

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 585 of 2010

1. Devendra Kumar S/o Late Bihari Lal, aged about 42 years, R/o village Chinouri (Jhipatola), P.S. Charama, District Uttar Bastar, Kanker (C.G.)
2. Hem Raj @ Pandaru S/o Sarju Ram, aged 41 years, R/o village Malgaon, at present R/o Reshu Dhaba, Jhipatola, P.S. Charama, District Uttar Bastar, Kanker (C.G.)

---- Appellants

Versus

- State of Chhattisgarh Through : P.S. - Charama, District - Uttar Bastar, Kanker (C.G.)

---- Respondent

For Appellant : Shri Shobhit Koshta, Advocate.
For Respondent/State: Shri Bhaskar Pyasi, P.L.

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

Judgment On Board

By Pritinker Diwaker, J

13/09/2017

This appeal arises out of the judgment of conviction and order of sentence dated 03.08.2010 passed by Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, North Bastar, Kanker, in Special Sessions Trial No.74/2009 convicting the accused/appellants under Sections 302/34 and 404/34 IPC & sentencing them to undergo imprisonment for life with fine of Rs.1,000/-, R.I. for two years with fine of Rs.500/- each respectively, plus default stipulations.

02. As per the prosecution case, in the night intervening 4-5/05/2009, deceased Ishwarlal Mandavi had gone to one Reshu Dhaba owned by Reshu Bhai Katendra and there he had quarreled with appellant No.2-Hem Raj, who at the relevant time was working as a servant in the said dhaba, after consuming liquor. It is said that accused/appellant No.1-Devendra Kumar, brother of Reshu, also reached the place of occurrence and then both the appellants had caused club injuries on the body of deceased as a result of which deceased died instantaneously. Merg intimation (Ex.P/1) was recorded on 05.05.2009 at 9.10 am at the instance of Rohidas Mandavi (PW/1), father of the deceased. On same day, at 9.15 am, FIR (Ex.P/2) was lodged by PW/1 against 2-3 unknown persons under Sections 302, 394 and 34 IPC. Inquest on the body of deceased was prepared on 05.05.2009 vide Ex.P/4 and dead body was sent for postmortem examination which was conducted by Dr. O.P. Shankhwar (PW/8) who gave his report Ex.P/20 opining the cause of death of deceased to be shock (excessive hemorrhage) caused by multiple rupture of liver and death was homicidal in nature.

03. On 10.05.2009, memorandum of accused/appellant Devendra Kumar (A-1) was recorded vide Ex.P/8, based on which, one club was seized from him vide Ex.P/10. Likewise, memorandum of accused/appellant Hem Raj (A-2) was also recorded vide Ex.P/9, based on which, Rs.660/- and his bloodstained half shirt were seized under Ex.P/11. Seized articles were sent for chemical examination to FSL and as per

FSL report Ex.P/25, no blood has been found on above seized articles.

04. After investigation charge-sheet was filed against the accused/appellants and the trial Court framed the charge against the accused/appellants under Sections 302/34, 404/34 IPC and Section 3 (ii) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

05. So as to hold the accused/appellants guilty, the prosecution examined as many as 10 witnesses. Statements of the accused/appellants were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

06. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the appellants as mentioned in para-1 of this judgment. Hence, this appeal.

07. Learned counsel for the appellants submits:

- That there is no eye-witness account to the incident and the accused/appellants have been convicted solely on the basis of circumstantial evidence but the nature of circumstantial evidence is not as such which can be made basis for their conviction.
- That on the memorandum (Ex.P/8 and P/9) of the accused/appellants, seizure of club under Ex.P/10 and half shirt of appellant No.2 under Ex.P/11 respectively have been

made, but as per FSL report (Ex.P/25), no blood has been found on the above seized articles.

- In support of above submission, reliance is placed on the decision in the matter of **Ram Adhin @ Ramdin @ Charaka Vs. State of C.G.** reported in **2017(3)C.G.L.J.397.**

08. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellants is in accordance with law and there is no infirmity in the same.

09. We have heard learned counsel for the parties and perused the material available on record.

10. Rohidas (PW/1) is father of the deceased who lodged merger intimation (Ex.P/1) and F.I.R. (Ex.P/2). He is also witness to inquest (Ex.P/4). This witness has stated that the deceased had neither enmity with the accused persons nor with the dhaba owner. Nothing incriminating has been stated by this witness against the accused/appellants.

11. Devendra Kumar (PW/2)-Sarpanch of the village, has not stated anything specific against the accused/appellants.

12. Ramdas (PW/3) and Kuleshwar Singh (PW/4) are witnesses to memorandum (Ex.P/8 and P/9) of the appellants and seizure of club & half shirt of A-2 made under Ex.P/10 and P/11 respectively. These witnesses have merely stated that they signed these documents as was directed to them by the police.

13. Bhirendra Kumar Sinha (PW/5) is Patwari who prepared

spot map vide Ex.P/16.

14. Thakur Ram (PW/6) is friend of the deceased. He has stated that he along with his 4-5 friends had gone to Dhaba for dinner where he saw the deceased along with his friend whom he doesn't recognize. The deceased and his friend were consuming liquor. He has further stated that he too also consumed liquor along with his friend. During his presence, no quarrel had taken place between him and the dhaba worker. This witness has further stated that after consuming liquor, he (this witness) left the dhaba and was not aware about subsequent development.

15. Sukhlal (PW/7) turned hostile. Dr. O.P. Shankhwar (PW/8) has conducted postmortem examination on the body of deceased vide Ex.P/20 and found following injuries:-

- (i) Lacerated wound in the size of 2 x 1/2 x 1/2 inch over occipital region.
- (ii) Lacerated wound in the size of 1/2 x 1/2 x 1/2 inch over left cheek.
- (iii) Superficial abrasion in the size of 2 x 1 x 1/3 inch over upper part of scapular region.
- (iv) Superficial abrasion in the size of 1/2 x 1/2 x 1/3 inch over left deltoid region.
- (v) Swelling was present over left side of upper 1/3 of thigh within limbs

The Doctor has opined that the cause of death of deceased was shock due to excessive hemorrhage caused by multiple rupture of liver.

16. K. M. Mishra (PW/9) - Investigating Officer has duly supported the prosecution case. M.M. Minj (PW/10)- Inspector has assisted in the investigation.

17. Based on the memorandum (Ex.P/8 and P/9) of the

accused/appellants, one club from appellant Devendra Kumar (A-1) and half shirt of appellant Hem Raj (A-2) were seized vide Ex.P/10 and P/11 respectively, however, in the FSL report (Ex.P/25) no blood has been found on it.

18. In the present case, there is no eye-witness account to the incident and the accused/appellants have been convicted solely on the basis of very weak type of circumstantial evidence.

19. Before proceeding to marshal the evidence adduced by the prosecution, it would be apt to remind the principle on which the prosecution can succeed in a case based on circumstantial evidence. In **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **AIR 1984 SC 1622**, 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.

(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."

20. In **Sujit Biswas v. State of Assam** reported in **AIR 2013 SC 3817**, the Supreme Court has held that suspicion, however, strong cannot take place of proof. Para 6 is quoted below :

"6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved, and something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. **(Vide:**

Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979)".

21. Yet again in **Kanhaiya Lal v. State of Rajasthan** reported in **(2014) 4 SCC 715**, the Supreme Court has held thus in para 15 :

15. The theory of last seen--the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh v. State of Rajasthan*.

22. We shall now consider the evidence on the touchstone of the above principle to find out as to whether the prosecution has established the case against the appellants.

23. It is the prosecution case that in the night intervening 4-5/05/2009, deceased Ishwarlal Mandavi along with Sukhlal Poyam (PW/7) had gone to Reshu Dhaba owned by Reshu Bhai Katendra and there they had consumed liquor. A quarrel between the deceased and appellant No.2-Hem Raj, who was working as a servant in the said dhaba, had ensued. While the quarrel was going on, accused/appellant No.1-Devendra Kumar, brother of Reshu, also reached there and then both the appellants caused club injuries on the body of deceased as a result of which he died. On the basis of suspicion, the accused/appellants were arrested and interrogated and in the course of interrogation they made statement to the effect that

they have assaulted the deceased by club. On the date of incident, PW/7 was with the deceased and as per his diary statement (Ex.P/19), both of them had consumed liquor in the Reshu Dhaba. In the meanwhile, friends of deceased also came there, they greeted each other, consumed liquor and after some time deceased went outside the dhaba and PW/7 asleep in the said dhaba as he was under the heavy influence of intoxication. When he woke-up at 4.00 am, he saw the body of deceased lying under a mango tree near the dhaba. PW/7, in examination-in-chief, has reiterated the same thing and on this point he has been declared hostile. In para 4 of his cross-examination, he has stated that after the incident accused/appellant Hemraj @ Pandru, servant of dhaba was absconding. It is relevant to note that on the date of incident, nobody has ever seen the deceased and appellants quarreling and mere suspicion raised by the police over the act of the accused/appellant.

24. In examination-in-chief, Ramdas (PW/3) and Kuleshwar Singh (PW/4) have proved the memorandums statements (Ex.P/8 and P/9) of appellant Devendra Kumar (A-1) and Hemraj @ Pandaru (A-2) and consequent seizure of club under Ex.P/10 and Rs.660/- & Appellant's (A-2) half shirt under Ex.P/11 respectively, but in cross-examination they stated that they signed these documents as was directed to them by the police. If the circumstance of seizure of club and shirt of A-2 is seen in the light of evidence of Investigating Officer, in that case the said circumstance is not of such nature which could

unerringly point towards the guilt of the accused because the FSL report Ex.P/25 does not confirm the presence of blood on the above seized articles. The conviction for committing the murder cannot be based solely on the strength of recovery of some articles at the instance of the accused and some more cogent and reliable corroborative evidence is required to complete the chain.

25. In **Vijay Thakur v. State of Himachal Pradesh** reported in **2014 AIR SCW 5625**, the Supreme Court held thus in paras 13 to 16 :

13.It is to be emphasized at this stage that except the so-called recoveries, there is no other circumstances worth the name which has been proved against these two appellants. It is a case of blind murder. There are no eye-witnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. Insofar as these two appellants are concerned, there is no circumstance attributed except that they were with Rajinder Thakur till Sainj and the alleged disclosure leading to recoveries, which appears to be doubtful. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.

14. In **Mani v. State of Tamil Nadu, (2008) 1 SCR 228 : (AIR 2008 SC 1021 : 2008 AIR SCW 576)**, this Court made following pertinent observation on this very aspect:

"21. The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."

15. There is a reiteration of the same sentiment in **Manthuri Laxmi Narsaiah v. State of Andhra Pradesh, (2011) 14 SCC 117 : (AIR 2011 SC (Supp) 73 : 2012 AIR SCW 2234)** in the following manner: **(Para 2 (c) of AIR, AIR SCW)**

"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence".

16. Likewise, in **Mustkeem alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724 : (AIR 2011 SC 2769 : 2011 AIR SCW 4410)**, this Court observed as under:

"24. In a most celebrated case of this Court, **Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, in para 153 (AIR 1984 SC 1622)**, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185)

"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;

- (ii) 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;
- (iii) The circumstances should be of a conclusive nature and tendency;
- (iv) They should exclude every possible hypothesis except the one to be proved; and
- (v) 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".

25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution".

It is settled position of law that suspicion, however strong, cannot take the character of proof.

26. In the case at hand also, except for the evidence of memorandum statements and consequent seizure of articles, there is no other circumstance proved by the prosecution against the appellants to complete the chain of circumstantial evidence, which is so intricately connected to each other that it only points towards their involvement.

27. Thus having examined the evidence in the present case in light of the aforesaid principles of law, we are unable to hold the appellants guilty of the crime in question. None of the circumstances relied upon by the prosecution has been proved to the hilt so as to exclude the possibility of any person other than the appellants being the perpetrator of the crime. Being so, the benefit of doubt must be credited to the appellants and they deserve to be acquitted of the charges leveled against him.

28. In the result, the appeal succeeds and is, accordingly, allowed. The impugned judgment is hereby set aside and the appellants are acquitted of the charges under Sections 302/34 and 404/34 IPC by extending them benefit of doubt. Appellant No.1-Devendra Kumar is reported to be on bail. His bail bonds stand discharged. Appellant No.2-Hem Raj @ Pandaru is reported to be in jail, he be set at liberty forthwith if not required in any other case.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Ram Prasanna Sharma)
JUDGE