

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 11-7-2017

Judgment delivered on 2-8-2017

CRA No. 429 of 2012

- Pankaj Singh @ Pintu S/o Subhashchand Singh , Present R/o Kabir Nagar Mig 1/37 , Phase- 2 , P.S. Amanaka , Distt. Raipur , C.G.

---- Appellant

Versus

- State of Chhattisgarh Through - P.S. Gudhiari, Distt. Raipur , C.G.

---- Respondent

&

CRA No. 473 of 2012

1. Ravishankar Shukla s/o. Jwala Prasad Shukla, aged aboiut 29 years, permanent r/o. Belipar, District Gorakhpur (UP). Present address Reserve Lane, Balco Nagar, Korba (CG).
2. Navin Mishra S/o Hariher Prasad Mishra R/o Godedhowa Ps Ghughli Distt. Maharajganj Up Present Addi. Mp Nagar H/ 6 Korba Chowki Rampur Distt. Korba CG

---- Appellants

Versus

- State of Chhattisgarh through District Magistrate Raipur, District Raipur.

---- Respondent

For Appellant in : Mr. Raj Kamal Singh, Advocate.
CRA No. 429 of 2012

For Appellants in : Mr. Awadh Tripathi, Advocate.
CRA No. 473 of 2012

For Respondent/State : Mr. Avinash K. Mishra, Panel Lawyer.

**Coram: Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma**

CAV JUDGMENT

Per Ram Prasanna Sharma, J.

1. Since both the appeals arise out of same judgment dated 17-4-2012 passed in S.T.No. 152 of 2009 which are common in nature, they are heard analogously and are being disposed of by this common judgment.
2. The appellants have preferred these appeals against the judgment of conviction and order of sentence dated 17-4-2012 passed by the 7th Additional Sessions Judge, Raipur (CG), in Sessions Trial No. 152 of 2009 convicting the accused/appellants as under:

Sl.No.	Conviction	Sentence
i)	Under Section 120-B of IPC	RI for seven years.
ii)	Under Section 397 of IPC	RI for seven years.
iii)	Under Section 364 of IPC	RI for seven years and to pay fine of Rs.1000/-, each in default of payment of fine to undergo additional RI for six months.
iv)	Under Section 302/34 of IPC	Life imprisonment and to pay fine of Rs.1000/- each, in default of payment of fine to undergo additional RI for six months. All the sentences are directed to run concurrently.

3. Accused Manoj Dubey and Rudal Duey have been declared absconded under Section 299 of the Code of Criminal Procedure, 1973.
4. As per the prosecution case, deceased Narendra Kaushik was a driver of Scorpio vehicle bearing registration No.CG-04/H-8738 owned by one Mahesh Sahu, resident of Gudiyari, Raipur. On 14-1-2009 at about 11.30 am., deceased Narendra Kaushik called the owner of the vehicle over phone and told him that he was

taking the vehicle to Bilaspur on booking made by his known persons. He told the owner that he knew the said persons and he earlier also took them to Korba on booking. Thereafter, the deceased took the said persons by the said vehicle to Bilaspur on booking. On the same day at about 7.00 pm the deceased called the owner by mobile phone and told him that the persons who were brought are willing to go to Ambikapur and the owner Mahesh Sahu left the said booking to the wisdom of the deceased. Thereafter, in the morning of 15-1-2009 the owner of the vehicle Mahesh Sahu called the deceased over his mobile phone No. 9753736868, but his mobile phone was switched off. He repeatedly tried to contact the mobile phone of the deceased, but contact could not be made, then he contacted the parents of the deceased who told him that deceased did not return and then he tried to find out the deceased in the local area but could not locate whereabouts of the deceased. Thereafter, a missing report Ex.P/5 was lodged in Gudiyari Police Station about missing of deceased Narendra Kaushik and the same was registered as missing report No. 11/09. Search was being carried out in relation to the missing of the deceased. During search of deceased, his mobile phone was found to be used by the appellant Naveen Mishra on which appellant Naveen Mishra and appellant Ravi Shankar Shukla were arrested and were put to queries. During this period Police Station Bambhanee, District Sonabadra, Uttar Pradesh was conducting the investigation on merg intimation No.71/09 in relation to the corpse of an unknown

person. The panchnama of corpse was prepared and the corpse examination was conducted. The unknown person was identified as deceased Narendra Kaushik by his father Tekram Kaushik. Thereafter, the said merg intimation was transferred to missing report No.11/2009 of Gudiyaari Police Station, Raipur and then a case was registered against the appellants by the Gudiyaari Police Station. On discovery statement, Belt used in offence and mobile phone of deceased were seized from appellant Naveen Mishra. The bill of purchasing the mobile phone was seized from Tekram Kaushik, father of the deceased. During the investigation the call details of mobile numbers of the appellants and mobiles and SIM cards used by accused/appellants in the incident were seized. Identification parade was conducted in respect of all the accused/appellants. Statements of witnesses were recorded, search was made in respect of absconding accused persons Manoj Dubey and Rudal Dubey, but it is stated that they were at Nepal, therefore, arrest of these two accused persons and seizure of the said vehicle could not be made. The articles seized in this case were sent for chemical examination to Forensic Science Laboratory, Raipur.

5. After completion of investigation charge-sheet was filed and the trial Court framed charges against the appellants but they did not plead guilty, therefore, trial was conducted and after completion of the evidence of prosecution side, statements of the appellants under Sections 313 of the Code of Criminal Procedure, 1973 were

recorded and after completion of trial, appellants were convicted as mentioned above.

6. Learned counsel appearing for the accused/appellants submit as under:

(I)	That there is no eye-witness in the case and case of prosecution rests on circumstantial evidence and there is no link to connect the appellants with the crime in question;
(ii)	That as per the post-mortem of corpse concerned which was conducted by Dr. S.N. Sharma on 18-1-2009 at about 1.00 pm, cause of death was cut injuries in different parts of the body including throat and excessive bleeding, but Police Agency during investigation seized a belt on the assumption that it is a case of strangulation by belt and falsely implicated the innocent appellants;
(iii)	That the identification parade is of no value because no witness has seen any of the appellants in the company of the deceased between 14-1-2009 to 17-1-2009 which is said to be time of occurrence;
(iv)	That circumstantial evidence regarding telephone call details is inadmissible being contrary to Section 65(B) of the Indian Evidence Act, 1872 and the same cannot be used against any of the appellants; and
(v)	That the finding arrived at by the trial Court is not in the fitness of factual matrix and legal aspect of the matter, therefore, the same is liable to be quashed.

7. *Per contra*, State counsel supporting the impugned judgment of the trial Court has submitted that the finding arrived at by the

trial Court is just and proper and there is no illegality or infirmity in it warranting any interference by this Court.

8. We have heard counsel for the parties and perused the material on record.
9. Admittedly, there is no eyewitness to the incident. The case of the prosecution is based on circumstantial evidence. In the matter of **Jaharlal Das Vs. State of Orissa**¹, it is held by Hon'ble the Apex Court as under:

“The circumstantial evidence in order to sustain the conviction must satisfy three conditions;

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

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

(iii) 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 it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

In cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. When the main link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubts. It is at this juncture the court has to be

¹(1991) 3 SCC 27

watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be short step between moral certainty and the legal proof. At times, it can be a case of "may be true. But there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions."

10. Tekram Kaushik (PW/1), father of the deceased Narendra Kaushik has stated before the trial Court that on 14-1-2009 his son Narendra Kaushik went to Bilaspur from Raipur with his Scorpio vehicle. He further stated that when he returned to his home at 9.00 pm., his wife informed him that deceased informed her that he was leaving for Ambikapur from Bilaspur. As per version of this witness, his wife said that the persons with whom he had gone to Korba on 8-11-2008, the same persons have hired his Scorpio vehicle from Bilaspur to Ambikapur. As per version of this witness when he tried to contact his son on 14-1-2009 his mobile phone was switched off and on the next day i.e., on 15-1-2009 again he tried to contact with his son but his mobile phone was switched off. As per the statement of this witness, on 16-1-2009 owner of the vehicle came to him and enquired about his son Narendra Kaushik whether he had returned or not and he replied that he had not returned. As per statement of this witness, Mahesh Sahu informed him that he had talked with Narendra Kaushik over telephone on 14-1-2009 and he informed him that his Scorpio vehicle is hired by same persons who have hired the vehicle in the month of November, 2008. As per statement of this witness Mahesh Sahu informed him that Narendra Kaushik was going with

appellants Pankaj Singh and Ravi Shankar Shukla. As per the statement of this witness, they visited Intercity Hotel, Korba and in that hotel's register, name of Narendra Kaushik was mentioned, but names of the appellants were not mentioned in the said register. As per statement of this witness, after three months of the said incident, Police has informed him that one dead body was found in Sonabhadra District of Uttar Pradesh and his goods are to be identified and thereafter they proceeded to Sonabhadra and after seeing T-shirt, brown pant, slippers and other articles, he identified that the said goods are belongings of his son Narendra Kaushik.

11. PW/2 Mohammed Shafique Khan has stated about stay of the persons on 12-11-2008 and 13-11-2008 in Intercity Hotel, Korba, but from his statement, it is not established that any of the appellants had stayed in the said hotel in the said period. PW/3 Avinash Mishra has stated about delivery of SIM No.9752080936 to appellant Ravi Shankar Shukla. PW/4 Ashvani Mishra has stated about delivery of SIM No.9617996600 to appellant Naveen Mishra. PW/5 Ajay Giri Goswami has stated about some land deal between him and the appellants Pankaj Singrh and Ravi Shankar Shukla during last winter season. PW/6 Mahesh Sahu, who is owner of the Scorpio vehicle has stated that his vehicle Scorpio bearing registration No. CG-04-H-8738 was driven by deceased Narendra Kaushik and as per his statement Narendra Kaushik informed him through telephone that two persons who have hired his vehicle on 7-11-2008 are again wishing to hire his vehicle and whether he

should go with them or not. As per statement of this witness, Narendra Kaushik informed their names as Ravi Shankar Shukla and Pankaj and the said travelling is left by him on wisdom of the driver. When Narendra Kaushik did not return after two days then he started searching him and then it is known to him that his vehicle passed from Raipur at 8.22 pm and thereafter they lodged missing report in Police Station. As per statement of this witness, information was received by him through Gudiyari Police Station that dead body of someone is recovered at Police Station Bambhanee, District Sonabhadra, then they proceeded to Bambhanee and after seeing photographs, clothes, belt, slippers and other articles, they found that the person whose body was recovered was Narendra Kaushik. He has stated that one Mobile phone Model No. 3110 and one belt were seized from appellant Naveen Mishra.

12. PW/7 Chandrashekhar Singh, PW/8 Manikpuri, PW/9 Raghunandan Singh, PW/10 Bhaskar Naidu and PW/13 Ahirwar have not supported the prosecution case. PW/11 Sudhakar Naidu has stated before the trial Court that in November, 2008 his Scorpio vehicle bearing registration No. CG-04-H-8738 was driven by Narendra Kaushik and appellants Naveen Mishra and Ravi Shankar Shukla were sitting in the same vehicle and the vehicle was hired to go to Korba from Raipur. PW/32 Bhargav Sharma, who is a Nodal Officer, Idea Cellular Limited, MP/CG, has stated about the call details of Mobile phone No.9753736868 with IMEI No 352032025475790 and Mobile phone No. No..9617998500 with IMEI

No.354870028356670. PW/33 Sai Dutt Bohare, who is a Nodal Officer of Airtel, has stated about call details of Mobile No.9993000717 from 10-11-2008 to 15-11-2008.

13. As per the post-mortem report of Dr. S.N. Sharma (PW/17), cause of death was excessive bleeding due to multiple cut injuries on the body and the same was done on 18-1-2009 and as per his opinion time of death is 30 to 40 hours since the post-mortem, it means the person had died on 16-1-2009 or 17-1-2009. The first link that has to be seen is whether the appellants were in the company of the deceased on 16-1-2009 or 17-1-2009, but no cogent or firm evidence is given by the prosecution. As per the statement of the witnesses, the deceased and the persons who hired taxi started from Bilaspur and stayed for some time in Intercity Hotel, Korba, but no one is there to say that he has seen any of the appellants or the deceased in the vehicle between Bilaspur to Korba or at Intercity Hotel, Korba. No one is examined from the intercity hotel, Korba to identify any of the appellants as to whether they stayed in their hotel or not and whether the deceased also stayed with him or not. There is no evidence to connect the appellants during travelling period from Korba to Bambhanee, Sonabhadra District, UP. Whether any of the appellants travelled in the vehicle of the deceased is also not established by the firm evidence. The evidence is given to the effect that the persons who hired the vehicle in the month of November, 2008 have hired the same on 14-1-2009, but the same hearsay evidence is not sufficient to conclude that any of the

appellants has travelled in the vehicle of the deceased from 14-1-2009 to 17-1-2009. When there is no evidence regarding travelling of any of the appellants from 14-1-2009 to 17-1-2009 it would not be safe to conclude that any of the appellants had travelled with the deceased in his vehicle and were in company of the deceased before his death.

14. The said vehicle bearing registration No. CG-04-H 8738 is not seized in this case and there is no evidence to connect any of the appellants for taking the vehicle after commission of the offence. When the vehicle is not seized, the theory of robbing the vehicle is not substantiated in any way. As per statement of Police Inspector, Ramakant (PW/31), who is Investigating Officer, he has seized belt from appellant Naveen Mishra and one Nokia Mobile phone Model 3110 with IMEI No. 352032025475796.
15. From the scrutiny of the evidence adduced by the prosecution, it is clear that the cause of death is due to cut injuries and it cannot be said that belt is used for commission of the said offence and seizure of the belt is not relevant looking to the evidence adduced by the prosecution. Whether Nokia Mobile phone seized from the appellant Naveen Mishra is used by the deceased just before the incident may be ascertained by the evidence of responsible officer of mobile phone company. The prosecution has adduced evidence of PW/32 Bharagav Sharma, who is a Nodal Officer of Idea Company and PW/3 Avinash Mishra, who is a Nodal Officer of Airtel Company, but looking to their statements, the same is not admissible in evidence in view of Section 65-B of the Indian

Evidence Act, 1872. Sub-Clause (iv) of Section 65-B of the Indian Evidence Act, 1872 may be read as under:

"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

16. In the case on hand, no certificate was issued by any responsible officer of the company and the same is not adduced before the trial court, therefore, their evidence is not admissible and it cannot be used against any of the appellants.
17. PW/30 Anjor Singh Paikra is a witness of identification and he has stated that Vimal Kumar Jain, Sudharkar Naidu and Ganesh Sahu identified the appellants Ravi Shankar Shukle and Pankaj Singh but Vimal Kumar Jain, Sudharkar Naidu and Ganesh Sahu have not stated before the trial Court that they had seen any of the appellants with the deceased between 14-1-2009 to 17-1-2009 which is crucial period for commission of offence. The whole idea

of a test identification parade is that the witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as a witness of the crime, but the veracity in other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression. In the case on hand, as no one has seen the occurrence and no one has seen any of the appellants during crucial period of 14-1-2009 to 17-1-2009, test identification in this case is irrelevant and insignificant and the same has no probative value.

18. The discovery of the vehicle is failed, recovery of belt is irrelevant and the evidence regarding mobile phone is inadmissible and there would be literally nothing which would support the prosecution case. Again, the link of travelling of any of the appellants with the deceased is also not established as there is nothing on record to take us anywhere near the crime to have been committed by the appellants. The presence of any of the appellants at scene of occurrence is not established. We must always remind "more heinous the offence, stricter the degree of proof", but here not a single link with commission of crime is established, offence of kidnapping, conspiracy, robbery and murder is

not established, therefore, we are duty bound to record the judgment of acquittal.

19. For the foregoing, we are of the considered opinion that the finding arrived at by the trial Court is not sustainable and the same is set aside. All the appellants are acquitted of the charges framed against them. They shall be set at liberty, if not required, in any other case. The appeals are accordingly allowed.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Ram Prasanna Sharma)
JUDGE

Raju