

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.248 of 2008**

Khorbahara @ Sukhram, S/o Thanuram, Caste Sahu, aged about 50 years,
R/o Village Kohadiya, P.S. Berla, District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through P.S. Berla, District Durg

---- Respondent

For Appellant	:	Shri H.S. Ahluwalia, Advocate
For State/Respondent	:	Ms. Smita Ghai, Panel Lawyer

Hon'ble Shri Deepak Gupta, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Deepak Gupta, Chief Justice

8.9.2016

1. This appeal by the accused is directed against the judgment dated 24.1.2008 passed in Sessions Trial No.3 of 2007 by the Additional Sessions Judge, Bemetara, whereby the accused/Appellant has been convicted for having committed offence punishable under Section 302 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.100/-, in default of payment of fine, to further undergo simple imprisonment for 15 days.
2. The prosecution story, briefly stated, is that Dayawatibai, wife of accused/Appellant Khorbahara had some illicit relation with deceased Mohitram. The prosecution case is that on 23.12.2006, at about 10:30 – 11:00 p.m., Mohitram went to the house of the Appellant with a view to visit Dayawatibai, wife of the Appellant. It is the further case of the prosecution that Dayawatibai did not open the door of the house. Mohitram started shouting and abusing. As a result, the accused/Appellant woke-up. The accused then took a rope and with the help of his wife Dayawatibai strangled Mohitram by using the rope. As a result, Mohitram died on the spot. Thereafter, the

Appellant and his wife Dayawatibai hid the evidence of the murder by taking body of the deceased near a *Pipal* tree in the village.

3. Merg Intimation, Ex.P-6 was lodged at the instance of PW-6, Ferhapal, brother of deceased Mohitram. He is not an eyewitness to the occurrence. He was only told by the villagers that dead body of Mohitram was lying near the *Pipal* tree. PW-6, Ferhapal thereafter went to the police and lodged the Merg Intimation and on the basis of the Merg Intimation, First Information Report, Ex.P-10 was lodged. In the Merg Intimation and in the FIR, PW-6, Ferhapal has expressed suspicion that his brother Mohitram had been killed by the Appellant and his wife. The reason for suspicion is that deceased Mohitram and the Appellant's wife Dayawatibai had illicit relationship with each other. After the Merg Intimation was lodged, post mortem (Ex.P-8) on the body of the deceased was conducted by PW-7, Dr. Jitendra Kumar Kunjam, who opined that the deceased had been strangled to death. He found ligature mark on the neck of the deceased and also found other abrasions to support his theory of strangulation by use of a rope. After completion of the investigation, the police filed a report under Section 173 of the Code of Criminal Procedure (Cr.P.C.) against the accused/Appellant as well as his wife Dayawatibai. Both of them were charged for having committed murder of Mohitram. They pleaded not guilty and claimed trial. After trial, Dayawatibai has been acquitted of the charge framed against her, but accused/Appellant Khorbahara has been convicted and sentenced as aforesaid. Hence, this appeal.
4. We have heard Learned Counsel appearing for the parties and have also perused the record.
5. This is a case based on circumstantial evidence and the circumstances relied upon by the prosecution are as follows:

(1) Motive – According to the prosecution, the motive was the illicit relationship between Dayawatibai and deceased Mohitram, which angered the husband of Dayawatibai, i.e., accused/Appellant Khorbahara.

(2) Recovery of Rope – Recovery of a rope allegedly at the instance of accused/Appellant Khorbahara, which rope had been used for strangulating Mohitram.

(3) Statement – Statement made by the accused/Appellant before the recovery of the rope that he had strangled Mohitram.

(4) Recovery of Body – Recovery of the body of the deceased from near the house of the accused/Appellant.

6. As far as motive is concerned, at the outset, we may state that it is almost the admitted case of the parties that earlier deceased Mohitram and Dayawatibai, wife of the accused/Appellant had an illicit relationship with each other, which continued for many years. Reference may be made to the statement of PW-6, Ferhapal, brother of deceased Mohitram, who is the star witness of the prosecution. According to PW-6, Ferhapal, Dayawatibai, wife of the Appellant and his brother deceased Mohitram had run away together many years back. They lived together as husband and wife for almost 1 year. Thereafter, both of them came back to the village and returned to their respective homes, which means deceased Mohitram returned to his house and Dayawatibai returned to the house of the Appellant. In cross-examination, the witness admits that the relationship between his brother Mohitram and Dayawatibai, wife of the Appellant had continued for about 15 years. He admits that some village meeting had taken place about 2-3 years before the occurrence and thereafter

both Mohitram and Dayawatibai had returned to their respective homes and relations for the last 2-3 years between the parties were normal. This means that the illicit relationship had ended about 2-3 years earlier. Therefore, why should there be any motive for the Appellant to kill Mohitram after about 3 years of end of the illicit liaison. Therefore, the prosecution has not been able to prove this circumstance.

7. As far as the recovery of the rope is concerned, the recovery has been made pursuant to memorandum, Ex.P-4 recorded under Section 27 of the Evidence Act. Ex.P-5 is the seizure memo, whereby the rope was taken into possession by the police. The witnesses to the recovery of the rope and the memo are PW-4, Kumbhkaran Pal and PW-5, Jeevanlal Sahu. They have no doubt supported the case of the prosecution regarding recovery of the rope. However, it would be important to note that such a rope would be available in every villager/agriculturist's house as it is a common article of use where cattle are kept. It is also available in the houses of the villagers who are engaged in avocation of animal husbandry. It has been urged by Learned Counsel for the Appellant that the colour of the rope has been described differently by different witnesses. Somebody has described the colour of rope as being of yellow and somebody has described the same as being of brown and, therefore, the rope, which was seized, cannot be held to be used for commission of the offence in question. We are not in agreement with the Learned Counsel for the Appellant because in Hindi language colours are not reflected in actual shades and sometimes when colours are translated from Hindi to English they are reflected differently by different persons.
8. It has been argued that the thickness of the seized rope was 4 cms., but the wideness of the ligature mark found on the neck was only 1

cm. There is nothing unusual in that, because the entire rope will not leave its mark on the body and the only portion of the rope which was in touch with the skin will leave its mark.

9. Be that as it may, the fact remains that the rope which is seized is commonly available in the houses of the villagers. Though this rope was sent for forensic examination, nothing has been brought to show that this is the rope which alone could have been used in the commission of the offence in question. The prosecution, if it wants to rely on the seized rope, must show with more exactitude that this is the rope which was used in commission of the offence, which it has failed to show beyond reasonable doubt.
10. The third circumstance is the statement of the accused/Appellant. As far as using the statement of the accused/Appellant against him is concerned, we are clearly of the view that the Trial Court fell into grave error. The statement of an accused under Section 27 of the Evidence Act can be divided into two parts. One part of the statement allegedly made by the Appellant is that he along with his wife committed murder of the deceased by strangulating him with a rope. The second part of his statement is that he could get the rope recovered. The first part of the statement being in the nature of a confession made to the police is totally inadmissible in view of Section 25 of the Evidence Act and, therefore, this statement could not have been taken into consideration. No doubt, the second part of the statement could be taken into consideration and we have already held that the recovery of the rope stands proved.
11. The fourth and last circumstance relied upon by the prosecution is that the dead body was found near the house of the accused/Appellant. We have perused the site-map, Ex.P-3. We find from the site-map that the body has not been recovered from close to house of the

accused/Appellant. In fact, there are two paths/roads in between the house of the accused/Appellant and the *Pipal* tree, below which the body of the deceased was found. There are also two houses close to the *Pipal* tree. It is not proved that the dead body was found from the house of the accused/Appellant or within the boundary of the plot of the accused/Appellant. There are many other houses near the house of the accused/Appellant, therefore, this circumstance, in our view, cannot be used against the accused/Appellant.

12. We may also add that during the investigation of the police, nothing has come out to show that there were any drag marks from the house of the accused/Appellant leading to the place where the body of the deceased was found. The deceased possessed a well developed body and, therefore, the accused/Appellant could not have carried his dead body to the *Pipal* tree and had he carried the dead body from his house to the *Pipal* tree, there would have been some marks left not only on the ground but also on the body of the deceased.
13. Out of the four circumstances relied upon by the prosecution, even if we accept the prosecution case, the only one circumstance of recovery of rope is proved, but, in our view, this circumstance is not sufficient to convict the accused/Appellant. As held above that this rope is commonly found in the villagers' houses for household purposes. The prosecution has also failed to show that only this rope could be used to strangle the deceased. As per PW-6, Ferhapal, the deceased left his house after drinking at about 9:30 p.m. The occurrence took place at about 10:30 p.m. No prosecution witness has stated that they met the deceased during this period when he walked from his house towards the house of the accused/Appellant. It is the prosecution case that the deceased was in a drunken condition and knocked at the door of the accused/Appellant and shouted loudly

and that is why the accused/Appellant woke up. Had this been true, the residents of the neighbouring houses would also have been aware of the hue and cry and would have also noticed some sound. No evidence of any independent witness has been led to prove any of these facts.

- 14.** In view of the above discussion, we hold that the prosecution has miserably failed to prove beyond reasonable doubt that the accused/Appellant was the only person who could have committed the offence in question and, therefore, the possibility of committing the offence by any other person cannot be ruled out. Therefore, the benefit of doubt goes in favour of the Appellant.
- 15.** Consequently, the appeal is allowed. The impugned judgment of conviction and sentence passed by the Trial Court is set aside. The Appellant is acquitted of the charge framed against him. The bail bonds of the Appellant are cancelled subject to his compliance of the condition under Section 437A of the Code of Criminal Procedure.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE