

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 750 of 2008**

- Dharam Pal s/o. Moharsai, aged about 48 years, r/o. Village Ghatama, P.S. Kotadol, District Korla (CG).

---- Appellant in jail.**Versus**

- State of Chhattisgarh through PS Kotadol, Manendragarh, District Korla (CG).

---- Respondent

For Appellant : Mrs. R.K. Jain, Advocate.

For Respondent/State : Mr. Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Pritinker Diwaker,
Hon'ble Shri Ram Prasanna Sharma, JJ

Per P. Diwaker, J**21-08-2017**

This appeal arises out of the judgment of conviction and order of sentence dated 26-6-2008 passed by the 1st Additional Sessions Judge, Manendragarh, District Korla in Sessions Trial No. 54 of 2007 convicting the appellant under Sections 302 & 201 of IPC and sentencing him to undergo imprisonment for life, to pay a fine of Rs.500/- and to undergo RI for five years and pay a fine of Rs.500/- with default stipulations respectively.

2) In the present case, name of the deceased is Gopal. It is alleged that on 1-5-2007 the accused/appellant consumed liquor along with deceased Gopal and then committed his murder by strangulation. After committing murder of the deceased, he picked up the dead body of the deceased on his shoulder and threw the same behind the house of the deceased beneath the Mango tree. On 2-5-2007 at 8.30 pm., Merg intimation (Ex.P/11) was lodged by the appellant informing the Police that he saw the dead body of the deceased beneath the Mango tree and some-body had killed him. Inquest on the dead body was conducted on 3-5-2007 vide Ex.P/7 and the dead body of the deceased was sent for postmortem which was conducted on 4-5-2007 by Dr. Rajeev Kumar Raman (PW/9) vide Ex.P/9 and according to autopsy surgeon, cause of death of the deceased is asphyxia due to strangulation. It has been opined by the autopsy surgeon that death was homicidal in nature. On the basis of merg enquiry, first information report (Ex.P/13) was registered on 6-5-2007 under Sections 302 and 201 of the IPC against unknown person. On 8-5-2007 memorandum of the accused/appellant (Ex.P/2) was recorded, based on which seizure of Tong (Sandshi) was made whereas vide Ex.P/4 club was seized and vide Ex.P/5 plastic shoe allegedly belonging to the deceased was seized. As per identification memo (Ex.P/6), the said plastic shoe was identified by the wife of the deceased to be of the deceased. During investigation, it was noticed by the Police that to save himself, the appellant had given a different story of the murder of the deceased by saying everywhere that the deceased was killed by the Naxalite.

However, Police reached the conclusion that it is the accused/appellant who killed the deceased. After filing of charge sheet, the trial Court framed charges under Sections 302 & 201 of IPC against the appellant.

3) So as to hold the accused/appellant guilty, the prosecution examined 12 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

4) The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned above.

5) Learned counsel for the appellant submits as under:

- i) that there is no eye-witness account to the incident and the appellant has been convicted solely on the basis of circumstantial evidence.
- ii) that the chain of circumstantial evidence is not complete and under no circumstances on the basis of weak type of circumstantial evidence collected by the prosecution, the appellant could not have been convicted.
- iii) that main piece of evidence relied upon by the trial Court against the appellant is the statement of Jagdish (PW/1) who allegedly saw the accused/appellant carrying dead body from his house.
- iv) that 161 Cr.P.C., statement of this witness was

recorded on 28-5-2007 i.e., after about 27 days of the incident and no explanation has been offered by this witness as to why he kept quiet for 27 days, except saying that he got scared and therefore, did not disclose the fact to anyone.

- v) that so-called witnesses of extra judicial confession PW/7 Mohan and PW/8 Fuleshwari are not reliable and the statement of PW/5 Balsai is also not clinching in nature.
- vi) that though on the memorandum (ExP/2) of the appellant, certain seizures have been made but in absence of FSL and Serological report, those seizures are of no consequence.
- vii) that the plastic shoe seized vide Ex.P/5 is a common article and merely on the basis of recovery of the same, the appellant cannot be convicted for the offence under Section 302 of the IPC.

6) On the other hand, State counsel supporting the impugned judgment has submitted that the judgment impugned is strictly in accordance with law and there is no illegality or infirmity in it warranting any interference by this Court.

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

8) PW-1 Jagdish has stated that he knew the deceased and the appellant. On the date of incident at about 11 pm when he was returning from his field, he saw the accused/appellant carrying the dead body of the deceased on his shoulder for throwing the same. He has further stated that he got scared, therefore, he did not disclose this fact

to anyone and had gone to his house. On the second day, he disclosed this fact to the villagers including Balsai (PW/5), Gulab Singh (PW/4), Bhikham (PW/2). He has further stated that on the next morning the report was lodged by the appellant at Police Station and he (this witness) was keeping guard on the dead body. In cross examination he has stated that his house is covered with fence and nobody can be seen from outside. He has further stated that his diary statement was never recorded.

9) PW/@ Bhikam is a villager and hearsay witness. PW/3 Manmati is wife of the deceased and she is also a hearsay witness. She identified the shoe of the deceased. Gulab Singh (PW/4) is a hearsay witness and has stated that after the incident the appellant fled away from the spot. He is also a witness of memorandum of the accused/appellant vide Ex. P/2, P/3, P/4 and P/5. Balsai (PW/5) is a witness of last seen who allegedly saw the accused/appellant and the deceased on 1-5-2007 in the morning. PW/6 Heerasai is a witness of inquest. PW/7 Mohan and PW/8 who are witnesses of extra judicial confession allegedly made by the accused/appellant, have not supported the case of the prosecution.

10) PW-9 Dr. Rajeev Kumar Raman conducted postmortem on the body of the deceased on 23-5-2008 vide Ex.P/9 and noticed the following injuries.

- i) Body undergoing decomposition and maggots present in whole body.
- ii) Whole body swell up due to decomposition and both eyes protruded out.

- iii) Tongue down outside.
- iv) blood came out from the body, eyes and nostril.
- v) swelling present over right side of skull on
desertion haematoma present about 3 cm x 2 cm
in size
- vi) faecal matter came out

11) PW/11 Sumarsai is a Patwari, who prepared spot map vide Ex.P/1 PW/12 Churawan Singh is the Investigating Officer.

12) Admittedly, there is no direct evidence against the appellant to show his complicity in the crime in question and his conviction rests upon circumstantial evidence.

13) In the matter of ***Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra, (2008) 3 SCC 210***; the Supreme Court while dealing with circumstantial evidence observed in paras 11, 12, 13 & 26 as under:

“11. In Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:

“10. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

12. [In Padala Veera Reddy v. State of A.P.](#) [(1989) Supp (2) SCC 706], this court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.[]

13. [In Sharad Birdhichand Sarda v. State of Maharashtra](#) [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These 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.[]

14) Close scrutiny of the evidence makes it clear that there is no legally admissible or clinching evidence showing the complicity of the accused/appellant in commission of the offence. PW/1 Jagdish is a witness who allegedly saw the accused/appellant carrying the dead body of the deceased from his house, but his 161 Cr.P.C., statement was recorded after about 27 days of the incident and no acceptable explanation was offered by him or by the Investigating Officer as to why there was inordinate delay in recording his 161 Cr.P.C., statement. More-over, according to PW/1 Jagdish, his diary statement was never recorded by the Police whereas though same is

not confronted by the defence, but is available in the original record. Yet, another aspect of the matter is that PW/1 Jagdish on the second day was keeping guard on the dead body of the deceased, when this witness saw the accused/appellant throwing the dead body, had disclosed this fact to villagers, then keeping quiet for 27 days, creates doubt on the prosecution case. PW/7 Mohan and PW/8 Fuleshwari, who are witnesses of extra judicial confession, have not supported the case of the prosecution in their cross examination.

15) Likewise, PW/5 Balsai is the witness of last seen who saw the accused/appellant and the deceased in the morning of 1-5-2007 whereas his dead body was found on 2-5-2007 in the evening. Considering the time gap between seeing the appellant along with the deceased and finding the dead body of the deceased, it will not be safe for us to convict the appellant on the basis of the evidence of last seen by PW/5 Balsai. Even otherwise, merely on the basis of statement of last seen, it will not be safe for us to convict the appellant.

16) Hon'ble the Supreme Court in the matter of **Anjan Kumar Sarma and others Vs. State of Assam, reported in 2017 SCC 622** has held as under

“21. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the

judgment of this Court in *State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:-

“34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.

22. Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court and acquit the Appellants of the charges of Section 302, 201 read with 34 IPC. The Appellants are directed to be set at liberty forthwith, if not required in any other case.”.

(Also See :State of Goa vs. Sanjay Thakran, reported in 2007 (3) SCC 755, S.K. Yusuf vs. State of West Bengal, reported in AIR 2011 SC 2283, Nizam and another vs. State of Rajasthan, reported AIR 2015 SC 3430 and the decision of this Court in the matter of Smt. Jiteshwari Bai vs. State of Chhattisgarh (CRA No. 587 of 2004) decided on 25-10-2016).

17) On the memorandum of PW/2 Bhikham, certain seizures have been effected but there is no FSL report connecting those seizures with the commission of the offence. Mere identification of shoe allegedly seized from the possession of the accused/appellant is not good enough to uphold the conviction of the appellant.

18) Thus taking into cumulative effect of the evidence, we are of the view that the appellant is entitled for the benefit of doubt and he deserves to be acquitted of the charges leveled against him.

19) In the result, the appeal succeeds and is, accordingly, allowed. The impugned judgment is hereby set aside and the appellant is acquitted of the charges under Sections 302 and 201 of IPC by

extending him benefit of doubt. The appellant is reported to be on bail.

His bail bonds stand discharged.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(R.P. Sharma)
Judge

Raju