

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 834 of 2011**

- Gambhir Yadav S/o Budhu Ram Yadav, aged about 35 years, R/o village Dumaria, Thana Gandai District, Rajnandgaon (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : The Police Station Gandai, District Rajnandgaon (C.G.)

---- Respondent

For Appellant	:	Shri N.K. Malviya, Advocate.
For Respondent/State	:	Shri Avinash Mishra, Panel Lawyer.

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

Judgment on Board by Pritinker Diwaker, J**05/07/2017**

This appeal has been filed against the judgment of conviction and order of sentence dated 07.09.2011 passed by the Special Judge, Rajnandgaon (C.G.), in Special Case No.12/2010 convicting the accused/appellant under Sections 302 and 201 IPC & sentencing him to undergo imprisonment for life with fine of Rs.10,000/- and R.I. for two years, plus default stipulation.

2. As per the prosecution case, on 12.08.2009 deceased Jagbati Bai, aged about 14 years, had gone to forest to collect some fruits and when she did not return by evening, an extensive search was made by her relatives and villagers. Thereafter, missing report Ex.P/8 was lodged on 13.08.2009 by Ratnu (PW/3). On 14.08.2009,

body of deceased was found in the forest lying in a pit covered with bushes. At the instance of Ratnu (PW/3) merger intimation Ex.P/10 was recorded on 14.08.2009. Immediately thereafter dehati nalisi Ex.P/13 was registered, based on which, FIR (Ex.P/14) was registered on 15.08.2009 under Sections 302 and 201 IPC against an unknown person. Inquest on the body of the deceased was conducted on 15.08.2009 vide Ex. P-2 and the dead-body was sent for postmortem examination which was conducted by Dr. (Smt) Leela Ramteke (PW/13) who vide report Ex. P/10 opined the cause of death to be asphyxia due to strangulation. As per the prosecution case, on 12.08.2009 the accused/appellant had also gone to forest and on seeing the deceased he followed her and after committing rape he killed her. Prosecution has relied upon Salik Ram (PW/2) - witness of last seen, Chain Singh (PW/4) and Girwar Mandavi (PW/10), witnesses of extra-judicial confession made before them by the accused/appellant. After investigation the charge-sheet was filed and the trial Court framed the charge against the accused/appellant under Sections 302, 201 IPC and Section 3 (2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. In order to prove complicity of the accused/appellant in the crime in question, the prosecution has examined 14 witnesses. Statement of the accused under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case.

4. After hearing the parties the Court below has convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment. Hence, this appeal.

5. Counsel for the accused/appellant submits as under:

(i) That there is no eye-witness to the incident and the accused/appellant has 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 his conviction.

(ii) That according to the prosecution, Salik Ram (PW/2) - witness of last seen had seen the accused/appellant and the deceased on 12.08.2009.

(iii) That Salik Ram (PW/2) was also searching the missing Jagbati Bai from the first day and had he really seen the accused/appellant following the deceased, he would have definitely disclosed this fact to the villagers.

(iv) That case diary statement Ex.D/1 of Salik Ram (PW/2) was recorded on 16.08.2009 and inordinate delay of about 4 days in making such statement by PW/2 has not been explained by him.

(iii) That the other piece of evidence against the accused/appellant is his so called extra-judicial confession made before Chain Singh (PW/4) and Girwar Mandavi (PW/10). It has been argued that Chain Singh (PW/4), in para 2, has categorically stated that when the accused/appellant confessed his act, the police was present. It has been also argued that Girwar Mandavi (PW/10), for the first time, has deposed in the Court about the extra-judicial confession made by the appellant before him otherwise his case diary statement is not there on record. Thus, the evidence of last seen and extra-judicial confession cannot be relied upon by the Court below.

6. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the extra-judicial confession

made by the accused/appellant before Chain Singh (PW/4) and Girwar Mandavi (PW/10) is fully reliable and likewise statement of last seen Salik Ram (PW/2) is also in accordance with law and therefore no interference is called for with the judgment under challenge.

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

8. Salik Ram (PW/2) is the witness to last seen who has stated that on the date of incident at about 7-8.00 am he had gone towards Tolapara to collect *Pihari* (Mushroom) where he saw the deceased Jagbati Bai coming after collecting *Pihari* (Mushroom). On seeing her with Pihari, he went in some other direction to collect the same. At the same time, about 200 feet away from the said place (where this witness was standing) he saw the accused/appellant. After seeing him, he (this witness) came back to his house thinking that he would not get Pihari (Mushroom) as everybody might have already collected the same. He has further stated that in the night he slept in his house and on the second day all the villagers had gone to search the missing person, however, as he was not well he did not accompany them. However, on the third day he joined them to search the deceased, but they could not find deceased. While returning from Jhiriakhola, this witness asked the villagers to search in Ghutkuri forest also, on which the people of Darbantola told to follow the flies and ultimately the body of deceased was found in Ghutkuri forest covered with earth and bushes. The information of the same was given to the police and on the second day a village meeting was convened in this regard. He has also stated that in the said meeting he informed that when he went to the forest, he saw the deceased coming from forest

after collecting *Pihari (Mushroom)* and upto some distance he also saw the accused/appellant. This witness has further stated that when police arrived to the village, the accused/appellant came to his house and asked him not to disclose anyone about being seen in the forest. Chain Singh (PW/4) is the witness before whom and other villagers the extra-judicial confession is said to have been made by the accused/appellant. He, however, in para 2, has stated that the said extra-judicial confession was made before him and the police. Girwar Mandavi (PW/10) is another witness of extra-judicial confession made by the accused/appellant. He states that in the Sanskritik Manch the accused/appellant had confessed that after seeing the deceased he first committed rape upon her and then killed her. This witness, however, in para 7, has stated that when the accused/appellant was arrested, about 5-6 police personnel were with him. The accused/appellant was not scary and that he confessed his act voluntarily. Here again the presence of the police at the time of so called extra-judicial confession of the accused/appellant creates doubt. Dr. (Smt.) Leela Ramteke (PW/13) is the witness who conducted postmortem examination on the body of the deceased and gave her report Ex. P-10 noticing following injuries/symptoms:-

- (i) Rigor mortis passed off, body decomposed, face swollen, body swollen, putrefaction present, eyes closed, tongue out, blood mixed fluid coming out of nostril.
- (ii) Lividity seen over back of buttock. Rope present all around the neck. The mark of rope over neck was 1 1/2" width all round neck (lower part). Neck was swollen.

The cause of death has been opined to be asphyxia due to

strangulation. However, the doctor has not stated anywhere that the deceased was subjected to rape before commission of murder. She has not even stated that the death was homicidal or not.

9. Lal Singh (PW/1) is father of the deceased. He has stated that his daughter went missing and then report Ex.P/8 was lodged and after about 3 days she was searched in the forest. He has further stated that the day on which the body of the deceased was found, it was informed by Salik Ram (PW/2) that he had seen the accused/appellant following the deceased. After threatening PW/2 the accused however left the village in the night. He has also stated that earlier also the accused/appellant raped one girl for which he was sentenced for ten years. This witness has further stated that on 15.10.2009 in the village meeting a suspicion was raised that the accused/appellant might have killed the deceased and as per advice of PW/2 a decision was taken. Ratnu (PW/3) is lodger of missing report Ex.P/8 and merged Ex.P/10. Lamu (PW/5) and Panchlal Yadav (PW/6) turned hostile. Goukaran (PW/7) is witness to inquest Ex.P/2. Samli Bai (PW/8) is the mother of deceased who has not stated anything specific against the accused/appellant. Ganpat Ram (PW/11) and Virendra (PW/12) helped in the investigation. Arun Kumar Singh (PW/14) is the investigating officer who has duly supported the prosecution case.

10. Close scrutiny of the evidence makes it clear that there is no clinching and conclusive piece of evidence showing the involvement of the accused/appellant in commission of the offence. Salik Ram (PW/2) who has been examined by the prosecution as the witness of last seen does not specifically state that he saw the accused/appellant and the deceased together. According to his examination-in-chief, while he was going to forest to collect Pihari

(Mushroom) he saw the deceased returning. Thereafter, he also saw the accused/appellant on the other side at the distance of about 200 feet. Even otherwise it is settled position of law that merely on the basis of evidence of last seen the accused cannot be convicted unless there is some other corroborative piece of evidence. The Supreme Court on the decision in the matter of **State of Goa V. Sanjay Thakran¹, Brahm Swaroop V. State of U.P.², and Anjan Kumar Sharma & Ors. V. State of Assam³**, wherein it has been held as under:-

“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.”

11. The other piece of evidence which has been collected by prosecution against the accused/appellant is his so called extra-judicial confession made before PW/4 and PW/10. It is settled position of law that in a case where the prosecution relies on extra-judicial confession, the Court has to examine the same with a greater degree of care and caution so as to ascertain that such confession was made voluntarily. In the present case, as per the statement of PW/4 and PW/10, it is evident that at the time of making such confession, the police was present, and therefore, the extra-judicial confession so made cannot be said to be made voluntarily and without any pressure of the police. Yet another important piece of evidence which is required to be noted here is the case diary statement of PW/4 which was recorded 31.01.2010 i.e after about six months from the date of incident, for which no satisfactory explanation has come forth from the prosecution as to

1 (2007) 3 SCC 755

2 6 SCC 288 ¶ 38

3 (2017) SCC online 622

why he kept quiet for about six months. Furthermore, though in his Court statement PW/10 has stated about the extra-judicial confession but his diary statement is not there and it appears that for the first time in the Court he has disclosed the fact that the accused/appellant made extra-judicial confession before him. Law is further well settled that if extra-judicial confession is not found to be voluntarily, it is hit by Section 25 of the Evidence Act which clearly envisages that no confession made to a police officer shall be proved against the accused of any offence. Though there is no such evidence in this case in hand that the extra-judicial confession was made to a police officer but the witnesses have stated that while the extra-judicial was being made, the police people were present there.

Though the facts involved in the case and the evidence on record give rise to the suspicion about the participation of the accused/appellant in the crime in question, in a series of cases it has been held by the Apex Court that howsoever strong the needle of suspicion moves, it cannot take the place of the evidence. One such judgment of the Apex Court dealing with this fact is **Commissioner of Police, Delhi & Others V. Jai Bhagwan**⁴.

12. Thus, considering this factual and legal position and taking the cumulative effect of the evidence, we are of the view that there is no conclusive piece of evidence showing the guilt of the accused/appellant for commission of offence and the benefit of doubt, of course, has to go to the accused/appellant.

13. Accordingly, the appeal is allowed, judgment impugned is hereby set aside and the accused/appellant stands acquitted for the charges levelled against him. The appellant is reported to be in

4 2011 (6) SCC 376

jail, he be set at liberty forthwith if not required in any other case.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(Ram Prasanna Sharma)

Judge

vijay