

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 439 of 2007

- Rinku @ Om Prakash, Son of Dhruv Prasad, aged about 22 years, resident of Behind Chhattisgarh Electricity Office, Bhilai, Police Station Bhilai-3, District Durg (CG)
- Pappu @ Jashwant @ Yashwant S/o Ram Bhajan, R/o Jhopdi Mohalla, Bhilai-3, Police Station Bhilai-3, Distt- Durg (C.G.)

---- Appellants

Versus

- State Of Chhattisgarh, through District Magistrate, Durg, District Durg.

---- Respondent

And

ACQA No. 2 Of 2009

- State Of Chhattisgarh, through District Magistrate, District Durg (CG)

---- Appellant

Vs

1. Dilip Tandi, S/o Shri Bhojraj Tandi, aged about 20 years, R/o F/53, CG Vidhut Mandal Colony, PS Bhilai-3, Durg (CG)
2. Ravi @ Ravindra Kumar S/o Tejram Sahu, Occupation- Work Related To Wiring, R/o Ekta Nagar, Bhilai-3, P.S.-Bhilai-3, Distt.-Durg (C.G)

---- Respondents

Cr. Appeal No.439/2007

For Appellants : Smt. Indira Tripathi, Advocate

For Respondent : Shri N.K. Mehta, Panel Lawyer

Acq. Appeal No.2/2009

For Appellants : Shri Bhaskar Pyasi & Smt. Madhunisha
Singh, Panel Lawyers

For Respondents : Shri Indira Tripathi, Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgement

Per P. Diwaker, J

04/10/2017

1. Since the above criminal appeal & acquittal appeal have been filed against the judgment dated 31.5.2007 passed in S.T. No.212/04, the same are being disposed of by this common judgment.
2. By filing criminal appeal, the accused/appellants have challenged the legality and propriety of the judgment of conviction and order of sentence judgment dated 31.5.2007 passed by the 1st Additional Sessions Judge, Durg in S.T. No.212/04 by which each of the accused has been convicted for the offence punishable under Sections 302, 376 (2) (g) & 201 of the Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/-; RI for 10 years and fine of Rs.500/- & RI for 3 years and fine of Rs.500/-, with default stipulations, respectively.
3. In the acquittal appeal the appellant State has assailed the acquittal of co-accused Dilip Tandi & Ravi @ Ravindra Kumar who have been acquitted of all the charges by the trial Court.
4. Brief facts of present case are that on 7.5.2004 at about 10.00 p.m. T. Dharma Rao (PW-4) lodged a missing report (Ex.P-29) about his seven years old daughter i.e. deceased prosecutrix, alleging in it that she is missing since 7.30 p.m. This report was recorded in the roznamcha sanha and after lodging the said report, PW-4 along with others went in search of the deceased in the vicinity. While PW-4 was searching his daughter, accused/appellants namely Rinku @ Omprakash and Pappu @ Jaswant @ Yashwant met him and asked as to whether he is looking for the deceased prosecutrix. They made extensive search of the deceased and ultimately the body of deceased was located in the gutter of Quarter

No.D/21 in naked condition. The body was duly identified by PW-4 to be that of his daughter. Dehati Nalishi (Ex.P-26) was recorded on 8.5.2004 at 3.30 a.m.. Immediately thereafter Dehati Merg (Ex.P-52) was recorded at 3.50 a.m. at the instance of PW-4. FIR (Ex.P-24) under Sections 302 & 201 of IPC was registered on 8.5.2004 at 7.30 a.m. Merg Intimation (Ex.P-25) was recorded. Inquest over the body of deceased was conducted vide Ex.P-5. Body was sent for post-mortem examination which was conducted by a team of three doctors including Dr. S.P. Kesharwani (PW-11) and following injuries were noticed on her body:-

- multiple abrasions on the inner aspect of upper and lower lips with few contusions.
- Two abrasions on upper side of gum.
- Multiple abrasions over left side of cheek.
- Abrasion on the whole chin of 3.5 x 3cm in size.
- Swollen & contused upper lip.
- Multiple contusion on the forehead, red in colour.
- Abrasion on the lower part of chest and upper part of abdomen.
- Abrasions over right side of chest of 5x3cm in size.
- Abrasion over the whole back including both shoulders, red in nature.
- Erosion in lower part of vagina. Blood clot was present. Hymen was ruptured and it is one finger tight.

The team of doctors gave its report Ex.P-28 opining that cause of death was asphyxia, smothering and shock due to massive haemorrhage and the death was homicidal in nature. The doctors have not given any definite

opinion regarding recent sexual intercourse. Two vaginal smear slides were prepared and handed over for examination.

On 10.5.2004 memorandum statement of acquitted accused Dilip Tandi was recorded vide Ex.P-8 and on the basis of which clothes were seized vide Ex.P-9. Memorandum of accused/appellant Rinku was also recorded vide Ex.P-10 and based on which ashes of torn frock and anklet of deceased were recovered vide seizure memo of Ex.P-17. A beer bottle having finger prints of accused/appellant Rinku was also taken into possession vide Ex.P-18. Memorandum of accused Pappu alias Jaswant was recorded vide Ex.P-12 and in pursuance of his statement, one pant and shirt was seized vide Ex.P-13.

Seized articles were sent for chemical analysis to the Forensic Science Laboratory from where report of Ex.P-72 confirming presence of human spermatozoa in the vaginal slides of the deceased, underwear of acquitted accused Dilip Tandi and Rinku and also in the seminal slides of accused Rinku, Dilip & Pappu. Finger prints were taken from accused/appellant Rinku and the same were sent to the Finger Print Expert to compare the finger prints taken from the beer bottle and as per report of Finger Print Expert (Ex.P-45), finger prints of accused/appellant Rinku were found tallied with the finger prints taken from the beer bottle. Dr. S.N. Choubey (PW-15) conducted MLC of accused/appellant Rinku vide Ex.P-31 and noticed one abrasion on his penis. According to PW-15, said injury could have been caused 48 hours earlier than the time of his examination. It has further been opined by the doctor that such injury could have been sustained during the course of sexual intercourse. Smega has also been found to be absent.

4. On completion of investigation, charge sheet was filed against the accused persons for the offence punishable under Sections 302, 376 (2)

(g) & 201 IPC followed by framing of charges by the Court below under above sections. In order to hold the accused persons guilty, the prosecution had examined as many as 25 witnesses. Statements of accused persons were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case and pleaded innocence & false implication. They have examined two defence witness in support of their case.

5. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment, while acquitting respondents No.1 & 2 in Acquittal Appeal, convicted and sentenced the accused/appellants in Criminal Appeal in the manner as described above.

6. Learned counsel for the appellants in Criminal Appeal No.439/2007 submits that;

- there are no eyewitness to the incident and the trial Court convicted the appellants only on the basis of circumstantial evidence, but the circumstantial evidence relied upon by the prosecution were not sufficient to connect the appellants with the commission of crime in question.
- there are material contradictions and omissions in the evidence of prosecution witnesses i.e. PW-4 & PW-8, which make the entire prosecution story doubtful and untrustworthy.
- second statement of PW-4 recorded by the police materially differs from his first statement and as such no reliance can be placed on the second statement wherein the appellants are set out as the perpetrators of offence in question.
- mere asking by the appellants from the father of deceased as to whether he is looking for his daughter, is hardly sufficient to connect them with the crime in question.

- FSL (Ex.P-72) is not conclusive because it has not been established that human spermatozoa was that of these appellants.
- after the incident the police had detained number of persons, beaten them mercilessly and thereafter appellants have been falsely implicated.
- Appellant Rinku was arrested on 10.5.2004 whereas recovery of beer bottle has been shown to be made on 8.5.2004 at about 8 a.m. and this shows that he has been falsely implicated.

8. On the other hand, supporting the impugned judgment in respect of conviction of appellants Rinku & Pappu, it has been argued by the State Counsel that

- there are strong circumstantial evidence connecting the accused/appellants with the crime in question.
- the material witnesses remained unshaken in their version and nothing substantial has been elicited from them during the cross-examination which could create a dent in their testimony.
- According to prosecution, no body told the appellants that the deceased prosecutrix is missing, but on seeing PW-4 they themselves asked him as to whether he is looking for the deceased. This conduct and behaviour of the appellants is a very strong in itself which shows that they were aware of the incident else there was no occasion for them to ask of their own about the deceased when nobody asked them.
- at the time of recording of initial statement, PW-4 was nervous, as his daughter had been brutally killed after rape and therefore he was not in a position to correctly state the facts in his initial

statement. In this situation, the investigating officer had no alternative except to record correct version of PW-4 in the shape of supplementary statement in which he has made categorical statement. Thus, it cannot be said that recording of supplementary statement of PW-4 is an afterthought.

- Considering the seriousness of offence where a minor girl was first subjected to rape and thereafter murdered in a brutal manner with an intent to conceal the real fact and to divert attention of the investigation agency, the minor contradictions and omissions in the evidence of the prosecution witnesses are liable to be ignored.
- On the memorandum of accused Rinku, a beer bottle has been seized from the spot. Finger prints lifted from the said bottle were found tallied after comparison with the finger prints of accused Rinku,
- The doctor, who did MLC of accused Rinku vide Ex.P-31, noticed injury on his penis and according to him, such injury may come during sexual intercourse.

Acquittal Appeal No.2/2009

9. Counsel for the State submits that ;-

- the trial Court erred in acquitting the respondents-accused even when the facts and circumstances which were proved beyond reasonable doubt and the evidence adduced on record clearly proves the guilt of the respondents that in all probabilities they had caused the death of 7 year old deceased after ravishing her. Atleast, there are enough evidence on record showing involvement of respondent Dilip Tandi in commission of offence.
- the trial Court is not correct in not appreciating the testimonies of PW-4

and PW-8, who have clearly stated in their statements that accused Yashwant & Rinku met them and without being asked by us, they themselves asked as to whether they are searching for the deceased. Such clear and lucid statement of facts, which were proved beyond reasonable doubt should not have been overlooked and ignored by the trial Court.

10. Heard counsel for the respective parties and perused the material on record.

11. Kunwar Singh Yadav (PW-1), Shiv Kumar Saraf (PW-3), Jhaggar Singh (PW-9), Fulchand (PW-12), Shankar Singh (PW-14), S.M. Salauddin (PW-16), B.R. Singh (PW-17), T.R. Nagvanshi (PW-21), Santosh Singh (PW-22), B.P. Gupta (PW-23), Ashok Kumar Soni (PW-24) are the persons who assisted in the investigation and since their testimonies are formal in nature, the same need not be discussed in detail.

12. Shyam Sunder (PW-1), Shahzad (PW-17), K. Kameshwar Rao (PW-19) & Lavlesh Patel (PW-10) have not supported the prosecution and they have been declared, hence there is no need to discuss their evidence also.

13. T. Dharma Rao (PW-4) is the father of the deceased prosecutrix at whose instance missing report (Ex.P-29), Dehati Nalishi (Ex.P-26), dehati merg (Ex.P-52) and FIR (Ex.P-24) were recorded. While supporting the prosecution case, he has stated that on 7.5.2004 at about 9 in the night he returned home from the house of his sister and finding his daughter missing, he enquired about his daughter from his wife and she informed that she would have gone to the house of acquitted accused Dilip Tandi to play. He has further stated that he sent his elder son to the house of acquitted accused Dilip Tandi to see the deceased. His son returned and informed that the deceased is not there. Thereafter, he went in search of the deceased and he met accused Yashwant at Shishu Mandir road and

as soon he reached near to him, he asked him as to whether he is looking for the deceased, whereas he did not ask anything from him about his daughter. After some time he met with accused Rinku and he also asked from him as to whether he is looking for the deceased. He has further stated that thereafter he had gone to the house of one of the friends of his daughter. During search, they found sleeper of his daughter lying at a distance of 5-6 meter from the spot. He further states that when the deceased was searched in the septic tank of Quarter No.D21, her body was found lying there in naked condition. Blood was coming out from her private parts and her head was crushed from one side. He has further stated that as soon as the body of deceased was recovered, the accused Rinku & Yashwat disappeared. He has further stated that thereafter inquest on the body was prepared vide Ex.P-5 and the body was sent for post mortem examination. He further states that spot map of Ex.P-6 was prepared by the police and sleepers were seized vide Ex.P-7. In Para-13 he has stated that his relations with acquitted accused Dilip Tandi were cordial and his daughter used to call him "brother". He further states that one milkman (PW-7) informed him that he saw the deceased sitting on the culvert at about 9 in the fateful night. He has further stated that he had suspicion that his daughter was taken away by acquitted accused Dilip by enticing her. He has admitted the fact that his initial statement was recorded on 9.5.2004 and supplementary statement was recorded on 4.7.2004 in which he had disclosed to the police that while searching the deceased, he met accused Rinku & Yashwant who asked him as to whether he is looking for the deceased, whereas he had not asked from them about the deceased.

14.D. Venugopal (PW-5) is the witness of inquest (Ex.P-5), memorandum (Ex.P-8) of acquitted accused Dilip Tandi, seizure memo Ex.P-9. He is

also witness to documents Ex.P-10 to Ex.P-23.

15.T. Seemanchalan (PW-6) is the witness of inquest (Ex.P-5). He has not stated anything incriminating against the accused persons.

16.Sagar Sao (PW-7) is the another person who saw the deceased sitting alone on the culvert.

17.P. Someshwar Rao (PW-8) has stated that on coming to know from his wife about the missing of deceased, he rushed to PW-4 and thereafter he along with him went in search of the deceased. He has further stated that a missing report was lodged by PW-4. He has further stated that two accused though joined them but later on separated from them. He is also a witness of inquest Ex.P-5. Though this witness has been declared hostile but he has stated that when he along with other persons were searching for the deceased, accused No.1, 2 & 3 came running from the side of big ground and asked as to whether they are looking for the deceased, although nobody had inquired them about the deceased. He has further stated that on being asked to go in the direction from where dead body of deceased was recovered, they asked them not to go in that direction. He has further stated that many a time he was questioned by the police and this continued for about ten days and whatever has been recorded in his diary statement is correct. In Para-39 he has reiterated that it is incorrect to say that he does not know anything about the incident and then he clarifies that whatever has been stated by him is perfect.

18.Dr. S.K. Kesharwani (PW-11) is one of the members of the team which conducted post-mortem examination over the body of deceased. According to him, mode of death was asphyxia due to smothering and shock due to excessive bleeding and death was homicidal in nature.

19.Prabhat Kumar Verma (PW-13) is the photographer who took the photographs of the deceased and the spot.

20. Dr. S.N. Choubey (PW-15) is the doctor who did MLC of the accused persons including that of accused/appellant Rinku vide Ex.P-31 and noticed one injury on his penis. According to this witness, such injury could come during sexual intercourse.
21. S.K. Jain (PW-20) is the Finger Print Expert. According to this witness, he visited the spot and lifted two finger prints from the beer bottle in presence of two witnesses and the finger prints of accused Rinku tallied with the finger prints lifted from the bottle.
22. Yadav Ram Thakur (PW_25) is the Patwari who prepared the spot map vide Ex.D-1.
23. Dr. Prabhat Pandey (DW-1) is the doctor who medically examined accused/appellant Rinku on 23.5.2004 in the jail hospital. According to this witness, accused/appellant Rinku was complaining of pain in the chest. He remained admitted in the hospital for two days and thereafter he was discharged.
24. Dr. Shobharam Banjare (DW-2) is the doctor who medically examined accused Rinku at the time of his admission in jail and found him fully fit. He has further stated that on 26.5.2004 accused Rinku was treated for stomach pain and thereafter on 29.5.2004 he was suffering from fever and diarrhoea. He has further stated that on 30.5.2004 accused Rinku was referred to the government hospital for treatment.
25. In the present matter, the prosecution has no direct evidence to prove its case. However, the prosecution relied on three specific circumstances, namely conduct of accused/appellants, finger print expert's report and recovery at the instance of accused persons.
26. For resting the conviction solely based on the circumstantial evidence, the law laid down by the Apex court in the matter of **Dhananjoy Chatterjee -Vs- State of W.B, (1994) 2 SCC 22** is that "in a case based

on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

27. In **Bodh Raj alias Bodha and others v. State of Jammu and Kashmir** reported in **AIR 2002 SC 3164**, the Apex Court laid down that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

- 1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established;
- 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;
- 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.”

28. Almost similar view was again taken by the Apex Court in the matter of State of Goa v. Sanjay Thakran & anr. reported in (2007), State of Goa v. Sanjay Thakran & another reported in 2007 (4) SBR 321. While passing the said judgment, the Apex Court has also referred to the decision of Bodh Raj case (supra).

29. Close scrutiny of the evidence available on record makes it is clear that on 7.5.2004 the deceased prosecutrix was taken by accused/appellants herein to a lonely place and there they committed rape and murder of the victim and tried to cause disappearance of evidence of such offence by concealing the body of deceased in the septic tank of an abandoned structure. According to T. Dharamarao (PW-4), while he along with PW-8 was searching for the deceased, the accused persons came across them and quipped whether they were on the look-out for the deceased. This apart, accused Rinku and Yashwant, who were accompanying PW-4 & PW-8, had disappeared immediately after the recovery of body of the deceased. This shows that they were fully aware as to what had happened to the deceased and by whom.

No doubt, PW-4 T. Dharmarao improved his initial version in a supplementary statement recorded under Section 161 CrPC on 4.7.2004 in which for the first time he disclosed the aforesaid fact of the appellants enquiring from them about the deceased. This supplementary statement was duly signed by PW-4 and similar version was given by him in his Court deposition. Defence has utterly failed to elicit from him to show that such improvement was with an intent to falsely implicate the accused persons rather in the cross-examination he has clarified that his first statement was recorded immediately after the incident and at that time he

was so grief-stricken that he could not disclose those facts to the police and with the passage of time when he could come out of that sad phase of life, he disclosed about the aforesaid conduct of the appellants. For the reasons stated supra, the subsequent statement of PW-4 recorded under Section 161 CrPC appears to be quite natural and believable. Even otherwise, there is no evidence of enmity against any of prosecution witnesses, in particular against the father of the deceased prosecutrix, with the appellants which may lead to the presumption that they have been falsely implicated in the crime in question. Moreover, it defies the logic as to why the father of a girl aged 7 years, who was sexually ravished before murder through strangulation, would falsely implicate the appellants and allow the real culprit to go scot free.

The aforesaid position is further strengthened by the Forensic Report and that of the Finger-Print Expert to establish that the finger prints which had been lifted from the beer bottle seized from near the spot matched with the finger print of appellant Rinku Pandey which clearly established his presence on the spot. According to S.K. Jain (PW-20), Finger Print Expert, he lifted two finger prints from the beer bottle in presence of two witnesses and also the finger prints of accused Rinku and after analysis, he submitted a report to the effect that when the finger prints of accused Rinku were compared with the finger prints already taken from the beer bottle, it tallied with the finger prints of accused Rinku. Thus, the finger print of appellant Rinku Pandey found on the beer bottle seized from near the spot proves his presence on the spot and also the fact that it is accused/appellants who caused death of the deceased after having forcible sexual intercourse with her.

There is yet another circumstance which indicate involvement of accused/appellants in the crime in question. According to memorandum

statement of accused/appellant Rinku, while the deceased prosecutrix was sitting on the culvert, they enticed the prosecutrix, took her to Bijli Nagar Colony where they subjected her to forcible sexual intercourse turn by turn. Fact that the deceased prosecutrix was sitting on the culvert from where she was taken by the accused persons stands corroborated from the statement of Sagar Sao (PW-7), a milkman, who claimed to have seen the deceased sitting on the culvert in the fateful night.

Admittedly, there is no definite opinion regarding recent sexual intercourse with the deceased, but the circumstances on record point to the commission of rape of the deceased. The deceased was found lying naked in a septic tank with blood oozing out of her genitals. Presence of semen-like substance in her vagina, which was found during the post-mortem examination, was collected and sent for micro-biological examination and report of FSL showed the presence of semen. The presence of human spermatozoa in the vaginal smear which was sent for micro-biological examination and presence of blood at the vaginal outlet together with rupture of hymen confirms the commission of forcible sexual intercourse i.e. rape. In addition to above, the examination of accused Rinku Pandey by Dr. S.N. Choubey (PW-15), discloses injury on frenum & glans which could have been caused during the course of forced sexual intercourse with the victim. According to the doctor (PW-15) also, injury on the private part of accused Rinku may have come during the course of sexual intercourse. Further, since no smegma was found present on the glans penis of accused Rinku and it was clean, the doctor had opined that he had committed sexual intercourse within a period of 24 hours of his examination. Needless to mention that smegma vanishes from the glans penis during sexual intercourse. The abrasions on the male organ of the accused Rinku supported his view. Thus, the afore mentioned

circumstances are sufficient for drawing inference that the appellants are the persons who committed forcible sexual intercourse with the prosecutrix.

This apart, the shirt seized at the instance of accused/appellant Pappu alias Yashwant was found to be stained with blood and the report of the Serologist also indicate that it is stained with human blood. Accused/ appellant Pappu in his statement under Section 313 CrPC has utterly failed to bring forth any explanation as to how the blood stains appeared on the shirt seized at his instance.

30. On account of aforesaid circumstances, this Court is of the opinion that the chain of circumstances was complete and the completed chain of circumstances boil down to the conclusion that the accused/appellants are guilty of the offence punishable under Sections 302, 376 & 201 of IPC.

31. So far as the acquittal of respondent Dilip Tandi and Ravi alias Ravindra is concerned, in our opinion, the reasons recorded by the trial Court for recording their acquittal is based on proper appreciation of evidence. The findings are not only supported by proper appreciation but are also reasonable and sound. Even otherwise, it is a well settled principle of law that interference with appeal against acquittal is permissible only when there are compelling and substantial reasons for doing so. What the appellate Court has to see is whether the reasonings of the trial Court are well founded and acceptable with sound reasoning, and if it is so, then the question of reversing the finding of the trial Court does not arise. It is only in case, if the evidence on record has not been properly appreciated by ignoring the material facts, it is open to the appellate Court to interfere with such judgment of the trial Court. If there are two possible views on the basis of evidence on record in the case, the one favouring the accused should be adopted and that is what the trial Court has done.

32.In the result;

- Criminal Appeal No.439/2007 preferred by accused/appellants Rinku @ Omprakash and Pappu @ Jashwant @ Yashwant has no substance and the same is accordingly dismissed. They are reported to be on bail. Their bail bonds stand cancelled. They be taken into custody and sent to jail forthwith to serve out the remaining part of the sentence imposed on them.
- Acquittal Appeal preferred by the State is also dismissed as the views expressed by the trial Court are reasonable and possible views and there is no perversity therein.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(RP Sharma)
Judge