AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 15 of 2011

(Arising out of judgment dated 30.12.2010 passed by the Second Additional Sessions Judge, Bilaspur in ST No.52/2010)

- Jitendra @ Sonu, Son of Hinchha Ram Pal, aged about 23 years, R/o Village Padriya, P.S. Takhatpur, District Bilaspur (CG)

---- Petitioner

Versus

- State Of Chhattisgarh, through PS Takhatpur, District Bilaspur (CG)

---- Respondent

CRA No. 75 of 2011

- Rakesh Pal @ Bholu, S/o Dallu Ram, Aged about 19 years, R/o Gram Pandariya, Thana Takhatpur, District Bilaspur (CG)

---- Petitioner

Versus

- State Of Chhattisgarh, through Thana Prabhari Takhatpur, District Bilaspur (CG)

---- Respondent

For Respective Appellants	Mr. CK Kesharwani and Mrs. Hameeda Siddique, Advocates
For Respondent	Mr. Adhiraj Surana, Dy. GA

DB.: Hon'ble Mr. Justice Prashant Kumar Mishra &

Hon'ble Mrs. Justice Vimla Singh Kapoor

Order On Board By

Prashant Kumar Mishra, J.

27/6/2018

1. Heard.

2. The appellants have assailed the legality and validity of their conviction under Section 302/34 of IPC for committing murder of deceased Ashok Kumar Pandey at about 23-24:00 hours on 19.10.2009. The appellants and the deceased are the residents of the same village.

3. PW-1 Tretanath Pandey accompanied with appellant Rakesh Pal lodged merg intimation Ex.P/1 at 3.15 a.m. on 20.10.2009 (early morning) informing the Police that his younger brother Ashok Kumar Pandey (deceased) along with Rakesh Pal had gone to the agricultural field for repair of the motor pump and at that time, they heard murmuring of some persons, on which, Ashok Kumar Pandey chased them and Rakesh Pal followed him but at a distance of 300 meters, unknown persons caused injuries over the head of Ashok Kumar Pandey and strangulated him by means of *Pancha* (Towel). The FIR -Ex.P/2 was also lodged 15 minutes prior to the date of registration of merg intimation. In the FIR, PW-1 Tretanath Pandey informed the Police that Ashok Kumar Pandey had gone to the agricultural fields for starting the repaired motor pump at about 11-12:00 p.m. and at that time, some unknown persons have committed his murder. Tretanath Pandey and his son Gyandeep went to Pandariya and from there, they were accompanied by one Dallu, his son Rakesh Pal and other villagers to reach the place of occurrence.

It is also mentioned in the FIR that appellant Rakesh Pal informed about the incident to his father Dallu, who in turn informed appellant Jitendra @ Sonu and all of them had earlier witnessed the dead body.

4. During investigation, the Police took assistance of an expert dog, who went towards the house of the present appellants and thereafter, the appellants were taken into custody and their memorandum statements were recorded vide Ex.P/10 and 11 respectively, pursuant to which, vide seizure memo Ex.P/12, Hero Honda motorcycle of the deceased, two plastic containers containing plain and blood stained soil, one pair of black colour slipper, one red colour plier and one checked lungi of the deceased were recovered from the place of the incident. By seizure memo Ex.P/13 one blood stained light green colour trouser and one blood stained white colour half shirt were recovered from appellant Rakesh Pal. By another seizure memo- Ex.P/14, one black colour Nokia Mobile phone belonging to the deceased and one iron tyre lever rod bearing length of 16 inches and width of 2 ½ inches were recovered from one ditch having water from appellant Jitendra. Vide seizure memo Ex.P/15, a mobile set bearing Idea Sim Card No.9617215677 was recovered from appellant Rakesh Pal. In another seizure memo Ex.P/16, one bamboo stick and one Idea Sim Card of Mobile No.9826711310 was recovered from Rakesh Pal. By seizure memo Ex.P/17, one lungi was recovered from appellant Jitendra and vide seizure memo-Ex.P/18, one black colour rexine jacket was recovered from Jitendra. Blood stains

were found on several seized articles vide FSL report Ex.-P/35. Call details were obtained from the Idea Company vide Ex.P/36. On the basis of seizure of above mentioned articles as also on the basis of statements of the witnesses to the effect that right from the morning, Rakesh Pal was calling the deceased over his mobile to come to the agricultural field for repair of the motor pump, for which, the deceased had gone to the agricultural field after having dinner at 7:30 p.m., the charge sheet was filed against both the appellants.

5. In course of trial, the prosecution examined PW-1 Tretanath Pandey, PW-2 Sunita Pandey, PW-3 Sadhuram Pal, PW-4 Mayank Pandey, PW-5 Bahoran, PW-6 Ravishankar Tiwari, PW-7 Manharan Lal, PW-8 Keshav Singh Markam, PW-9 Dr. SA Siddique, PW-10 Sirish Pal, PW-11 Suresh Singh Thakur, PW-12 Gyandeep Pandey, PW-13 Naresh Sahu, PW-14 KS Rathia and PW-15 Prabhakar Tiwari.

6. On the basis of material available on record, the trial Court concluded that the appellants have committed murder of the deceased, which is proved by their confessional statement made before PW-7 Manharan Lal, seizure of the mobile set belonging to the deceased and the call details of the calls made by appellant Rakesh Pal to the deceased throughout the day on the date of the incident.

7. Mr. CK Kesharwari and Mrs. Hameeda Siddique, learned counsel for the respective appellants, would submit that the evidence relied by the prosecution to base the appellants' conviction is

not admissible in evidence, therefore, the conviction deserves to be set-aside.

8. Per contra, Mr. Adhiraj Surana, learned Dy. GA for the State, would support the impugned judgment.

9. We have heard learned counsel for the parties at length and perused the record.

10. Admittedly, the prosecution case is not based on any ocular version of the incident. Similarly, there is no circumstance of last seen together. PW-7 Manharan Lal is the person before whom the appellants have allegedly made extra judicial confession Mere reading of the statement of PW-7 Manharan Lal would discern that such confessional statements were made by the accused persons before PW-7 while they were in the Police custody and when the search & seizure operation together with preparation of memorandum statement were going on inside the Police Station. Such extra judicial confession in the presence of Police is not admissible in evidence, therefore, it is not a case where the prosecution is armed with the evidence of extra judicial confession.

11. The other types of circumstantial evidence is in the nature of seizure of incriminating articles belonging to the deceased including mobile set of the deceased and the presence of blood stains over some of the seized articles.

12. Before proceeding to dwell on the above evidence to conclude as to whether this evidence itself would be sufficient to bring

home the guilt of the appellants, it would be apt to remind ourselves as to when a conviction on the basis of circumstantial evidence is permissible in law.

13. 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 :
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> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
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> 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:
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> '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.'
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> (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.
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> (3) the circumstances should be of a conclusive nature and tendency.
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> (4) they should exclude every possible hypothesis except the one to be proved, and
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> (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

1(1984) 4 SCC 116,

human probability the act must have been done by the accused."

14. In another judgment in the matter of **Nathiya** Vs. **State represented by Inspector of Police, Bagayam Police Station, Vellore, (2016) 10 SCC 298**, the Supreme Court has reiterated the above principles.

15. 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 reliable and clinching evidence and the circumstances so proved must form

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> 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."

16. The articles recovered from the appellants including the iron tyre lever rod were sent for FSL examination and the report thereof has been proved vide Ex.P/35. However, the report does not mention that human blood was found on the iron tyre lever rod. When there is no evidence of presence of human blood on the weapon used for committing murder, the said seizure would not connect the appellant with the crime in question. For the same reason, presence of blood on some other articles recovered from the accused persons is also of no assistance to the prosecution. The other circumstantial evidence is in the nature of the calls made by appellant Rakesh Pal to the deceased in the morning and thereafter, in the evening on the date of the incident. However, the evidence in

this regard does not conform to the requirement under Section 65B of the Evidence Act, as the competent authority who has issued the call detail report has not been examined.

17. Moreover, there is absolutely no evidence on record to connect as to which mobile number belong to the deceased. The call details -Ex.P/36 does not carry the name of the person to whom the Sim card was issued by the Idea Company. The witnesses namely PW-1 Tretanath Pandey, elder brother of the deceased, PW-2 Sunita Pandey, wife of the deceased and PW-4 Mayank Pandey, son of the deceased have not been able to state the mobile number which the deceased was carrying. Even if the mobile set belonging to the deceased was recovered at the instance of appellant Rakesh Pal and the same has been identified by PW-1 Tretanath Pandey and PW-4 Mayank Pandey vide Ex.P/5, in absence of proof as to which Sim card number was carried by the deceased, the calls allegedly made by Rakesh Pal could not be connected to any of the appellants, therefore, this evidence is also not of such clinching nature which alone would be sufficient to convict the appellants.

18. Learned counsel for the State has pointed one more circumstance going against the appellants in the nature of the sniffer dog or tracker dog having gone to the house of the appellants, pointing towards their involvement in commission of crime.

19. The trial Judge has also referred to this evidence by referring to the statement of the IO PW-14 Mr. KS Rathia in para 33 of

the impugned judgment. However, we are not impressed with this particular circumstance to rest the appellants' conviction on this evidence.

20. For the evidentiary value of the lead provided by the sniffer dog as one of the circumstance going against the accused, it will be profitable to refer some of the pronouncements of the Supreme Court.

21. In the matter of **Abdul Rajak Murtaja Dafedar** Vs **State of Maharashtra, 1969 (2) SCC 234**, the Supreme Court has held thus in para 11 :

> "11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions :
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> > "There have been considerable uncertainty in the minds of the courts as to the reliability of dogs in identifying criminals and such conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases, however, reveals that most courts in which the question of the admissibility of evidence of trailing by bloodhounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the persons trailed was the guilty party, such evidence is admissible and may be

> permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime."

There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of the proportion to its true evidential value. In *R. V. Montgomery* a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behavior of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the

instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

22. In **Surinder Pal Jain** Vs. **Delhi Administration, 1993 Supp (3) SCC 681**, the Supreme Court observed that the possibility that the entire case was built up after the dogs of the dog squad pointed towards the appellant cannot be ruled out. The pointing out by the dogs could as well lead to a misguided suspicion that the appellant had committed the crime.

23. In the matter of **Gade Lakshmi Mangaraju alias Ramesh** vs. **State of A.P., (2001) 6 SCC 205**, the Supreme Court has held, thus, in para 13, 17 & 18 :

13. The weakness of the evidence based on tracker dogs has been dealt with in an article *"Police and Security Dogs*". The possibility of an error on the part of the dog or its master is the first among them. The possibility of misunderstanding between

> the dog and its master is close to its heels. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. Last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Police dogs engage in these actions by virtue of instincts and also by the training imparted to them.
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> 17. We are of the view that criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above, although we cannot disapprove the investigating agency employing such sniffer dogs for helping the investigation to track down criminals.
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> 18. Investigating exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."

24. On the basis of the judgments of the Supreme Court, as noted above, we may conclude, in the facts and circumstances of the present case, that there is no evidence that the dog employed by the investigating team was an expert neither there is any material as to the manner in which the tracker dog eventually reached to the house of the appellant. It would, therefore, be extremely dangerous to rest conviction on the circumstance that the sniffer dog had pointed towards the appellant as perpetrator of the crime.

25. For the above stated reasons, we are of the considered opinion

that the finding of guilt recorded by the trial Court that the appellants are guilty of committing murder of deceased Ashok Kumar Pandey, deserves to be set-aside.

26. For the foregoing, the appeals are allowed. The impugned judgment deserves to be and is hereby set-aside and the appellants are acquitted of the aforementioned charge. The appellants are 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 appellants shall appear before the higher Court as and when directed.

Sd/- Sd/-

Judge Judge

(Prashant Kumar Mishra) **(Vimla Singh Kapoor)**

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