

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 917 of 2012**

- Rati Pradhan S/o Lakhman Pradhan, aged about 19 years, R/o Shastri Nagar Phokatpara, Raipur, Police Station - Devendra Nagar, District Raipur (C.G.)

---- Appellant**Versus**

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

---- Respondent

For Appellant : Shri Ravi Maheshwari, Advocate.
For Respondent/State: Shri Vaibhav Goverdhan, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Judgment On Board

By Pritinker Diwaker, J
03/04/2018

This appeal arises out of the judgment of conviction and order of sentence dated 18.07.2012 passed by the Sessions Judge, Raipur, in S.T. No.222/2011 convicting the accused/appellant under Section 302 of IPC and sentencing him to undergo rigorous imprisonment for life with fine of Rs.1,000/- plus default stipulation.

02. As per the prosecution case, deceased Debo Kshatriya was a close friend of the accused/appellant and almost every

day they used to meet each other and roam around various places. On 17.06.2011, the accused/appellant and deceased had gone to mobile shop of Himanshu Chandrakar (PW/9) to recharge their mobiles. It is said that from the shop accused/appellant and the deceased committed theft of cell phone belongs to Himanshu Chandrakar (PW/9). On 18.06.2011, Himanshu Chandrakar (PW/9) had gone to appellant's house and could get his cell phone but in respect of SIM of the said cell phone it was disclosed by the appellant that the SIM is with the deceased and they would return the same. Further case of the prosecution is that in the evening, PW/9 and his friend could catch the appellant and the deceased & they beat the deceased by hands and fists. The deceased was annoyed with PW/9 and his friend and had asked the appellant to take revenge, however, the appellant asked the deceased not to take any revenge and during the said discussion, some hot talk took place between them and it is said that the appellant throttled the neck of the deceased and committed his murder. Body of the deceased was found near the railway track. On 19.06.2011 at 6.00 am, inquest on the body of deceased was conducted vide Ex.P/1 and dehati merg (Ex.P/14) was recorded at 10.00 am of unknown body. However, after some time, body was identified to be that of deceased Debo Kshatriya and his body identification memo is Ex.P/6. After inquest, dead body was sent for postmortem examination to Dr. Bhimrao Ambedkar Hospital, Raipur where

Dr. S.K. Bagh (PW/13) conducted postmortem examination on the body of deceased and gave his report (Ex.P/10) noticing following injuries:-

- (i) Dark red colour ecchymosis present on vertex region of head in the size of 5 x 4 cm obliquely, at occipital region in the size of 6 x 4 cm, at right temporal region in the size of 4 x 3 obliquely and skull showed no fracture. Arachnoid hemorrhage present all over right hemisphere of brain and at right lobe of cerebellum.
- (ii) Few crescent shape scratched mark present on left and right side of neck 3 in number and contusion abrasion present on left side of neck 3 cm above from medial end of left clavicle bone, underneath skin showed red coloured ecchymosis and underneath muscle contused.
- (iii) Contusion also present on both side of thyroid muscle all over. Contusion present on lower lip in the size of 2.5 x 2 cm obliquely. Few tracheal rings fractured at lower part of neck and there is inward compression fracture of greater horn of hyoid bone left side and fracture of cricoid cartilage.
- (iv) Contusion present on both bony prominence of scapular region in the size of 3.5 cm diameter.
- (v) Ecchymosis present on right elbow extension aspect in the size of 2.5 cm diameter.

The Autopsy Surgeon opined the cause of death of deceased to be asphyxia as a result of throttling and death was homicidal in nature. The autopsy surgeon further opined that the neck injuries were sufficient to cause death in ordinary course of nature.

03. On 20.06.2011 FIR (Ex.P/15) was registered against unknown person under Section 302 IPC. On 23.06.2011 memorandum of the accused/appellant (Ex.P/7) was recorded, based on which, one Gamcha was seized vide Ex.P/8 and it is said that the said Gamcha was identified by Vishnu Sagar (PW/6) to be that of the deceased. After filing of charge sheet, the trial Court framed charge under Section 302 IPC against the appellant.

04. So as to hold the accused/appellant guilty, the prosecution examined as many as 19 witnesses. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the appellant as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellant submits:

- That there is no eye-witness account to the occurrence and the conviction of the appellant is based on circumstantial evidence but none of the circumstances from which the inference of guilt of appellant can be drawn has been proved beyond reasonable doubt and, therefore, there can be no inference that it was the appellant who committed the murder.

- That the main piece of evidence against the accused/appellant is alleged evidence of last seen by Hanu Kshatriya (PW/1), Smt. Gomti Kshatriya (PW/2), father and mother of the deceased, Himanshu Chandrakar (PW/9) and Suresh Das Manikpuri (PW/10). It has been argued that evidence of last seen is weak in nature and in the present case it has got no evidentiary value.
- That Jitendra Kumar (PW/12), so called witness of extra-judicial confession, has not supported the prosecution case.
- That on the memorandum of the accused/appellant (Ex.P/7), one Gamcha was seized vide Ex.P/8 but there is no FSL report on record to confirm presence of blood thereon and, therefore, the seizure is of no consequence.
- That possibility of deceased being killed by Himanshu Chandrakar (PW/9) or by his friend cannot be ruled out because as per the statement of PW/9, he and his friends had beaten the deceased.

07. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellant is strictly in accordance with law and there is no infirmity in the same.

08. We have heard learned counsel for the parties and perused the material available on record.

09. Hanu Kshatriya (PW/1) is father of the deceased. He has stated that on the date of incident at about 3.00 pm, the

accused/appellant took the deceased along with him and on the next day his body was found. However, in para 3 of his cross-examination, he has stated that the fact of deceased being taken by the appellant was disclosed to him by his neighbour.

10. Smt. Gomti Kshatriya (PW/2) is mother of the deceased. She has stated that the accused/appellant and the deceased were close friends and most of the time the accused/appellant used to take deceased along with him. She has further stated that on the date of incident also the deceased left his house along with the appellant. This witness has also stated that the deceased did not return in the night and this was a common feature but still she searched the deceased.

11. Horilal Yadav (PW/5) is a witness to inquest (Ex.P/1) and seizure of intoxicant tablet (Ex.P/3).

12. Vishnu Sagar (PW/6) has identified the Gamcha seized from the accused/appellant to be that of the deceased.

13. Khemu Yadav (PW/7) turned hostile. Dhansingh Jagat (PW/8) identified the body of the deceased vide Ex.P/6. He is also a witness to seizure of Gamcha made under Ex.P/8.

14. Himanshu Chandrakar (PW/9) is owner of the mobile shop from where the accused/appellant and the deceased had committed theft of cell phone. He has stated that on the next day he reached the appellant's house who gave him said

mobile and told him that the SIM is with the deceased. In the evening, when he was strolling along with his friends, he could catch the appellant and deceased and after inquiry deceased gave him broken SIM from which he (this witness) used to recharge the mobile. He has further stated that after seeing broken SIM, he got annoyed and slapped the deceased, thereafter, the accused/appellant and the deceased went from there.

15. Suresh Das Manikpuri (PW/10) is a witness who saw PW/9 quarreling with the accused/appellant and the deceased.

16. Mukesh Nirmalkar (PW/11) is driver of the ambulance from whose phone the accused/appellant had called Jitendra Kumar (PW/12).

17. Jitendra Kumar (PW/12) turned hostile.

18. Dr. S.K. Bagh (PW/13) conducted postmortem examination on the body of deceased and gave his report (Ex.P/10) opining the cause of death of deceased to be asphyxia due to throttling.

19. P.L. Sahu (PW/14) - Patwari who prepared spot map vide Ex.P/12.

20. Pradeep Patel (PW/15) - Constable given call details of cell phone allegedly belongs to PW/11 and PW/12.

21. Navin @ Viccky (PW/16) is witness to memorandum of the accused/appellant (Ex.P/7) and seizure of Gamcha made

under Ex.P/8.

22. Kumari Chandrakar (PW/17) - Investigating Officer has duly supported the prosecution case.

23. Anil Baghel (PW/19) - Head Constable, assisted in the investigation.

24. Admittedly, there is no eye witness account to the incident and the conviction of the appellant rests upon circumstantial evidence main being the fact that he was seen last time in the company of deceased by Hanu Kshatriya (PW/1), Smt. Gomti Kshatriya (PW/2) and Himanshu Chandrakar (PW/9). Once the evidence is there on record that the deceased left his house along with the appellant, in the evening he met with PW/9 and some hot talk took place between the deceased and PW/9 over theft of cell phone belongs to PW/9 then it cannot be said that it is the accused/appellant alone, who was seen last time in the company of the deceased, had killed him unless being corroborated by other substantive piece of evidence.

25. In the matter of **Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra, (2008) 3 SCC 210**, the Supreme Court while dealing with circumstantial evidence observed in paras 11, 12 & 13 as under:-

“11. In Hanumant Govind Nargundkar V. State of M.P. [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as

under:

“10..... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

12. In *Padala Veera Reddy V. State of A.P.* [(1989) Supp (2) SCC 706], this Court held that when a case rests upon circumstantial evidence, the following tests must be satisfied:

- (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 the 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.

26. **In Sharad Birdhichand Sarda v. State of Maharashtra** [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- (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 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.

27. In the instant case, according to evidence of Hanu Kshatriya (PW/1), he was informed by some boys of his vicinity that the deceased had gone along with the appellant. It is difficult to accept the testimony of this witness with regard to last seen for the reason that when the deceased left his house along with the accused/appellant, PW/1 was not present in his house and he has not seen the accused/appellant and the deceased together either in the house or on the way. Secondly, according to evidence of Smt. Gomti Kshatriya (PW/2), mother of the deceased, she saw the accused/appellant and the deceased together last time but, on the other hand, she admits this fact that almost every day the accused/appellant used to take her son with him. That apart, it has come in the evidence of PW/9 that when he was strolling with his friends in the evening, he met with accused/appellant and the deceased and some hot talk took place between them over theft of cell phone in which PW/9 slapped the deceased and on the next day body of deceased

was found. In the facts and circumstances of the case, where the body of deceased was found on the second day, the accused/appellant and deceased were good friend, and the deceased was beaten by PW/9, no definite conclusion can be drawn that it is the accused/appellant alone who could have killed the deceased and possibility of some third person killing the deceased thus cannot be ruled out. Another aspect of the case is that on the memorandum of the accused/appellant (Ex.P/7), one Gamcha was seized vide Ex.P/8, which was identified by Vishnu Sagar (PW/6) to be that of the deceased, but there is no FSL report on record to confirm presence of blood and the prosecution has utterly failed to prove that the said Gamcha was used in the commission of crime.

28. Thus having examined the evidence in the present case in light of the aforesaid principles of law, we are unable to hold the appellant guilty of the crime in question. None of the circumstances relied upon by the trial Court has been proved by the prosecution so as to exclude the possibility that it is the appellant alone who is the author of crime beyond the shadow of all reasonable doubt. Being so, the benefit of doubt must be credited to the appellant and he deserves to be acquitted of the charge leveled against him.

29. In the result, the appeal succeeds and is, accordingly, allowed. The impugned judgment is hereby set aside and the appellant is acquitted of the charge under Section 302 IPC by

extending him benefit of doubt. The appellant is reported to be in jail. He be set at liberty forthwith, if not required in any other case.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Sanjay Agrawal)
JUDGE

Vijay