumar Mishra

Sd/-
Judge
Anil Kumar Shukla