

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 09 of 2015**

1. Karuna Sagar alias Kapil son of Sibam Ram, Caste - Khadiya, aged about 27 years, R/o Village Joranda Jhariya, Police Station Tumla, District Jashpur, CG

---- Appellant**Versus**

1. State of Chhattisgarh through District Magistrate, Police Station Farshabahal, District Jashpur, CG

---- Respondent

For Appellant : Shri Sanjeev Sahu, Advocate
For Respondent/State: Shri Vaibhav Goverdhan, PL

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Gautam Chourdiya****Judgment On Board by Pritinker Diwaker, J****31/07/2018**

This appeal has been filed against the judgment of conviction and order of sentence dated 22.12.2014 passed by Additional Sessions Judge, Kunkuri, District Jashpur, in Sessions Trial No. 31/2013 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life and pay fine of Rs. 10,000/-, plus default stipulation.

2. Facts of the case in brief are that the accused/appellant was having an affair with the deceased namely Sumitra Bai aged about 16 years at the relevant time and from him she was carrying pregnancy of 6-7 months. It is said that on 12.02.2013 the deceased was telephonically called by the

accused/appellant and pursuant to the call so received she left her house by informing her father Jagarnath (PW-1) and then on the next day i.e. 13.02.2013 at about 9 AM her dead-body was found in the field - about 20 KM away from her house. Upon receiving the information from the village Secretary, PW-1 and other family members identified the body to be that of Sumitra Bai. At the instance of PW-1, *merg* intimation (Ex.P-1) was recorded on 13.02.2013 at 1.05 PM. After drawing inquest vide Ex. P-2, the dead-body was sent for postmortem examination which was conducted by Dr. C.R. Bhagat (PW-4) who gave his report Ex. P-12 which says that the deceased was carrying pregnancy. On the basis of *merg* inquiry, FIR Ex. P-22 was registered on 15.02.2013 against an unknown person for the offence punishable under Section 302 IPC. On the memorandum of accused/appellant Ex. P-6 dated 18.02.2013 seizure of a cell phone was made under Ex. P-8 from beneath the sand. Further case of the prosecution is that cell phone was without SIM card which was destroyed by the accused/appellant. Cell phone is said to have been identified by Abhiram (PW-2), Smt. Kaushaliya Bai (PW-10) and Shivnarayan (PW-12) in the Test Identification Parade ("TIP" for brevity) vide Ex. P-31 which was conducted by B.R. Nag - the Tehsildar (PW-15). On the basis of material collected by the prosecution, the Court below framed the charge against the accused/appellant under Section 302 IPC.

3. In order to prove the complicity of the accused/appellant in the crime in question, the prosecution has examined 19

witnesses. Statement of the accused/appellant under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case.

4. After hearing the parties, the Court below has convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment.

5. Counsel for the accused/appellant submits as under:

(i) That there is no eyewitness to the incident and the entire case of the prosecution is based on circumstantial evidence which is very weak in nature as none of the circumstances leading to an inference against the accused/appellant has been proved beyond all reasonable doubt for committing the murder of the deceased.

(ii) That the main piece of evidence against the accused/appellant is that on his memorandum Ex. P-6, seizure of cell phone belonging to the deceased was made under Ex. P-8.

(iii) That PW-2 - the witness to memorandum and seizure has not supported the case of the prosecution and has been declared hostile, and the other one namely Pahar Sai (PW-8) does not appear to be reliable.

(iv) That the TIP of cell phone conducted by PW-15 is doubtful though the said phone is said to have been identified by PW-2, PW-10 and PW-12 to be of the deceased. It is for the reason that in the TIP only one cell phone was put for the

identification without any proper mixing of the other similar phones.

(v) That merely on the basis of seizure of cell phone, the accused/appellant cannot be convicted for committing the murder of the deceased.

(vi) That there is no evidence to show that the said phone was used by the deceased while being contacted by the accused/appellant. The prosecution has not filed any document to show that the SIM cards allegedly used for ensuring the commission of the incident belonged to the deceased and the accused.

(vii) That the call details have not been proved as per the requirement of Section 65-B of the Evidence Act.

(viii) That the most important witness being PW-1 - the father of the deceased has also not fully supported the case of the prosecution.

6. State counsel however supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellant under Section 302 IPC are based on due appreciation of the evidence on record and there is no infirmity in the same.

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

8. Jagarnath (PW-1) - the father of the deceased has stated that on account of an affair between the accused and the

deceased they wanted to marry and that the deceased kept pregnancy of six months from the accused. He has further stated that on the fateful day the deceased received a telephonic call from the accused/appellant and then after informing him she went away. According to him, when she did not return home in the night, a search was made and while doing so he was informed by the village Secretary that the dead-body of one girl was lying outside the village. Though in the examination-in-chief he has stated that on the date of incident at about 8 PM his deceased daughter received a telephonic call from the accused yet in paragraph Nos. 9 and 10 of his cross examination he has denied the said fact. He has stated that on the next day he came to know about the body of the deceased lying in the field and after identifying the same to be of his daughter he lodged the merg intimation Ex.P-1. Abhiram (PW-2) - the witness to memorandum of the accused (Ex.P-6) and the seizure of cell phone made under Ex. P-8 has not supported the case of the prosecution and has been declared hostile. Pramod Bhagat (PW-3) is the Patwari who prepared spot map Ex.P-10. Dr. C.R. Bhagat (PW-4) is the witness who conducted postmortem examination on the body of the deceased and gave his report Ex. P-12 stating that one black spot was present over anterior part of the neck, over thyroid cartilage - size 2 x 1 cm, one nail mark was present over anterior right side of neck - size 1/2 x 1/2 cm, one abrasion was present over right side of cheek - 1/2 x 1/2 cm. Report further says that dead male fetus was also there inside

the deceased, and the cause of death was asphyxia due to blockage of air passage by throttling and the death was homicidal in nature. Sukhsagar (PW-5) has not supported the case of the prosecution and has been declared hostile. Smt. Sanmati Bai (PW-6) is the mother of the deceased who has not stated anything specific against the accused/appellant and therefore has been declared hostile. Amarpati (PW-7) - relative of the deceased has also not supported the case of the prosecution and has been declared hostile. Pahar Sai (PW-8) too has not supported the case of the prosecution and has been declared hostile. In paragraph No. 5 he has completely denied the seizure of cell phone from a pit. In paragraph No. 6 also he has denied the mobile phone or SIM having been seen by him, and stated that he signed certain papers on being asked by the police. Bodh Sai (PW-9) has stated that two days before the incident the deceased had informed him about being beaten by the accused. Smt. Kaushaliya Bai (PW-10) is the witness who had identified the cell phone of the deceased in the TIP vide Ex. P-31. She has stated that only one cell phone was shown to her which she had identified to be that of the deceased. In paragraph No.8 she however has stated to the contrary that the mobile phone of her sister was not got identified by her. According to this witness, at the time of identification parade, police people were also present. Jai Singh (PW-11), Shivnarayan (PW-12), Santosh Sai (PW-16) and Sukhram (PW-17) have not supported the case of the prosecution and have been declared hostile. R.A. Chhatre (PW-

13) is the investigating officer who has supported the case of the prosecution. B.R. Nag (PW-15) is the Executive Magistrate who conducted TIP vide Ex. P-31. He has stated that the TIP was conducted by him but no mixing of other cell phones was done and no independent witness was present at the relevant time. Alish Khalko (PW-18) and Dilip Khalko (PW-19) are the witnesses who assisted in the investigation.

9. We have heard counsel for the respective parties at length and gone through the evidence of the witnesses very minutely. Undoubtedly, there is no eyewitness to the incident and it is only the circumstantial evidence that too not forming the complete chain which has been made basis for conviction of the accused/appellant. Though it has come in the evidence of the witnesses that the deceased and the accused had an affair and out of their relations the deceased was carrying pregnancy of about 6-7 months yet this alone does not lead to the sole conclusion that the deceased was eliminated by the accused/appellant only. According to the case of the prosecution, after receiving the telephonic call of the accused, the deceased had left her house in the night by informing her father (PW-1) but in the cross-examination PW-1 has stated to the contrary that his daughter had not disclosed anything like this to him. Even the identification of the cell phone made under Ex. P-31 is doubtful because in the TIP only one cell phone was kept for the said purpose without being mixed with the other similar ones. Most importantly, no document like receipt or bill has been produced by the prosecution to show

that the cell phone so seized and identified belonged to the deceased. Though two witnesses being PW-2 and PW-8 have been examined to prove the seizure of two SIMs having the number 8965833541 and 9993211077 made under Ex. P-7, both of them have not supported the case of the prosecution and have been declared hostile. Even the call details have not been proved as per the requirement of the Evidence Act. This apart, the prosecution has not collected any evidence that the cell phone allegedly seized from the accused/appellant was used for calling the deceased. Thus as already said, this case hinges on the fulcrum of circumstantial evidence and no eyewitness is there to fortify the same. The settled legal position in the cases where circumstantial evidence is the only material to arrive at a particular conclusion postulates that the onus to prove the completeness of chain is on the prosecution and the 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. In slew of decisions the Apex Court went on to emphasize that the circumstances from which the conclusion of guilt is to be drawn must or should, and not may be fully established. The Apex Court has reiterated that 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. However, in the case in hand the prosecution has failed in its duty of collecting the material capable of forming a complete chain of circumstances

unerringly leading to the guilt of the accused of commission of murder of the deceased. Benefit of this lacuna on the part of the prosecution thus must go to the accused/appellant.

10. In view of this factual and legal sketch work, we are not in a position to approve the erroneous decisional approach of the Court below holding the accused guilty even in the absence of any substantive material for so doing. Accordingly, the appeal is allowed, judgment under assail is set aside and the accused/appellant is acquitted of the charge levelled against him. As the accused/appellant is already in jail, he is directed to be set free at once if not required in any other case.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(Gautam Chourdiya)

Judge