

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 569 of 2010**

(Arising out of the judgment dated 18.6.2010 passed by the First Additional Sessions Judge, Bilaspur in ST No.135 of 2009)

- Bagirathi Kolam S/o Banshi Kolam aged about 20 years, Resident of Village Kodasar, Police Station Takhatpur, District Bilaspur (CG)

---- Petitioner

Versus

- State Of Chhattisgarh, Through Police Station Takhatpur, District Bilaspur (CG)

---- Respondent

For Appellant
For Respondent /State

Mr. Aman Tamboli, Advocate
Mr. Bhaskar Pyasi, Panel Lawyer

DB.: Hon'ble Mr. Justice Prashant Kumar Mishra &**Hon'ble Mrs. Justice Vimla Singh Kapoor****Order On Board By****Prashant Kumar Mishra, J.****2/7/2018**

1. Heard.
2. Challenge in this appeal is to the appellant's conviction under Section 302 and 201 of IPC and sentence of RI for life and RI for 3 years as also fine of Rs.500/- and Rs.1000/- respectively with usual default sentence.

3. The appellant has allegedly committed murder of deceased Daulat during the period 9:00 p.m. of 11.5.2009 to 12:00 noon of 15.5.2009. Several children engaged in grazing cattle saw a dead body in a well near Village Siltara in the agricultural field of one Khorbahra Sahu. The information was sent to the concerned Police, where-after, the mere intimation -Ex.P/1 was recorded. During mere enquiry, it was revealed to the Police that the appellant and the deceased were last seen together at about 9:00 p.m. on 11.5.2009, therefore, after registration of FIR and recording statements of the witnesses, the appellant was taken into custody and his memorandum statement -Ex.P/4 was recorded on 18.5.2009, pursuant to which, the trouser and T-shirt of the appellant were recovered from his house vide Ex.P/6. These clothes along with one piece of brick was sent for FSL examination, however, the FSL report -Ex.P/31 has not found presence of human blood on the articles.
4. On the basis of statements of PW-1 Dashrath Kol, , PW-2 Uma, PW-3 Devki, PW-4 Milau Das, PW-5 Dhannu Kol, PW-6 Harprasad, PW-7 Anil Sahu, PW-8 Bharat Sahu, PW-9 Maleshram, PW-10 Vishwanath Sahu, PW-11 Pradeep Kumar Netam, PW-12 JL Sonwani, PW-13 Devcharan Maravi, PW-14 S.N. Sidar, PW-15 Dr. M.K. Sammuel and the contents of the memorandum statement of the appellant, the trial Judge has convicted the appellant on the ground that he was last seen together with the deceased; blood has been found on the trouser worn by him at the time of occurrence; and thirdly, there is "motive" for committing the offence.

5. Mr. Aman Tamboli, learned counsel for the appellant, would submit that the trial Judge has convicted the appellant on the basis of inadmissible evidence without their being clinching proof in the nature of legally admissible evidence, on the basis of which, a finding of guilt can be recorded.
6. Per contra, Mr. Bhaskar Pyasi, learned Panel Lawyer for the State, would support the impugned judgment.
7. In the matter of **Sharad Birdhichand Sarda vs. State of Maharashtra**¹, 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-153 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 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

¹(1984) 4 SCC 116,

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."

8. In a recent judgment in the matter of **Navaneethakrishnan vs State by Inspector of Police**², the Supreme Court has held thus in paras 14 & 23:-

"14. In the present case, there is no witness of the occurrence and it is only based on circumstantial evidence. Before moving further, it would be apposite to refer the law regarding reliability of circumstantial evidence to acquit or convict an accused. The law regarding circumstantial evidence was aptly dealt with by this Court in [Padala Veera Reddy vs. State of Andhra Pradesh and Others](#) 1989 Supp. 2 SCC 706 wherein this Court has observed as under:-

"10. x x x x

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

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

(3) 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

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

23. The law is well settled that each and every incriminating circumstance must be clearly established by

² AIR 2018 SC 2027

reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important 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 doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove."

9. In the present case, to appreciate as to whether the prosecution has been successful in establishing the chain of circumstantial evidence against the appellant, we shall advert to the depositions of the witnesses.
10. PW-1 Dashrath Kol, father of the deceased, has stated in his examination-in-chief that his son Daulat (deceased) was moving with appellant Bagirathi, one Jaggu and one Basant. He also says that the appellant had left the village to attend his work of playing drums and when he enquired from Basant, he stated that he is not aware about the whereabouts of the deceased. The witness would further depose that there is family enmity

with one Ramphal as he had outraged the modesty of his wife and daughter in an open place and further that the SHO was pressurising him to name the present appellant as the person responsible for committing murder of Daulat. However, this witness was insisting the SHO that not only the appellant but 3-4 more persons have committed the crime.

11. PW-2 Jaya is the wife of deceased Daulat. This witness has seen the appellant in the village in the next morning and had enquired from him about her husband, on which, the appellant had explained that he, Jaggu and Basant had dropped the deceased near his house in the night and he is not aware as to where the deceased had gone thereafter. Thus, according to this witness, the appellant never evaded any question in relation to the deceased nor tried to flee from the village after the night of 11.5.2009. This witness would further depose that Jaggu has also informed her that they had dropped the deceased near his house in the night of 11.5.2009. Further, from the statement of PW-3 Devki, brother of the deceased, it appears that the appellant and the deceased were good friends and were always moving together in the village. The appellant also used to pay regular visits to the house of the deceased. PW-5 Dhannu Kol is the person whose name has figured in the memorandum statement of the appellant. However, he has not supported the prosecution although he would state in his examination-in-chief that the deceased and the appellant had come together at the place of brick kiln where their huts are situated and further that at that point of time, the appellant

and deceased had brought country made liquor with them.

12. PW-6 Harprasad is a grocery shop owner in whose shop the appellant and the deceased had gone at about 8:30 p.m. According to this witness, the deceased was wearing a *lungi* at that time, whereas, the dead body of the deceased was found to have worn a trouser and a shirt. PW-9 Maleshram had turned hostile and has denied that the appellant had made extra judicial confession. In the case diary statement of this witness, the prosecution had put-forth a case of extra judicial confession. The other witnesses are either seizure witnesses or the persons, who have assisted in the investigation or the IO.

13. We are not referring to the evidence regarding memorandum statement and the consequent seizure, because, the FSL report has not found presence of any human blood on the brick and the clothes recovered from the appellant. Therefore, even if the seizure is proved, it does not assist the prosecution in establishing the chain of circumstantial evidence viz-a-viz the presence of human blood over the articles.

14. There is also total absence of "motive" on the part of the appellant to commit murder of the deceased. The prosecution has not led any substantial evidence to establish motive to commit the crime, however, the trial Court has referred to the statement made by the appellant in his memorandum statement concerning motive.

15. Without commenting on the understanding of the trial Court as

to the principle under Section 27 of the Evidence Act, suffice it would be to observe that except for the part which led to the discovery of any article from the appellant, the other part of the memorandum statement is not admissible in evidence, therefore, the trial Court was not at all justified in culling out the evidence of motive against the appellant on the basis of the said part of the memorandum statement, which is not admissible in evidence.

16.If there is no motive on the part of the appellant to commit murder of the deceased, who was his friend, as admitted by the father, wife and brother of the deceased, the case of the prosecution has rendered very weak. Even otherwise, the evidence of last seen together is also not clinching for the reason that according to the prosecution witnesses, the appellant alone was not seen in the company of the deceased but two other persons were also seen with the deceased. Even if for the sake of argument, it is taken that the prosecution has been able to establish the fact of last seen together, the other evidence that the appellant and the deceased were good friends and kept on visiting the houses of each other on number of occasions throughout the day, is sufficient to infer that their seen together in the night of 11.5.2009 was not an unusual activity. Therefore, mere evidence of last seen together is not so incriminating against the appellant that it would be treated as sufficient to establish his guilt.

17.In our opinion, the prosecution has miserably failed to establish

all the link in the chain of circumstantial evidence to bring home the guilt of committing murder of the deceased. The conviction and sentence imposed on the appellant deserves to be set-aside.

18. For the foregoing, the appeal is allowed. The impugned judgment of conviction and sentence is set-aside and the appellant is acquitted of the aforementioned charge. The appellant is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.

Sd/-

Sd/-

Judge

Judge

(Prashant Kumar Mishra)

(Vimla Singh Kapoor)

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