

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 151 of 2012

1. Chunnilal, S/o Bhagatram Sarthi, aged about 31 years
2. Lukeshwar S/o Bedram Sarthi, aged about 24 years.

Both residents of Village Rampur Kirari, P.S. Dabhara, Distt. Janjgir Champa C.G.

---- Appellants

Versus

- State Of Chhattisgarh, through Thana Incharge - Dabhra, District Janjgir Champa (CG)

---- Respondent

For Appellants	:	Shri Pawan Shrivastava, Advocate
For Respondent	:	Shri Anil Pillai, Dy. Advocate General.

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

Judgement

P. Diwaker, J

03/04/2018

1. This appeal has been filed against the judgment of conviction and order of sentence dated 13.12.2011 passed by the Additional Sessions Judge, Sakti, District Janjgir Champa in S.T. No.91/10 convicting the accused/appellants under Section 302/34 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo R.I. for Life and to pay a fine of Rs.3,000/-, in default to undergo additional R.I. for 05 months.
2. In the present case name of deceased is Bablu @ Manmohan @ Mohan.
3. As per prosecution case, on 25.2.2010 there was some dance programme in village Kirari. On the same day at about 7.00 p.m. when deceased

Manmohan along with his mother was standing near his house, he received a call on his cell phone of accused/appellant No.2 Lokeshwar inviting him to join him to see dance programme, whereupon the deceased after taking meals left his house at about 7.30 pm. Immediately thereafter mother of deceased also left the house and had gone to the house of one Khageshwar Sarthi. Further case of the prosecution is that while the deceased and accused/appellant No.2 were going to watch the dance programme, on the way accused/appellant No.2 met them and on being informed by deceased and accused No.1 that they are going to watch a dance, he expressed his desire to go along with them. While Kamlabai (PW-1) was sitting in the house of Khageshwar, there was some noise in the locality that accused persons have killed one boy. Soon thereafter both the accused persons came to the house of Khageshwar, enquired about mother of accused/appellant No.2 and went back. It is further case of the prosecution that the accused persons made extra-judicial confession before Kamlabai (PW-1), mother of deceased, that they have killed the deceased. It is also the case of the prosecution that while accused/appellant No.2 and deceased were going together, accused/appellant No.1 showed his desire to join them and this was seen by Amritlal (PW-5). Dead body of the deceased was found lying in a village pond. After identification, FIR (Ex.P-2) was lodged by Kamlabai (PW-1) on 26.2.2010 at 5.00 a.m. against the appellants under Section 302/34 of IPC. Merg Intimation (Ex.P-1) was registered at the instance of PW-1. Inquest over the body of deceased was prepared vide Ex.P-4 on 26.2.2010. Body of the deceased was sent for post-mortem examination which was conducted by Dr. N.P. Mishra (PW-17) and he noticed following injuries;-

- Incised wound on 2nd finger of left hand at middle of ½" x ¼" x ¼" in

size.

- Incised wound on 3rd finger of left hand at middle of ½" x ¼" x ¼" in size.
- Incised wound on left side of occipital region of ½" x ¼" x ¼" in size.
- Incised wound on the neck below chin of 3" x ¼" x ¼" in size.
- Incised wound on neck of 2½" x ¼" x ¼" in size.
- Bruise on left side of eye below lower lid of 1"x ½" in size.
- Incised wound on left side of face of 1" x ¼" x ¼" in size.

The doctor has opined that cause of death appears to be asphyxial due to drowning at semi conscious position on account of injuries and the death was homicidal in nature. On 26.2.2010 memorandum statement (Ex.P-10) of accused/appellant No.1 was recorded in which he made disclosure statement and in pursuance of such disclosure statement he got recovered one axe and clothes vide seizure memos Ex.P-10 & Ex.P-14 respectively. Likewise, memorandum statement of accused/appellant No.2 was also recorded vide Ex.P-8 and based on which knife, clothes and cell phone were seized vide seizure memos Ex.P-9 & Ex.P-13. Seized articles were sent for chemical examination to the Forensic Science Laboratory from where report of Ex.P-33 was received confirming presence of blood on the knife seized from accused/appellant No.2 and shirts of accused/appellants.

4. On completion of investigation, charge sheet for the offence punishable under Section 302/34 IPC was filed against the accused/appellants and accordingly the charge was framed against them by the trial Court. The prosecution in order to bring home the charge levelled against the accused/appellants examined 23 witnesses in all. Statements of accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.

5. After hearing the parties, the Court below has convicted & sentenced the accused/appellants in the manner as described above.

6. Counsel for accused/appellant submits that;-

- there is no eyewitness to the occurrence and conviction of appellants is based on the circumstantial evidence but none of the circumstances from which inference of guilt of appellants could be drawn has been proved beyond doubt by the prosecution. Therefore, there can be no inference that it was the appellants who committed the crime in question.
- Kamlabai (PW-1) has improved while deposing in the Court and thus she is totally unreliable witness.
- Last seen evidence of PW-5 is not reliable atleast against appellant No.1 because this witness has nowhere stated that this appellant had also accompanied the deceased and appellant No.1.
- in absence of serological report, FSL report showing presence of blood is of no consequences.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court. It has been argued that minor improvements in the statement of Kamlabai (PW-1) will not vitiate the entire prosecution case in particular considering the fact that she is a rustic villager and lost her young son. If the entire evidence is assimilated the chain of circumstances is complete and it indicates that it is the accused persons who have killed the deceased. Though Amritlal (PW-5), witness of last seen, may not have stated in specific term that accused/appellant No.2 had also joined the company of deceased and accused/appellant No.1 but from the statement of this witness an

inference can be drawn that after making query from Lokeshwar (accused No.1) and deceased, accused/appellant No.2 also made up his mind to join them. Statement of PW-13 to the effect that accused/appellant No.1 informed him that accused / appellant No.2 and deceased are quarrelling makes it clear that accused/appellant No.2 had also accompanied them.

8. We have heard counsel for the parties and perused the evidence available on record.
9. Kamlabai (PW-1), mother of deceased and lodger of Merg Intimation (Ex.P-1) & FIR (Ex.P-2). According to this witness, on the fateful evening when she and her son (deceased) were standing near boring located in front of her house, her son received a call on his mobile and being asked, he informed that accused/appellant No.1 had called him for seeing the dance. She has further stated that after taking meals, her son (deceased) left the house and she also went to the house of Khageshwar for watching television. At about 7-8 in the night, accused/appellants came to the house of Khageshwar and accused/appellant No.2 enquired from him about his mother. At that time clothes of both the accused were soaked with mud. She has further stated that on hearing the loud noise from outside, both the accused persons rushed outside the house. On hearing noise, they also came out of the house and saw that the villagers gathered outside the house of Khageshwar were asking from the accused persons as to whom they have killed. At that time her son (deceased) and accused Chunnilal were not there. She has further stated that she tried to contact her son on his mobile but could not connect to him. When she reached the house of Amritlal (PW-5) in search of her son, she was informed by him that he saw her son in the company of accused persons. On coming to know about the aforesaid fact, she suspected that the accused persons might have killed her son. She has further stated that on being asked by

the villagers, accused/appellant No.1 admitted to have killed deceased along with accused/appellant No.2. Next morning she along with her husband had gone to the police station and lodged the report of incident. In the cross-examination certain questions were put to this witness regarding character of the deceased to the effect that he was a womaniser, used to tease the girls of the village and used to take their photographs from his mobile, but all these suggestions have been flatly denied by her.

10. Dhurwa Ram (PW-2) is the witness of inquest (Ex.P-4), but he did not support the prosecution and turned hostile.
11. Amritlal (PW-5) has been examined as a witness of last seen. According to this witness, on the fateful night at about 8, he along with accused/appellant Chunnilal was sitting outside his house. Accused/appellant No.1 and deceased came from the road side and being asked by accused/appellant No.2, they informed that they are going to watch the dance programme organized in village Kirari. Hearing this, accused/appellant No.2 left the place saying that he is coming back after changing his clothes. 5-10 minutes thereafter mother of deceased came there and on being asked by her, he told that they were saying that they would go to see the dance. He has further stated that after half-an hour thereafter he heard that some people have killed somebody near the village pond.
12. Chandrika Prasad Nishad (PW-6) is the witness of inquest (Ex.P-4). Rajkumar Nishad (PW-7) is the witness of inquest (Ex.P-4), memorandum statements of accused/appellants recorded vide Ex.P--8 & P-10 respectively. Seizure memos Ex.P-9, P-11 to P-14.
13. Bharatlal (PW-7), village Kotwar, Gaurilal alias Bauna (PW-9), Madhu Chouhan (PW-11), father of deceased, Vinod Chouhan (PW-12) are the hearsay witness having no personal knowledge about the incident.

14. Ashok Chouhan (PW-13) has deposed that on the date of incident he was in his house. At about 7-8 in the fateful night, hearing noise he came out of his house and reached near the house of Kamlabai (PW-1), who was crying. He came to know from the people present there that on being enquired by Kotwar Vinod Chouhan (PW-12), accused/appellant No.1 informed that accused/appellant No.2 and the deceased had been quarrelling near the pond.
15. Dujeram Bareth (PW-14) is the witness of memorandum statements (Ex.P-8 & P-10) and seizure memos Ex.P-9, P-11 to P-14. He has duly supported the prosecution case.
16. Brijpal Burman (PW-15), Mohanidas Anant (PW-18), D.K. Mishra (PW-19), is the police person who assisted in the investigation. I.C. Shandilya (PW-16) is the investigating officer who has duly supported the prosecution case.
17. Dr. N.P. Mishra (PW-17) is the doctor who conducted post-mortem examination over the body of deceased and noticed the injuries as described above. He has opined that cause of death of the deceased was asphyxia due to drowning in semi unconscious condition and the death was homicidal nature.
18. Santosh Kumar (PW-21) has deposed that on the date of incident he had talked to the deceased on his mobile and on being asked the deceased told him that he is along with accused Lukeshwar near the village pond.
19. Shyam Singh Markam (PW-22) is the Patwari who prepared the spot map vide Ex.P-6. Deenbandhu Chouhan (PW-23) is the witness of spot map (Ex.P-15).
20. Since prosecution witnesses namely Dhanau Gada (PW-3), Ghurau Ram (PW-4), Lachhiram (PW-10), Ramlal Nishad (PW-20) have not stated anything specific against the accused persons, there is no need for us to

discuss their evidence here.

21. In the case in hand, admittedly there is no eyewitness and the conviction of accused/appellants is based upon the circumstantial evidence i.e. last seen theory coupled with extra-judicial confession made by one of the accused and recovery of bloodstained articles at their instance.
22. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for 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. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case.

23. Having noticed the relevant principles governing a case based on circumstantial evidence, this Court proposes to consider the question whether the case against the appellant is proved.
24. As regards the evidence of last seen, the prosecution to prove the fact of last seen examined Amritlal (PW-5). According to PW-5, on the fateful accused Lokeshwar and deceased Mohan came to them from the road side and on being asked by accused Chunnilal, they told him that they are going towards the locality to see dance. Said fact being disclosed by those persons, accused Chunnilal moved to his house saying that he is

coming back after changing clothes. Whereas, in the cross-examination this witness has admitted that shortly after departure of accused Lokeshwar & deceased, accused Chunnilal had moved to his house saying that he is coming back after changing clothes. Thus, this witness has nowhere stated that he had seen accused/appellant No.2 accompanying the deceased. Therefore, from the evidence on record, on the point of last seen together, there is no sufficient and reliable evidence of last seen together as far as appellant Chunnilal is concerned.

So far as accused/appellant Lokeshwar is concerned, no doubt the statement of Amritlal (PW-5) to the effect that he saw this appellant going along with the deceased towards the place where dance was organized creates suspicion against this appellant, but mere suspicion is not sufficient to hold that there is reasonable prospect of convicting this appellant of the offence like murder. Merely because PW-5 had seen the deceased and this appellant together on the date of incident, it is not sufficient to give rise to inference that it is he who committed the murder of deceased. Had it been the case where, after being seen by this witness, this appellant was also seen by someone at or near the place from where the dead body was recovered or it is he who got recovered the body of deceased from inside the pond, the position would have been different. It is trite law that suspicion, howsoever, strong cannot take the place of proof, whether the allegations are sought to be established by direct evidence or by circumstantial.

25. Another circumstance sought to be relied upon by the prosecution is that extra judicial confession was made by appellant Lokeshwar admitting to have killed the deceased along with accused Chunnilal. According to Kamla Bai (PW-1), in the fateful night itself accused Lokeshwar had confessed before her and other villagers namely Ramlal, Ghurau, Arjun,

Anandram, Suklal, Bedram, Khageshwar, Bahradihin, Gharghodahin, Jabalhine etc. that he along with co-accused Chunnilal had killed the deceased. However, if the diary statement of this witness is seen, which was recorded after the incident, there is no such statement regarding extra-judicial confession being made by accused Lokeshwar before her or any other villager. Furthermore, there is no reference of extra judicial confession in FIR (Ex.P-2) or Inquest (Ex.P-4) or in the evidence of Ghurau Ram (PW-4), who was also said to have been present when the confession was made by accused Lokeshwar. It may be relevant here to point out that FIR and inquest were admittedly made after the confession is alleged to have been made to aforesaid witness and PW-1 would have surely mentioned this fact in the FIR & Inquest, if, infact, the story about making extra-judicial confession was correct. Alas! there is no mention of the same in the aforesaid documents. In these circumstances, the statement of Kamlabai (PW-1) to the effect that accused Lokeshwar had confessed his guilt to her cannot be relied upon.

26. As far as the recovery of bloodstained axe, knife and shirts at the instance of accused/appellants is concerned, no doubt, in the report of FSL the aforesaid articles were found to be stained with blood but there is no report of serological department opining the same blood group on the alleged weapons of offence i.e. axe & knife, and shirts of appellants as that of the deceased and thus the prosecution has further failed to connect the alleged recovered articles with the commission of offence. For this view we are fortified from the decision in the matter **Kansa Behera v. State of Orissa** reported in **AIR 1987 SC 1507** wherein the Supreme Court while dealing with recovery of bloodstained articles has observed thus:-

“12. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained

with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.”

27. In the light of the discussions above, we are of the considered view that it cannot be said to be a case where the prosecution has established a complete chain of circumstances which rules out the possibility of involvement of any other person and unerringly points finger at the appellants to be the authors of the crime in question. The learned trial Judge convicted the appellants on the basis of presumption and suspicion but the conviction cannot be based on suspicion nor on the conscious of the Court being morally satisfied about the complicity of an accused. In such a situation the benefit of doubt must go to the accused/appellants.
28. In the result, the appeal stands allowed. Conviction and sentence of accused/appellants under Section 302/34 of IPC are hereby set aside and they are acquitted of that charge by extending them benefit of doubt. Appellant No.1 Chunnilal is reported to be on bail. His bail bonds stand discharged. Appellant No.2 Lokeshwar is reported to be in custody. He be set at liberty forthwith if not required to be detained in connection with any other offence.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Sanjay Agrawal)
Judge

roshan/-