

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 159 of 2009**

1. Shiv Nandan Rathiya S/o Mehetarram Rathiya, aged about 35 years, Occupation – Panchayat Secretary,
2. Shanker Nagwanshi, s/o Ghuran Nagwanshi, aged about 20 years, occupation – Farmer,

Both R/o Village Lalmati, Sohanpur Chowki-Rairuma, P.S.-
Dharamjaigarh, Distt. Raigarh (CG)

---- Appellants**Versus**

- State Of Chhattisgarh through P.S. Dharamjaigarh, Distt. Raigarh.

---- Respondent

For Appellants	:	Smt. Laxmin Tondey, Advocate.
For Respondent/State	:	Shri Anill Pillai, Dy. A.G.

CRR No. 243 of 2009

- Madan Ram, aged about 30 years, son of late Panik Ram, residence of village Lalmati, Sohanpur, Tahsil Dharamjaigarh, Distt. Raigarh (CG)

---- Applicant**Versus**

1. Thakur Ram son of Lal Bihari Rathiya, aged about 50 years,
2. Shani Ram son of Late Lal Bihari Rathiya, aged about 45 years,

Both residence of village Lalmathi, P.S. Dharamjaigarh, Distt. Raigarh,
Chhattisgarh.

3. State of Chhattisgarh, through Station House Officer, Police Station Dharamjaigarh, Tahsil Dharamjaigarh, Distt. Raigarh (CG)

---- Respondent

For Applicant	:	None.
For Respondents 1 & 2	:	Smt. Laxmin Tondey, Advocate.
For Respondent No.3/State	:	Shri Anil Pillai, Dy. A.G.

ACQA No. 160 of 2010

- State Of Chhattisgarh Through The District Magistrate District Raigarh, Chhattisgarh

---- Applicant

Versus

1. Thakur Ram S/o Lal Bihari Rathiya Aged About 50 Years
2. Shaniram S/o Lal Bihari Rathiya Aged About 45 Years

Both Occupation – Agriculturist, R/o Village Lalmati, Sohanpur,
Post Rairuma, P.S. Dharamjaigarh, Distt. Raigarh (CG)

---- Respondents

For Appellant/State	:	Shri Anil Pillai, Dy.A.G.
For Respondent/State	:	Smt. Laxmin Tondey, Advocate.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Smt. Justice Rajani Dubey

Judgment on Board by Pritinker Diwaker, J

04/09/2018:

As the above cases arise out of a common judgment dated 11th February, 2009 passed by 4th Additional Sessions Judge (FTC), Raigarh in ST No.84/2008, they are being disposed of by this common judgment. By the impugned judgment, the trial Judge has convicted accused Shivnandan and Shanker Nagwanshi u/s 302/34 of IPC and sentenced them to life imprisonment & fine of Rs.1000/- with default stipulation whereas accused Thakurram and Shaniram have been

acquitted of the said charge.

Assailing their conviction, accused Shivnandan and Shanker have filed Cr.A.No.159/09 whereas against the acquittal of accused Thakurram and Shaniram, the State has filed appeal i.e. Acquittal Appeal No.160/2010 and complainant has filed revision i.e. Cr.Rev.No.243/2009.

2. Brief facts of the case are that on the eve of Holi i.e. 22.3.2010, there was some quarrel between the accused persons and the complainant party where accused Shivnandan and Thakurram seemed to have been beaten. It is said that in the night intervening 22/23rd March, 2008, accused Shivnandan and Shankar gained entry in the house of deceased Panikram, took him outside his house, committed his murder by throttling and thereafter took his body inside his house and in order to give it a colour of suicide, hanged the body with the wooden beam of the roof with the help of *dhoti*. PW-9 Sonkunwar, wife of the deceased, a handicapped lady, saw the accused persons Shivnandan and Shankar taking the deceased outside the house and then she slept and in the next morning she found dead body of her husband/deceased in hanging condition. PW-12 Usatram also saw the accused Shivnandan and Shanker near the house of the deceased at the relevant point of time. After seeing the dead body of the deceased, PW-9 was crying aloud and upon coming to know about the incident, her son PW-1 Madan Rathiya rushed to the spot, saw dead body of his father and lodged Dehati Merg on 23.3.2008 (Ex.P/1). Inquest (Ex.P/7) on the dead body was conducted on 23.3.2008 and thereafter the body was sent for postmortem which was conducted on the same day by

PW-4 Dr. A.S. Thakur vide Ex.P/13. The autopsy surgeon noticed that a *dhoti* without knot was wrapped around the neck, saliva dribbled over right cheek upto abdomen, thigh and leg also; eyes were closed; finger nails had bluishness; tongue bitten in between teeth; abrasion marks by nail over left side of chin, left collar bone and on the back in the center also; there was ligature mark over half left side of neck appears to have been caused due to tying of dhoti, it was not deep and was not the mark developed due to suicide. There was no such pressure on the windpipe as is found in the cases of suicide by hanging. There was fracture on right side of neck. In his opinion, the cause of death was asphyxia due to strangulation and the death was homicidal in nature.

Regular merg (Ex.P/19) was recorded on 23.3.2008 at 4.10 pm and Dehati Nalishi (Ex.P/16) was recorded on 27.3.2008 at the instance of Madan Rathiya (PW-1). FIR (Ex.P/18) was registered on 27.3.2008 under Section 302 of IPC against unknown person. After investigation charge sheet was filed against the accused persons under Section 302/34 of IPC followed by framing of charge accordingly by the trial Judge.

3. In order to prove the complicity of the accused persons in the crime in question, the prosecution has examined 17 witnesses. Statements of the accused under Section 313 Cr.P.C. were also recorded in which they denied their guilt and pleaded innocence and false implication in the case. In their defence, they examined three witnesses.

4. After hearing the parties and appreciation of the material

available on record, the Court below by the impugned judgment while acquitting accused Thakur Ram and Shaniram of the charge, has convicted and sentenced the accused/appellants Shivnandan Rathiya and Shanker Nagwanshi as mentioned above in paragraph No.1 of this judgment.

5. Smt. Laxmin Tondey, learned counsel appearing for the accused persons submits as under:

(i) that so-called eyewitnesses to the incident PW-9 Sonkunwar has exaggerated her version while deposing in the Court. In her statement u/s 161 of CrPC she has nowhere stated that she saw the accused persons committing murder of her husband but in the Court she claims herself to be an eyewitness.

(ii) that PW-12 Usatram is also not a reliable witness.

(iii) that most of the witnesses examined by the prosecution are interested witnesses and they have falsely implicated the accused persons on account of village politics.

(iv) that the witnesses wanted to remove accused Shivnandan Rathiya from the post of Secretary of Gram Panchayat and that is why the entire exercise was done.

(v) that accused Thakur Ram and Shaniram have rightly been acquitted of the charge and thus, the trial Court ought to have acquitted appellants Shivnandan and Shanker Nagwanshi also on the basis of same set of evidence.

6. On the other hand, State counsel while supporting the judgment

impugned insofar as it relates to conviction of appellants Shivnandan Rathiya and Shanker Nagwanshi, submits that even if there is some improvement by PW-9 Sonkunwar in the Court, considering her overall statement which finds due support from the evidence of PW-12 Usatram and the medical evidence, the trial Court was justified in convicting appellants Shivnandan and Shanker. He submits that considering the statements of these two witnesses, the Court below ought to have also held accused Thakur Ram and Shaniram guilty of the offence.

7. Heard the counsel for the parties and perused the material available on record.

8. PW-9 Sonkunwar, wife of the deceased, has stated that she is suffering from rheumatism, she is unable to walk and was living in the village along with her husband deceased Panikram. On the eve of Holi, she was in her house along with the deceased; her grand-son and grand-daughter-in-law provided meals to her and her husband and thereafter, both of them slept in the cot. At night Shanker and Shivnandan (convicted accused) came to her house, called out her husband Panikram, asked Panikram to accompany them to their house and then Panikram went with them. At that time she also saw other acquitted accused Thakur Ram and Shaniram standing outside near the boring. She states that accused Thakur Ram pressed neck of her husband, Shaniram pressed his testicles and then all the four accused persons brought the deceased to her house, made him sit on the cot naked, tied his *dhoti* around his neck and one end of the *dhoti* was tied with the roof beam. She states that when the accused persons brought

her husband to her house, by that time he had died.

In cross-examination she has stated that she did inform the police of seeing acquitted accused standing near boring at the relevant time and likewise also informed the police of seeing accused persons killing the deceased and if the same is not recorded in her diary statement she cannot tell the reason. It is relevant to note here that in her statement u/s 161 of CrPC (Ex.D/4) she merely states that the accused persons Shivnandan and Shanker called out her husband, took him with them and thereafter she slept and in the next morning she saw dead body of her husband. This witness was cross-examined at length but her statement insofar as it makes allegations against convicted accused Shivnandan and Shanker remains intact and nothing could be elicited from her by the defence to its advantage in respect of these convicted accused.

9. PW-12 Usatram, neighbour of the deceased, states that on the eve of Holi, at about 12.30 in the night he woke up to ease himself and while doing so, he saw convicted accused Shivnandan and Shanker calling out deceased, and when the deceased came out, he (this witness) went inside the house and slept. In the next morning while he was brushing his teeth, he heard cries of PW-9 and then he came to know that the deceased had been killed. When he along with other villagers went to the house of the deceased, he saw that the deceased was naked and in sitting condition on the cot, one end of his *dhoti* was tied around his neck and the other end was tied with the roof beam. He states that on being asked PW-9 informed that in the night accused Shivnandan and Shanker had taken the deceased with them and then

brought him back, made him sit on the cot and tied *dhoti* around his neck in this manner. He further clarifies that PW-9 did not disclose the name of any other persons except Shivnandan and Shanker. In cross-examination this witness remained firm and reiterated that he saw accused Shivnandan and Shanker calling out the deceased.

10. PW-13 Shamsuddin Khan, investigating officer, has duly supported the prosecution case. PW-4 Dr. AS Thakur conducted postmortem on the body of the deceased on 23.3.2008 vide Ex.P/13 and noticed that a *dhoti* without knot was wrapped around the neck, saliva dribbled over right cheek upto abdomen, thigh and leg also; eyes were closed; finger nails had bluishness; tongue bitten in between teeth; abrasion marks by nail over left side of chin, left collar bone and on the back in the center also; there was ligature mark over half left side of neck appears to have been caused due to tying of *dhoti*, it was not deep and was not the mark developed due to suicide. There was no such pressure on the windpipe as is found in the cases of suicide by hanging. There was fracture on right side of neck. In his opinion, the cause of death was asphyxia due to strangulation and the death was homicidal in nature.

11. PW-1 Madan Rathiya, son of the deceased, is the informant. He states that as soon as he came to know about death of his father Panikram he rushed to the spot and saw dead body of the deceased. He states that his mother (PW-9) was sitting there crying and she informed him that his father was taken out by convicted accused Shivnandan and Shanker in the night and after some time the accused persons brought him back dead. Almost similar statements have been

made by PW-3 Raviprasad, PW-8 Teejram and PW-11 Chaitram Rathia. Though, legally speaking, these witnesses can be termed as hearsay witnesses but the fact remains that as soon as they entered the house of the deceased, they were informed about the incident by PW-9 Sonkunwar.

12. DW-1 Rajkumari, wife of accused Thakur Ram, states that on the date of incident Amrit Tirki, Kanhai, Anand, Usat, Bhogram, Shodhan, Bodhan, Upas, Ravi and Chaitram committed *marpeet* with Shivnandan accusing him of not distributing Ration Card and they also threatened him of removing from the post of Secretary and when she intervened in the matter, she too suffered injury. She further states that these persons were also searching for accused Thakur Ram and Shaniram for beating and after some time entered their house and beat them also. Similar is the statement of DW-2 Ramnath.

DW-3 Matwar Singh, Police Constable, produced copy of Rojnamchasanha (Ex.D/8) and stated that on 23.3.2008 accused Thakur Ram lodged a report that accused Shivnandan, Shriramnath, Rajkumari Mohanmati were beaten by Kanhai Chandra, Usatram, Mohan, Chaitram, Bhogram and Upasram as a result of which they suffered injuries.

13. Admittedly, there is no direct evidence against the accused persons to prove their complicity in the crime in question and the entire case rests upon circumstantial evidence. 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 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. □*

13. *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."

14. In the present case, close scrutiny of the evidence makes it clear that though PW-9, who claims herself to be an eyewitness to the incident in the Court, had not seen the actual occurrence of killing of the deceased and her court evidence is at variance with her diary statement (Ex.D/4) on this point, however, she has been consistent enough in stating that in the fateful night it is convicted accused Shivnandan and Shanker who having called out her

husband/deceased, had taken him out with them and after some time brought him back dead. Her version also finds due corroboration from the evidence of PW-12 Usatram who states that in the night when he woke up to ease himself he saw convicted accused Shivnandan and Shanker calling out deceased and when the deceased came out, he (this witness) went inside the house and slept, and that in the next morning he came to know about killing of deceased. He further states that on being asked PW-9 informed that in the night accused Shivnandan and Shanker had taken the deceased with them and then brought him back, made him sit on the cot and tied one end of *dhoti* around his neck and the other with the roof beam. These convicted accused/appellants have not offered any explanation on this point in their statements u/s 313 of CrPC as to where they had taken the deceased, what transpired between them during this period or as to when they parted with the company of the deceased or who could have killed the deceased. Having gone through the evidence of PW-9 & PW-12, we do not find any reason to disbelieve the same. Medical evidence also supports the prosecution case. According to the autopsy surgeon, the deceased had suffered number of abrasions, there was ligature mark over the neck which appeared to have been caused due to tying of *dhoti*, and that the death was homicidal in nature.

15. Further, after coming to know about the incident when PW-1 Madan Rathiya, PW-3 Raviprasad, PW-8 Teejram and PW-11 Chaitram Rathiya entered the house of the deceased, all of them were informed about the incident by PW-9 who specifically named convicted accused Shivnandan and Shanker. Even if they are hearsay witnesses, their

evidence insofar as it is consistent with the other legally admissible evidence can be taken into consideration to draw inference of guilt of the accused persons or otherwise. This apart, evidence of the defence witnesses also goes to show that prior to the present incident, there was fight between the accused party and the complainant party in which the accused persons were beaten and as such, it serves as a strong motive for the accused persons to commit the offence. Thus, from the above circumstantial evidence, the prosecution has successfully proved guilt of appellants Shivnandan Rathia and Shanker Nagwanshi and as such, the trial Court was justified in convicting them under Section 302/34 of IPC.

16. So far as acquittal appeal preferred by the State and revision preferred by the complainant are concerned, from perusal of the evidence on record, we find no legally admissible evidence against acquitted accused Thakur Ram and Shaniram which could prove their involvement in the crime in question beyond reasonable doubt. The evidence of PW-9 cannot be believed in respect of these accused firstly for the reason that she has not named them in her diary statement, secondly her evidence does not find support from medical evidence as the autopsy surgeon did not notice testicles of the deceased being crushed/broken whereas PW-9 has alleged that these accused persons had pressed the testicles of the deceased hard and thirdly, PW-12 also does not support her version and categorically states that neither he had seen these persons at the relevant time nor PW-9 had disclosed their names as the persons accompanying the convicted accused.

17. Thus, considering the overall evidence on record, the trial court came to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt against accused Thakur Ram and Shaniram and thus acquitted them of the charge u/s 302/34 of IPC by extending them benefit of doubt. We find no illegality in the judgment impugned acquitting these accused. Even otherwise, there is a settled legal position that if on the basis of record two conclusions can be arrived at, the one favouring the accused has to be preferred and scope of interference in appeal or revision against acquittal is very limited and can only be made if finding recorded by the trial Court is highly perverse or arrived at by ignoring the relevant material and considering the irrelevant ones. In the present case, no such circumstance is there warranting interference.

18. In the result, the appeal preferred against conviction of accused Shivnandan Rathia & Shanker Nagwanshi and the appeal and revision filed against acquittal of accused Thakur Ram & Shaniram being without any substance, are liable to be dismissed and are dismissed as such. Accused/appellants Shivnandan Rathia & Shanker Nagwanshi are reported to be on bail, therefore, their bail stands cancelled and they are directed to be taken into custody forthwith to serve out the remaining part of their sentence.

Sd/
(Pritinker Diwaker)
Judge

Sd/
(Rajani Dubey)
Judge