

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 224 of 2014**

- Yakub Khan S/o Mahboob Khan, aged 25 years, R/o Village Saitangertoli, Thana Jashpur, Civil & Revenue District, Jashpur, District Jashpur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : P.S. Ramanujganj, District Balrampur Ramanujganj (C.G.)

---- Respondent

For Appellant	:	Shri S.C. Verma and Shri Rajat Agrawal, Advocates.
For Respondent/State	:	Shri Avinash K. Mishra, P.L.

**Hon'ble Shri Justice Pritinker Diwaker &
Hon'ble Shri Justice Gautam Chourdiya**

Judgment On Board**By Pritinker Diwaker, J****21/06/2018**

This appeal arises out of the judgment of conviction and order of sentence dated 09.01.2014 passed by Additional Sessions Judge, Ramanujganj, District Balrampur - Ramanujganj (C.G.), in Sessions Trial No. 59/2010 convicting the accused/appellant under Sections 302/34, 364/34, 365/34, 386/34, 507/34, 201/34 IPC and Sections 25 & 27 of the Arms Act and sentencing him to undergo imprisonment for life with fine of Rs.500/-, R.I. for ten years with fine of Rs.500/-, R.I. for seven years with fine of Rs.500/-, R.I. for seven years with fine of Rs.500/-, R.I. for two years, R.I. for seven years with fine of Rs.500/-, R.I. for five years with fine of Rs.500/-

and R.I. for five years with fine of Rs.500/-, plus default stipulation respectively.

02. As per the prosecution case, truck bearing registration No.CG15A/5092 was owned by Brihaspati Singh (PW/1). Deceased Rajendra Yadav was a driver of the said truck whereas another deceased Ram Prasad was a helper. The truck was being used mainly for transportation of bauxite between the States of Jharkhand and Chhattisgarh. On 19.09.2009 at about 6.00 PM, deceased Rajendra Yadav came to the house of Brihaspati (PW/1) for settling the account and thereafter he left his house. On the same day at about 11.00 PM Brihaspati (PW/1) tried to contact Rajendra Yadav, however, his cell phone was reported to be switched off and thereafter repeated attempts were made by him but no contact could be made. On 29.09.2009 on the same number of Rajendra Yadav contact could be made by Brihaspati (PW/1) and it was informed by the receiver that the cell number is of Rajendra and the receiver introduced himself to be a chief of Jharkhand Liberation Tiger. He informed PW/1 that his driver and helper have been abducted and demanded total Rs.3,00,000/- as ransom. The person who attended the call told PW/1 to arrange money by the evening and when PW/1 asked him to give cell phone to the driver and helper, it was informed that they are far away from the place and assurance was given that the driver and helper would be set free after

receiving the money. As PW/1 found it difficult to arrange money, on 22.09.2009 he took help of P.S. Ramanujganj by filing report and Crime No. 96/09 under Sections 364, 365(A), 386, 392 and 507 of IPC was registered against unknown person at Police Station Rajamunjanj vide Ex.P/1. In the meanwhile, on 25.09.2009 Police Station Sanna, District Jashpur received information about two dead bodies lying near hill and after reaching the said place two dead bodies were found in decomposed condition and dehati merg (Ex.P/24 and P/25) were recorded. After receiving the information from police, PW/1 and relatives of two deceased identified the said bodies to be that of Rajendra Yadav and Ram Prasad vide Ex.P/28 and P/21 respectively. Numbered merg Ex.P/30 and P/31 were recorded. After merg, on 26.09.2009 inquest on the bodies of deceased Ram Prasad and Rajendra Yadav were conducted vide Ex.P/18 and P/27 respectively and bodies were sent for postmortem examination to Primary Health Center, Sanna District Jashpur where Dr. Anuranjan Kujur (PW/11) conducted postmortem examination on the body of deceased Rajendra Yadav noticing following injuries:-

- (i) The body was highly decomposed. Most parts of the body was full of maggots.
- (ii) Right leg was missing from thigh and left leg was missing from knee.
- (iii) Right hand was completely decomposed from elbow and bone could be seen. Right shoulder was decomposed.
- (iv) No skin was found on skull.

- (v) Exit wound of gun shot in the size of 0.5 inch on left side of skull parallel to eye.
- (vi) Entrance wound of gun shot in the size of 0.4 inch above exit wound.
- (vii) One entrance wound in the size of 0.4 inch on right side of back parietal region.
- (viii) Postmortem burn was all over body which was superficial.
- (ix) Brain was in liquid form in which bullet bend from one side in the size of 0.7 x 2.4 cm was present.

Autopsy surgeon opined the cause of death of deceased to be brain injury caused by gunshot and death was homicidal in nature.

03. Dr. Anuranjan Kujur (PW/11) also conducted postmortem examination on the body of deceased Ram Prasad noticing following injuries:-

- (i) Most parts of the body were full of maggots. Skull hair, skin of skull, face were burnt and antemortem in nature.
- (ii) Entrance wound of gun shot in the size of 0.5 inch on right side of head at occipital region.
- (iii) Entrance wound of gun shot in the size of 0.5 on the right side of injury No.2.
- (iv) Exit wound of gun shot on front side of head. Another exit wound touching it in the size of 0.8 x 0.5 inch.
- (v) Superficial burn on chest, abdomen and on both leg which was postmortem in nature.
- (vi) Most of the internal organs were decomposed which were in semigros form.

Autopsy surgeon opined the cause of death of deceased to be brain injury caused by gun shot and death was homicidal in nature.

04. On 27.09.2009, Crime No.72/2009 was registered under Section 302, 201/34 IPC against unknown person at P.S. Sanna District Jaspur vide Ex.P/32. Further case of the prosecution is that unknown person used to contact PW/1 from cell phone No.9406221282 and later he informed him for handing over the amount to driver and conductor of 'Rajdhani Bus'. PW/1 was further directed that after reaching near the bus, tell conductor to contact caller of cell phone number 9406221282. It is said that instead of giving money one packet was prepared with the help of police showing that the money is being kept in the same to be delivered to the conductor and driver & accordingly PW/1 had gone to the bus, contact was made with the unknown caller and the packet was handed over to the conductor of 'Rajdhani Bus'. The name of the conductor whom the packet was handed over was Akhilesh Upadhyay (acquitted accused). As soon as the packet was handed over to Akhilesh Upadhyay, the police reached there and arrested driver and conductor. Upon being questioned, Akhilesh Upadhyay informed the police that it is appellant Yakub Khan of Jashpur who was on the other side of the phone and immediately after giving information to Jashpur police, appellant Yakub Khan, his wife and family members were detained and brought to Ambikapur. On 29.09.2009, memorandum of acquitted accused Akhilesh and driver Ajmat Shah were recorded vide Ex.P/5 and P/6. Based on these memorandums, memorandum of appellant Yakub Khan was

recorded on the same day at night vide Ex.P/4 wherein he has stated that a decision was taken in consultation with other accused persons that the truck has to be sold out. He has further informed in his memorandum that the truck in question of PW/1 was looted, taken to nearby forest, both the deceased driver and helper were tied-up by a gamcha and thereafter the appellant killed them by causing gun shot injury and in order to conceal the identity both the deceased were burnt and then the truck was taken to Bagicha and efforts were made to sell the said truck. One Ishtiyag and another acquitted accused in the trial made arrangement for selling the truck. In the memorandum, appellant also informed the police about the role played by other accused persons. He has also stated that the truck is standing near Patthalgaon and likewise revolver used in commission of offence is in his house. Based on this memorandum, one revolver was seized from the possession of appellant vide Ex.P/8, whereas truck was seized from Patthalgaon vide Ex.P/12. It is relevant to note here that as per the prosecution case, registration number of the truck of PW/1 is CG15A/5092, whereas as per seizure memo (Ex.P/12) the number which has been found on the truck at the time of seizure bears registration No.CG16-A/6062. After investigation, charge sheet was filed against 10 arrested and 5 absconded accused persons under Sections 364(A), 365, 386, 396, 507, 120-B, 302 and 201 IPC. However, while framing the charge, the trial Court has framed

the charges against appellant Yakub Khan, Hulsaad Alam, Dilip Tirkey, Mohd. Ekram, Naeem Ansari, Wasim @ Sikandar, Rustam Khan and Ajmat Shah under Sections 364/34, 365/34, 396/34, 302/34, 201/34, 386/34, 507/34, 120-B/34 IPC and Sections 57 & 27 of the Arms Act, whereas against Akhilesh Upadhyay (acquitted accused) the charge was framed under Sections 386/34 and 120-B/34 IPC.

05. So as to hold the accused persons guilty, the prosecution examined as many as 24 witnesses. Statements of the accused persons were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

06. The trial Court after hearing counsel for the respective parties and considering the material available on record while acquitting 8 accused persons has convicted and sentenced appellant Yakub Khan as mentioned in para 1 of this judgment. Hence, this appeal.

07. Subsequently, co-accused Ishtiyag @ Nageshwar @ Aslam was tried, however, he has also been acquitted vide judgment dated 11.12.2017 passed in S.T.No.R-59/2010.

08. In respect of appellant Yakub Khan, it has been argued as under:-

- That there is no legally admissible evidence showing the involvement of the appellant in commission of offence.

- That the only piece of evidence against the appellant is his memorandum (Ex.P/4) which has been recorded after the memorandum of co-accused Akhilesh Upadhyay and Ajmat Shah (both acquitted)
- That memorandum of co-accused is not admissible in evidence against the appellant and likewise on the basis of memorandum of the appellant, certain seizures have been affected, however, those seizures have not been connected with the commission of crime.
- That seizure of truck has been made from an open place and even the identity of the truck is in dispute.
- That the seizure of weapon is of no help to the prosecution because there is absolutely no evidence on record that it is the said weapon which has been used in commission of offence.
- That there is no evidence that seized weapon was fired while committing the offence and the injuries sustained by two deceased were from the said weapon.
- That witnesses to memorandum and seizure have not supported the prosecution case.
- That on the same set of evidence other accused persons have been acquitted

09. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the appellant is in accordance with law and there is no infirmity in

the same.

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

11. Brihaspati Singh (PW/1) is owner of the truck bearing registration No.CG15-A/5092. He has stated that deceased Rajendra Yadav was driver of the said truck whereas another deceased Ram Prasad was a helper. On 19.09.2009, after settling the account the truck was taken by the driver and helper thereafter despite his repeated attempt no contact could be established by him on their cell phone and when the contact could be established on their cell phone, a ransom was made by the receiver, thereafter, he approached the police and the amount was given to acquitted accused Akhilesh Upadhyay. This witness has described the entire transactions in detail. He has further stated that he knew the appellant after the incident, however, he identified him on the basis of his voice as according to him, he was constantly contacting the appellant on cell phone. When this witness was questioned regarding identification of the voice of the appellant, he admits that the accused/appellant used to make call to him through different cell numbers. He is also a witness to inquest and identification memo of body of deceased Ram Prasad.

12. Phoolmohan Ram (PW/2) and Vijay Kumar Gupta (PW/3), witnesses to memorandum (Ex.P/4, P/5, and P/6) & seizure Ex.P/8, P/9, P/10, P/11 and P/12, have turned hostile.

13. Nageshwar Singh (PW/4), witness to memorandum (Ex.P/13, P/14) and seizure (Ex.P/15, P/16), has turned hostile.
14. Dhola Ram (PW/5), witness to inquest (Ex.P/18), seizure (Ex.P/19 and P/20), has turned hostile.
15. Sanjay Yadav (PW/6) and Kuldeep Yadav (PW/7), are the witnesses to identification of two dead bodies.
16. O.P. Singh (PW/8) has proved the sanction (Ex.P/21) given by Magistrate for prosecuting the accused persons under the Arms Act.
17. Rameshwar Sanwara (PW/9) - Armourer who gave his report (Ex.P/22) has stated that the weapon produced before him was in operating condition.
18. Virendra Tiwari (PW/10) - Revenue Inspector, prepared spot map vide Ex.P/23.
19. Dr. Anuranjan Kujur (PW/11) conducted postmortem examination on the bodies of deceased and gave his reports opining the cause of death of deceased to be head injury and death was homicidal in nature.
20. Raj Kumar Yadav (PW/12) is a witness to seizure of jerrycan, half burnt chappal, gamcha and cartridge of bullet made under Ex.P/20.
21. Virendra Singh (PW/13) is brother of PW/1. He has stated that his brother PW/1 informed him that his truck was looted,

driver and helper were abducted and ransom was demanded. He is also witness to memorandum (Ex.P/13) and seizure (Ex.P/14, P/15 & P/16).

22. Smt. Sangeeta Devi (PW/14) is wife of deceased Ram Prasad, who identified her husband's body.

23. Ashok Kumar (PW/15) and Shiv Kumar (PW/16) are son and first cousin of deceased Ram Prasad who have identified the body to be that of Ram Prasad.

24. Bhola Yadav (PW/17) - cousin brother, identified the body to be that of Rajendra Yadav.

25. Maheshwar Singh (PW/18) - Assistant Sub Inspector, Manharan Singh Maravi (PW/19) and Amitabh Rawat (PW/20) - Constables, assisted in the investigation.

26. Ramesh Kushwaha (PW/21) is a formal witness.

27. Amardeep Singh (PW/22), son of complainant (PW/1), has made almost similar statement as has been made by PW/13.

28. Ambrose Kujur (PW/23) - Investigating Officer, has duly supported the prosecution case.

29. Surjan Singh (PW/24) - Inspector, did part of investigation.

30. There is no direct evidence connecting the accused/appellant with the crime in question and his conviction is based on circumstantial evidence. It is by now well settled that in a case based on circumstantial evidence, the

circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

31. Close scrutiny of the evidence makes it clear that on the basis of memorandums (Ex.P/5 and P/6) of acquitted co-accused Akhilesh Upadhyay and Ajmat Shah respectively, memorandum of the appellant was recorded vide Ex.P/4 wherein it is alleged that he not only confessed his offence but also recovery of weapon of offence (revolver) was made vide Ex.P/8 and truck was seized vide Ex.P/12 at his instance. Witnesses to memorandum and seizure have not supported the prosecution case and turned hostile. Though, these witnesses have admitted their signatures on the aforesaid documents and the Investigating Officer has also supported the memorandum and seizure but this itself is not sufficient to hold the

accused/appellant guilty because the prosecution has not been able to establish nexus between the articles so seized with the crime in question. True it is that as per the postmortem report, deceased died due to head injury caused by gun shot and weapon (revolver) was seized from the possession of appellant. Though, the prosecution obtained sanction for prosecuting the appellant under the Arms Act but they failed to bring on record ballistics report proving the fact that it is the said gun which has been fired for committing the murder of two deceased. Neither there is FSL report nor any serological report or ballistics report establishing the fact that gun shot injuries sustained by the deceased have been caused from the seized weapon. Thus, in absence of such report, it is difficult to infer that it is the said weapon which has been used in commission of crime.

32. Now, we will focus on seizure of truck made on the basis of memorandum of the appellant. The truck in question has been seized from an open place parked near the road and thus it can safely be inferred that the said fact was within the special knowledge of the appellant, but there is huge discrepancy in the registration number of the truck. According to PW/1, he is the owner of truck bearing registration No.CG15-A/5092 which was looted and for setting his truck, driver and helper free, a ransom was demanded and it is this number which has been mentioned by him at the time of lodging FIR, whereas, as per

the seizure memo (Ex.P/12), the registration No. of the truck is CG16-A/6062 seized at the instance of appellant from an open place. Minor variation of digit or alphabet could be treated as *lapsus calami* but in the present case, the registration number of the vehicle seized at the instance of appellant is entirely different from that of the number mentioned in the FIR and for connecting the circumstance of looting the truck of PW/1 the prosecution was required to prove all the circumstances beyond all the reasonable doubt. Thus, the seizure of truck creates suspicion.

33. That apart, the appellant cannot be convicted solely on the basis of identification of the voice in the Court by PW/1 who had talked with him on cell phone frequently. Mere oral statement of PW/1 that he could identify the voice of appellant for the first time during deposition is not sufficient to hold the appellant guilty. The identity of voice of appellant could be established by bringing audio forensic report on record, which the prosecution has again failed to procure and mere statement of PW/1 that he could identify the voice of appellant as he used to contact him frequently after the incident would not be sufficient to prove the identity of the appellant.

34. The Supreme Court in the matters of **Sattatiya @ Satish Rajanna Kartalla V. State of Maharashtra, (2008) 3SCC 210** and **Sharad Birdhichand Sarda V. State of Maharashtra [(1984) 4 SCC 116]** has held that in a case

based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

35. Considering the fact that on the basis of memorandum of appellant, illegal weapon (revolver) was seized from his possession and for prosecuting him under the provision of Arms Act, all the formalities have been completed by the prosecution, the conviction of the appellant under Section 25 of the Arms Act is found to be proved and the same is in accordance with law.

36. 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 except under Section 25 of the Arms Act. 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 charges under Sections 302/34, 364/34, 365/34, 386/34, 507/34, 201/34 IPC and section 27 of the Arms Act. Conviction of the appellant under Section 25 of the Arms Act is hereby maintained.

37. In the result, the appeal is allowed in part. While convicting the appellant under Section 25 of the Arms Act he is acquitted of the charges under Sections 302/34, 364/34, 365/34, 386/34, 507/34, 201/34 IPC and Section 27 of the Arms Act by extending him benefit of doubt. The sentence awarded by the trial Court under Section 25 of the Arms Act is of five years, and the appellant has already undergone sentence of five years, he is not required to be detained in jail for the said offence. The appellant is reported to be in jail. He be set at liberty forthwith, if not required in any other case.

38. The appeal is thus allowed in part.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Gautam Chourdiya)
JUDGE