

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 829 of 2008**

1. Santlal Rajwade S/o Dubraj Rajwade, 28 years.
 2. Naresh Kumar Rajwade S/o Late Lalan Rajwade, 24 years.
- Both R/o Village Parri, Police Station Surajpur, District Surguja, Chhattisgarh.

---- Appellants**Versus**

State of Chhattisgarh, through District Magistrate, Surguja, Chhattisgarh.

---- Respondent

For Appellants	: Shri Keshav Dewangan, Advocate.
For Respondent	: Shri Ravindra Agrawal, Panel Lawyer.
For Objector	: Shri Sanjay Dewangan, Advocate.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Sanjay Agrawal, J.

Judgment on Board**23/01/2017**

1. This appeal by the convicted accused/Appellants is directed against the judgment dated 22.08.2008 delivered by the learned First Additional Sessions Judge, Surajpur, District Surguja, in Sessions Trial No. 305 of 2007 whereby he convicted and sentenced the accused/Appellants as under:

CONVICTION**SENTENCE**

Under Section 302 read with Section 34 IPC

Rigorous imprisonment for life with fine of Rs. 2000/-. In default of payment of fine, rigorous imprisonment for one year.

Under Section 201 Part II read with Section 34 IPC

Rigorous imprisonment for 5 years with fine of Rs. 1000/-. In default of payment of fine, rigorous imprisonment for six months.

2. The prosecution story, briefly stated is that on 27.04.2007, deceased Dinesh @ Gajanand, 10 years old son of Basanti Bai (PW-1) and Ram Ratan (PW-8) was playing outside their house with other children. Accused-Santlal is a cousin of Basanti Bai (PW-1). Accused-Naresh Kumar is his friend. The

prosecution version is that accused-Santlal was eying the property of Basanti Bai (PW-1) which she had inherited and accused-Santlal wanted that property to be transferred in his name and therefore, there was a dispute between them. This according to the prosecution is the motive for the murder. It is alleged that accused-Santlal took away the child from the place from where he was playing and thereafter pushed the child into a well and then gave blows with mud pellets, resulting in the death of the child.

3. The first recorded information with regard to the occurrence is the Merg Intimation (Exhibit P/11) which was recorded on 29.04.2007 at 10:05 am. This has been lodged at the instance of Ramratan (PW-8), father of the deceased and in this, it is stated that his son Dinesh @ Gajanand had left their house at 12:00 noon on 27.04.2007 to play with the other children in the neighbourhood. He did not return till 29.04.2007. The informant alongwith other villagers had searched for his son. During the search, some villagers, namely Gaurishankar (not examined) and Ramdhan (PW-5) informed him that a dead body of a boy is lying in the well of Ishwar Rajwade. On hearing this news, he went to the spot and found that the dead body was of his son. This information was lodged on 29.04.2007. In this, there is no allegation of accused-Santlal having taken away his son on 27.04.2007. The first information report (Exhibit P/16) has been recorded on 01.05.2007 at 4:30 pm. This FIR is also against unknown persons.

4. After investigation, the police charge sheeted the accused of having committed murder of deceased Dinesh @ Gajanand. The accused denied the charges and prayed for trial. After trial, they have been held guilty and have been convicted and sentenced, as aforesaid. Hence, this appeal.

5. The learned Trial Court has convicted the accused relying upon the following circumstances - (i) death of Dinesh @ Gajanand was homicidal in nature; (ii) accused-Santlal had some enmity with Basanti Bai (PW-1), mother of the deceased and accused Naresh Kumar is friend of Santlal; (iii) accused-Santlal

wanted that Basanti Bai (PW-1) should transfer her property in his favour; (iv) Basanti Bai (PW-1) was so scared that she used to sleep in the house of others; (v) deceased was playing in the house of Mala Devi (PW-9) and suddenly vanished from there; (vi) accused Santlal and Naresh Kumar at the relevant time had gone to the house of Mala Devi (PW-9) when the child Dinesh @ Gajanand went missing and they could give no reason why they were present in the house of Mala Devi; (vi) at the instance of accused, one bamboo stick and one mud pellet was recovered which had been broken from the side of the well and used to cause injuries to the deceased; and (vii) accused-Santlal had a motive to kill deceased Dinesh @ Gajanand because he wanted to get the property of Basanti Bai (PW-1) one way or the other.

6. Basanti Bai (PW-1) mother of deceased, and Ramratan (PW-8) father of the deceased, in Court have virtually deposed as if they were eyewitnesses to the disappearance of Dinesh @ Gajanand. Basanti Bai (PW-1) in Court stated that about 12 noon on 27.04.2007, her son was playing in the house of Mala Devi (PW-9). Her son came to the house and told her that maternal uncle (*Mama*), Santlal offered him some sweets and wanted to take him home and the child refused to go with him. Then accused Santlal and Naresh caught hold of his arm and took him with them. According to this witness, she saw the accused taking her son with them and she objected to them for taking her son. Then the accused told her that they would bring her son back immediately. She states that she searched for her son but could not find him. At about 8:00 pm, she met the accused Santlal and she asked him where her son was to which accused-Santlal replied that he had come back and left her son where they were playing. He then joined Basanti Bai (PW-1) and Mala Devi (PW-9) in the search. After sometime, he showed an axe (*tabbal*) to her and threatened her that she should not ask too many questions to him.

7. Ramratan (PW-8), father of the deceased has given a similar version. His statement is totally silent with regard to the meeting of accuse-Santlal in the evening or Santlal threatening his wife. If Basanti Bai (PW-1) had been threatened by accused Santlal and Santlal had been questioned by his wife, then this witness should have made such a statement but he has not done so. Therefore, this is a major contradiction in the statements of both the witnesses.

8. Moreover, all what is incriminating was stated by Basanti Bai (PW-1) for the first time in the Court itself. In case, accused-Santlal had forcibly taken her son away, then she would have reported the matter to the police. This was not done. Thereafter, on 29.05.2007, when the merg was recorded, at least on that date they would have informed the police that accused-Santlal had taken deceased Dinesh @ Gajanand. Even the FIR was lodged against the unknown persons. It is only when her statement was recorded under Section 161 CrPC she stated that she suspected the accused-Santlal saying that he had taken away her son from the place he was last seen. This clearly shows that this witness has put up a totally false case during the statement made in the Court. Similarly, statement of Ramratan (PW-8) is also not to be believed because what he has stated is totally different from what he has stated earlier, especially in the merg intimation lodged by him.

9. As far as Mala Devi (PW-9) is concerned, even if her statement is to be believed, all that can be deduced from her statement is that the deceased was playing with her children. Thereafter, the children including the deceased came into the house to watch TV. When the electricity went off, the children went out of the house to play. In the meantime, accused-Santlal and Naresh Kumar had visited her house. She also stated that she is related to both the accused. In a village, villagers especially relatives normally meet each other and visit each other's houses.

10. From the aforesaid discussion, it is established that neither Basanti Bai (PW-1) nor Ramratan (PW-8) had seen accused-Santlal and Naresh Kumar taking away their son Dinesh @ Gajanand from the house of Mala Devi (PW-9). Even if we take the statement of Mala Devi (PW-9), at best, all that is proved is that the accused persons had visited her house but there is no iota of evidence to show that they took away the child from there.

11. A lot of emphasis has been laid by the Court below on the memorandum statement made by the accused. Almost the entire statement under Section 27 of the Evidence Act is hit by Section 25 of the Evidence Act and cannot be read in evidence. Only that portion of the evidence can be read with regard to alleged discovery of some new fact. The memorandum statement (Exhibit P-4 and P-5) were recorded on 08.05.2007, more than 10 days after the occurrence. The body was recovered on 29.04.2007. The mud pellets and bamboo stick were already inside the well. If they were already inside the well why were they not seized by the police? Section 27 of the Evidence Act is available only when the statement of the accused leads to disclosure of new fact. A fact which is already in the knowledge of the police is not a new fact.

12. In any event, the recovery of the aforesaid two items is meaningless in view of the statement of the Dr. R.S.Singh (PW-6) who in no uncertain terms stated that the injuries caused on the head of the deceased could not be caused by these mud pellets, which had been allegedly seized at the instance of the accused. This is definitely not the weapon of offence and therefore, could not be used as a circumstance against the accused.

13. Even with regard to motive, we are of the view that the evidence is very sketchy in nature. Even if we assume that there was some differences between accused-Santlal and Basanti (PW-1) with regard to property which she had inherited, this by itself cannot be a motive to murder the child Dinesh @ Gajanand especially when by murdering the child, the accused does not become a legal

heir. How would the property get transferred in his name if he killed the child. We fail to understand the reasoning given by the learned trial Court in this regard.

14. As per the Doctor, the child was murdered. The question is who committed the murder. The only circumstance which may remotely be used against the accused is that they had visited the house of Mala Devi (PW-9) but can it be said that this circumstance is sufficient to hold that the accused alone committed the murder of the child. The possibility of somebody else killing the child cannot be ruled out and possibility of the accused being innocent cannot be ruled out.

15. In this view of the matter, we are clearly of the view that the learned trial Court has totally misapplied the evidence in convicting the accused.

16. Accordingly, the impugned judgment dated 22.08.2008 delivered by the learned First Additional Sessions Judge, Surajpur, District Surguja, in Sessions Trial No. 305 of 2007 is set aside. The Appellants are on bail. The bail bonds submitted by them shall remain in force for six months under Section 437-A CrPC.

17. The Appeal is allowed.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

Sd/-

(Sanjay Agrawal)
JUDGE