

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.93 of 2012

Judgment Reserved on : 17.11.2017

Judgment Delivered on : 31.1.2018

Fagnuram, S/o Late Mangluram Nag, aged about 32 years, R/o Village Chhotedonger, Police Station Narayanpur, District Narayanpur, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Chhotedonger, District Bastar, Chhattisgarh

--- Respondent

For Appellant : Shri Mukesh Shrivastava, Advocate
For Respondent/State : Shri Ravindra Agrawal, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

Per Arvind Singh Chandel, J.

1. This appeal is directed against the judgment dated 21.10.2011 passed in Sessions Trial No.77 of 2011 by the 2nd Additional Sessions Judge, Jagdalpur at Kondagaon, Bastar convicting and sentencing the accused/Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 302 of the Indian Penal Code	Imprisonment for Life and fine of Rs.100/- with default stipulation
Under Section 201 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.100/- with default stipulation

2. Case of the prosecution, in brief, is that on 19.3.2009, Karun

(deceased), son of Renuram (PW5), saying that he was going to visit fair, had gone out of home. He did not return. On making search, he was not found. On 22.3.2009 at about 7:00 a.m., the accused/Appellant informed Renuram that Karun had committed suicide in his house by hanging himself. Renuram went to the house of the Appellant and saw dead body of Karun. On 22.3.2009 itself, he lodged morgue intimation (Ex.P9). Plain and blood stained soil were seized from the place of occurrence vide Ex.P6. The rope which had been laced in the neck of the deceased was seized vide Ex.P7. Inquest (Ex.P5) was prepared. Spot-map (Ex.P3) was also prepared. The dead body was sent for post mortem examination. Post mortem examination was conducted by Dr. Prabhakar Ghote (PW1). He gave his report (Ex.P1) in which he found that blood was oozing out of nose, there was swelling in both the testicles, an injury was present on the right thigh, blood was mixed in urine, body had started decomposing and a post death mark was present on the neck. Duration of the injuries was opined to be within 72 hours. Cause of death was opined to be asphyxia due to chest injury and the nature of death was opined to be homicidal. On the basis of morgue inquiry, First Information Report (Ex.P11) was registered on 1.4.2009. Statements of witnesses were recorded under Section 161 Cr.P.C. On completion of the investigation, a charge-sheet was filed against the accused/Appellant for offences punishable under Sections 302 and 201 of the Indian Penal Code. Charges were framed against him under Sections 302 and 201 of the Indian Penal Code.

3. To rope in the accused/Appellant, the prosecution examined as

many as 8 witnesses. Statement of the accused/Appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the guilt and pleaded innocence. No witness has been examined in his defence.

4. After trial, the Trial Court convicted and sentenced the accused/Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the accused/Appellant argued that though the Appellant has been convicted on the basis of circumstantial evidence, not a single circumstance has been proved by the prosecution as per the requirement of law so as to hold the Appellant guilty for the act attributed to him. The main piece of the evidence is the statements of the witnesses of extra judicial confession, namely, Deochand (PW4), Renuram (PW5) and Hariram (PW6). But, such evidence being weaker in nature cannot be made basis for holding the Appellant guilty. The evidence on record does not go to show that there was any motive on the part of the Appellant to kill the deceased. There was a cordial relationship between the Appellant and the deceased. Therefore, this appeal may be allowed and the Appellant may be acquitted of the charges framed against him.
6. Per contra, Learned Counsel appearing for the State, supporting the impugned judgment, submitted that the Court below was justified in recording the conviction on the basis of material available on record and there is no infirmity in the same. He further submitted that there is no hard and fast rule that conviction cannot flow on the basis of circumstantial evidence and that the

evidence of the witnesses of the extra judicial confession before whom the Appellant had made a categorical disclosure of killing the deceased is quite trustworthy. It was further argued that the dead body of the deceased was found from inside the house of the Appellant in hanging condition. No explanation has been offered by the Appellant in this regard in his statement under Section 313 Cr.P.C.

7. We have heard Learned Counsel appearing for the parties and perused the material available on record including the impugned judgment with utmost circumspection.
8. Dr. Prabhakar Ghote (PW1) is the witness who conducted post mortem examination on the dead body of deceased Karun. He gave his report (Ex.P1) in which he found that blood was oozing out of nose, there was swelling in both the testicles, an injury was present on the right thigh, blood was mixed in urine, body had started decomposing and a post death mark was present on the neck. Duration of the injuries was opined to be within 72 hours. Cause of death was opined by him to be asphyxia due to chest injury and the nature of death was opined to be homicidal.
9. Patwari Humesh (PW2) prepared spot-map (Ex.P3). Hariram (PW3) is the witness of inquest (Ex.P5), seizure of plain and blood stained soil (Ex.P6) and seizure of clothes of the deceased (Ex.P7). He has supported the said documents.
10. Deochand (PW4) has stated that Renuram (PW5), father of deceased Karun came to him and informed that Karun had gone to visit fair, but he did not return home. He has further stated that

search for Karun was made for 2 days. Thereafter, the Appellant himself came and told him that Karun had committed suicide in his house by hanging himself. He has further stated that later on the Appellant told him that he himself had committed murder of Karun by inflicting injury on his testicles and hanging his dead body in his house.

11. Renuram (PW5), father of deceased Karun has stated that Karun had gone to visit fair, but he did not return home. They searched for him for 2-3 days, but he was not found. Thereafter, the Appellant came to the house of his son-in-law in his presence and told there that he had killed Karun and hanged his dead body in his house. They went to the house of the Appellant and saw that a cloth was laced in the neck of Karun and his dead body was hanging. Injuries were present on the testicles of Karun and blood was oozing out from those injuries. Ear of the deceased was cut and eye was not present on the head. He has further stated that he had lodged morgue intimation (Ex.P9) in the police station.
12. Hariram (PW6), brother-in-law of the deceased has stated that he, Karun and the Appellant were visiting in the fair together and they had also taken meals together in the fair. Thereafter, he had returned his home. The deceased did not return his home. On being searched, he was not found. He has further stated that the Appellant, later on, came to his house and told him that he had committed murder of Karun by inflicting injury on his testicles by his knee and on the chest by his fist.
13. Head Constable Rekhan Thakur (PW7) is the witness who recorded morgue intimation (Ex.P9). Inspector H.R. Sahu (PW8) is

the Investigating Officer who investigated the alleged offence.

14. A minute scrutiny of the evidence adduced by the prosecution reveals that the case of the prosecution is mainly based on the circumstantial evidence. The first circumstance is that the dead body of the deceased was found in the house of the Appellant and the body had started decomposing. The other circumstantial evidence is the extra judicial confession made by the Appellant before Deochand (PW4), Renuram (PW5) and Hariram (PW6).
15. Undoubtedly, in this case, the dead body of deceased Karun was found inside the house of the Appellant. In the cases where an offence like murder is committed inside the privacy of a house, it is a settled legal position that in such circumstances where the assailant had all the opportunity to plan and commit the offence at the time and in circumstances of his choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon by the Courts. The Supreme Court goes on to hold that the law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be held, rather the duty cast on it is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. While dealing with the matter involving a murder committed inside the house, it has been held by the Supreme Court in **(2006) 10 SCC 681 (Trimukh Maroti**

Kirkan v. State of Maharashtra) as under:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions*, 1944 AC 315 — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*, (2003) 11 SCC 271.) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be held. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case

lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

The above position has been fortified in **(2014) 12 SCC 211 (State of Rajasthan v. Thakur Singh)**.

16. In the instant case, the dead body of deceased Karun was found on 21.3.2009. As per the statement of Dr. Prabhakar Ghote (PW1), his post mortem report (Ex.P1) and the opinion stated therein, decomposition of the dead body had started. Thus, it is clear that when the body of the deceased was found inside the house of the Appellant, decomposition of the dead body had started. In his statement under Section 313 Cr.P.C., the Appellant has not offered any explanation as to why the dead body of the deceased remained kept in his house till its decomposition started and why did he not disclose this fact to anyone.
17. Further, there are three witnesses, namely, Deochand (PW4), Renuram (PW5) and Hariram (PW6) to the extra judicial confession, who have unequivocally and unflinchingly stated that after recovery of dead body of deceased Karun from the house of the Appellant, the Appellant made a categorical disclosure to have killed Karun by causing injuries on his testicles by his knee and on his chest by his fist. No doubt, the evidence of extra judicial confession of the Appellant is fragile in nature, but once it is established that such confessional statement was voluntary and gets corroboration by the other surrounding circumstances, it regains the credibility of being made a basis to arrive at a particular conclusion. Here, in this case also, nothing has been elicited by the defence that the extra judicial confession made by the

Appellant was not voluntary or that the witnesses before whom it is said to have been made nurtured any bias or inimical relationship as an indication of motive on their part of attributing an untruthful statement against the Appellant. Regarding the extra judicial confession of the Appellant, the above statements of Deochand (PW4), Renuram (PW5) and Hariram (PW6) are not rebutted during their cross-examination.

18. From the above discussion, it is clear that the deceased was killed by the Appellant by assaulting on his testicles and chest. From the statement of Hariram (PW6), it is also clear that when deceased Karun had gone out of his house to visit the fair, at that time, Hariram (PW6), deceased Karun and the Appellant had visited the fair together and they had also taken meals therein together. As per the post mortem report (Ex.P1), alcohol was also found in the stomach of the deceased. From the above, it is also clear that there was a cordial relationship between the Appellant and the deceased and they had consumed liquor either in the house of the Appellant or in the fair. There is nothing on record to establish that there was any previous enmity between the Appellant and the deceased. In such circumstances, it appears that some dispute had taken place between the Appellant and the deceased and as a result thereof the Appellant assaulted the deceased on the testicles by his knee and on the chest by his fist. Thus, there was any intention on the part of the Appellant to commit murder of the deceased is not established. Therefore, in our opinion, the offence committed by the Appellant does not fall within the ambit of Section 302 IPC, rather, it falls under Section 304 Part II IPC.

- 19.** Therefore, the conviction and sentence imposed upon the Appellant under Sections 302 and 201 IPC are set aside and instead thereof he is convicted under Sections 304 Part II and 201 IPC.
- 20.** So far as sentence part is concerned, for the offence under Section 304 Part II IPC, the Appellant is sentenced with rigorous imprisonment for 10 years and fine of Rs.100/-. In default of payment of fine, he shall be liable to undergo rigorous imprisonment for 1 month. For the offence under Section 201 IPC, he is sentenced with rigorous imprisonment for 3 years and fine of Rs.100/-. In default of payment of fine, he shall be liable to undergo rigorous imprisonment for 1 month. If any amount has already been deposited towards fine against any of the two counts, the same shall be adjusted towards the fine imposed today. Both the jail sentences are directed to run concurrently. The period already undergone by the Appellant shall be adjusted in the period of imprisonment imposed upon him today. The Appellant is reported to be still in jail.
- 21.** Consequently, the appeal is allowed in part to the extent indicated above.
- 22.** Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Arvind Singh Chandel)
JUDGE