

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 920 of 2010

- Sanjay Bhagat, S/o. Shivcharan Ram Bhagat, Aged about 19 years, Resident of Bouripara, Shikari Road, Ambikapur, Sarguja (CG)
- Rajesh Kushwaha S/o Rammurat Kushwaha, aged about 19 years, R/o Godhanpara, Near Kattha Factory, Ambikapur, P.S. Batouli, Distt.-Surguja, C.G.

---- Appellants

Versus

- State Of Chhattisgarh, through Station House Officer, Police Station Ambikapur, district Sarguja (CG)

---- Respondent

For Appellants	: Shri Vineet Pandey and Shri Dharmesh Shrivastava, Advocates
For Respondent /State	: Shri U.K.S.Chandel, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay K.Agrawal

Judgment On Board By P.Diwaker

22/05/2017

This appeal arises out of the judgment and order dated 23.11.2010 passed by the Fourth Additional Sessions Judge (FTC) Ambikapur (Sarguja) in Sessions Trial No. 362/2007 convicting the accused/appellants under Section 302/34 IPC and sentencing each of them to undergo imprisonment for life and to pay fine of Rs. 1,000/- with default stipulation.

2. The prosecution case is as follows : Name of the deceased is Atal Paikra. It is alleged that juvenile accused Santosh Kumar Vishwakarma got married with Rajni Bai (PW-13) in the month of May 2007 and said Rajni Bai was earlier living as neighbour of deceased

Atal Paikra at village Champa. Further case of prosecution is that Juvenile accused Santosh Vishwakarma suspected about the illicit relation of his wife Rajni Bai and deceased Atal Paikra. On 15.07.07 when Chain Sai (brother-in-law of the deceased) returned home from the market place along with his wife, Atal Paikra (since deceased) was sitting along with Santosh Vishwakarma whereas Sanjay and Rajesh were waiting outside. Santosh asked the deceased to accompany him for a walk and that his father had called him and then juvenile accused Santosh along with Rajesh and Sanjay left the place. After about 1 1/2 to 2 hours later, when it was getting dark and deceased did not return home, Chain Sai along with Sukhendra @ Bablu and his neighbour Ganesh went in search of him and when they did not get the deceased, they went to the house of Santosh Vishwakarma where his wife was also present and asked him about Atal Paikra and came to know that Atal was beaten and thrown by him near Pratappur Square, Forest Ground. Thereafter they went to the spot and with the help of the villagers, deceased was immediately taken to the hospital however he succumbed to the injuries on the next day (16.07.07). After receiving information, merger intimation was recorded vide Ex.P-6 at 6.30 a.m. on 16.07.07. On the same day at 9.00 a.m. FIR Ex.P-5 was lodged by Chain Sai (PW-7) against Santosh Vishwakarma and two others under Section 302 IPC. As per the allegations made by the prosecution, the present appellants helped the main accused Santosh in committing the murder of the deceased. Inquest of the body of the deceased was made vide Ex.P-4. The post-mortem of the dead body was conducted by Dr. H.N.Ram PW-3 who opined that the cause of death is due to head injuries leading to diffuse intra cerebral haemorrhage and mode of death is due to coma. After filing of the charge sheet, trial judge has

framed charge against all the three accused persons i.e. the present appellants and Santosh Kumar under Section 302/34 IPC.

3. So as to hold the accused persons guilty, prosecution has examined 14 witnesses in support of its case. Statement of the accused persons were also recorded under section 313 of the Code of Criminal Procedure in which they denied the charge levelled against them and pleaded their innocence and false implication in the case.

4. After hearing the parties the trial Court has convicted and sentenced the accused/appellants for the offence as mentioned above. Hence the present appeal.

5. Against the impugned judgment, present appellants have preferred this appeal whereas Santosh Kumar Vishwakarma has preferred Cr.A. No. 41/2011. Vide judgment and order dated 09.09.2013, the appeal preferred by co-accused Santosh Kumar Vishwakarma has been disposed of by this Court holding him juvenile and further directing that being juvenile he cannot be kept behind the bars for more than three years whereas he has already remained in jail for about 6 years. This appeal has been preferred by Sanjay Bhagat and Rajesh Kushwaha assailing the impugned judgment.

6. Contention of counsel for the appellants is :

i) that 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 of their conviction.

ii) that the chain of circumstantial evidence is not complete and the prosecution has utterly failed to prove the same and thus the appellants are entitled for benefit of doubt.

iii) that the only piece of evidence against the appellants is the statements of Chain Sai (PW-7) Anita (PW-8) and Sukhendra Kumar Paikra (PW-12) who are allegedly said to have last seen the appellants in the company of the deceased Atal Paikra and the main accused Santosh Kumar Vishwakarma.

iv) that the FIR has been lodged by Chain Sai (PW-7) who is the witness of last seen but while lodging the FIR he has not named the present appellants. Likewise, Smt. Anita Paikra (PW-8) and Sukhendra Kumar Paikra (PW-12) have also not named the appellants in their initial statements and have categorically stated that subsequently they came to know about the names of the appellants.

v) that no identification parade has been conducted by the prosecution for proving them in commission of the crime as required under the law.

vi) even otherwise the evidence of last seen is a weak type of evidence and unless the same is corroborated by other piece of evidence it would not be safe for this court to uphold the conviction of the appellant.

vii) that the appellants have served about seven years of sentence and therefore their sentence may be reduced to the period already undergone by them.

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

9. We have carefully perused the judgment of the learned trial Judge and considered the arguments advanced by learned counsel for the appellants and learned State counsel on the basis of the evidence brought on record.

9. Chain Sai (PW-7) is the brother-in-law of the deceased and lodger of FIR. He has stated that at the relevant time he was working as Constable in the police. He has stated that he knew the accused persons and that marriage of Santosh Vishwakarma was solemnized at village Champa and as his wife is also from the same village he knew him. He has stated that on 15.07.07, in the evening when he returned from the market he saw Santosh Vishwakarma sitting with his brother-in-law Atal Paikra who was residing with him and after a while, Santosh had asked the deceased to accompany him and then the deceased went along with Santosh and present appellants. He has stated that when he did not return after 1 1/2 to 2 hours, he went along with his neighbours in search of the deceased and as they did not find him anywhere, they went to the house of Santosh who confessed that after assaulting the deceased he threw him near Pratappur Square, Forest Ground. He has stated that thereafter they went to the spot, found the deceased lying in injured condition, took him to Mission Hospital where on the next day he succumbed to his injuries. Evidence of so called extra judicial confession made by Santosh appears to be important one

because in the FIR and dairy statement of this witness no such statement has been made by him. In cross-examination he has further stated that at the time of lodging FIR he did not know the name of the present appellants and that is why he did not mention the same and he came to know about their names only through his neighbours. He has further admitted the fact that at the time of lodging the FIR he has not given the description of other two persons and before he could name these two persons, the appellants were already arrested by the police. He admits the fact that no Test Identification Parade was conducted by the prosecution. Smt. Anita Paikra (PW-8) is the wife of Chain Sai (PW-7). She too has been examined by the prosecution as witness of last seen and her diary statement has been recorded by the police on 03.08.07 i.e. after about 18 days of the incident. In her diary statement she has stated that she came to know about the names of the present appellants from one Ganesh. It is relevant to note here that in the statement under Section 161 Cr.P.C. of this witness no description of the present appellants has been given and according to her this description was given by the police if the police has not recorded the same she could not tell the reason. She has further admitted the fact that no Test Identification Parade was conducted by the police. According to the prosecution, Sukhendra Kumar Paikra (PW-12) is also a witness of last seen. However this witness has also admitted the fact that when he met the main accused Santosh at that time appellants were not there. He has further admitted the fact that at the time of recording his diary statement he did not disclose the name of present appellants and for the first time he named the appellants as was told by Ganesh. He also admits that the appellants were shown to him by Ganesh and prior to that he had never seen the appellants. Ranjit

Kumar (PW-1) has not stated anything against the accused/appellant and has been declared hostile. Dr. H.N.Ram (PW-3) conducted post-mortem examination on the body of deceased Atal Paikra who opined that the cause of death is due to head injuries leading to diffuse intra cerebral haemorrhage and mode of death is due to coma. Sanjay Paikra (PW-4) has not stated anything specific against the appellants. Bali Ram (PW-5) has not stated anything against the accused/appellants and has been declared hostile. N.L.Shrivastava (PW-6) helped in the initial investigation. Ram Lagan (PW-9) father of the deceased is a hearsay witness. Rajbhan Singh (PW-10) has prepared the spot map Ex.P-10. Ganesh Kumar Paikra (PW-11) has not stated anything against the accused/appellants and has been declared hostile. Rajni Bai (PW-13) is the wife of accused Santosh Vishwakarma has not stated anything against the accused/appellants and has been declared hostile. Nasar Siddiqui (PW-14) is the Investigating Officer who has done the investigation.

10. Close scrutiny of the evidence makes it clear that but for the evidence of last seen by Chain Sai (PW-8) Anita (PW-8) and Sukhendra (PW-12) there is no other evidence against the appellants. Chain Sai (PW-7) one of the eyewitness to the last seen has neither named the present appellants in the FIR nor in his statement under Section 161 Cr.P.C. In the court, he deposed the name of the accused persons but has failed to satisfy as to on what basis he has named these two persons. He has also admitted the fact that no Test Identification Parade was conducted by the prosecution. Similar is the case with Anita (PW-8) and Sukhendra (PW-12) who too have come to know about the name of accused persons from one Ganesh and they

have admitted the fact that no Test Identification Parade was conducted by the prosecution.

11. Upon meticulous consideration of the evidence on record and the submissions made by the parties, we find it difficult to uphold the conviction of the appellants on the basis of evidence adduced by the prosecution. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence, provided, the prosecution is able to prove beyond reasonable doubt, complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eye-witness to the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of accepted principles in that regard.

12. In support of the aforesaid discussion, reliance is placed on the judgment reported in the matter of ***Sharad Birdhichand Sarda Vs. State of Maharashtra (1984)4 SCC 116*** which reads as under:

“153. 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 Sahabrao Bodade v. State of Maharashtra* (1973) 2 SCC 793 1973 SCC (Cri) 1033: 1973 Cri.LJ 1783 where the following observations were made : [SCC para 19, p.807:SCC (Cri)p.1047]

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.

13. There is no direct evidence in the present case. It was a case of circumstantial evidence, thus, the prosecution had to establish the motive for crime. The test for proving a case of circumstantial evidence stands entirely on a different footing, than a case of direct evidence. When the case rests on circumstantial evidence, the circumstance must be cogently and firmly established.

14. Hence, taking the cumulative effect of the evidence we find it difficult to uphold the conviction of the appellants on the basis of evidence adduced by the prosecution. We therefore allow the appeal, set aside the judgment of the court below and acquit the appellants of the charges framed against them by extending benefit of doubt. Accused/appellants are in jail. They be released and set at liberty forthwith.

Sd/-

(Pritinker Diwaker)
Vacation Judge

Sd/-

(Sanjay K.Agrawal)
Vacation Judge