

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.336 of 2014**

- Madan @ Sudhanshu S/o Budhdimat Badhai Aged About 29 Years R/o New Kapsi, Ps Pakhanjur, Distt. Uttar Bastar Kanker C.G. ,

---- Petitioner

Versus

- State Of Chhattisgarh Through Sho, Ps Pakhanjur, Distt. Uttar Bastar Kanker C.G. ,

---- Respondent

CRA No.430 of 2014

- Smt. Pavitra Malakar W/o Late Shri Sameer Malakar Aged About 29 Years R/o New Kapsi, Thana - Pakhanjoor, Distt. North Bastar Kanker C.G. ,

---- Petitioner

Versus

- State Of Chhattisgarh Through Sho, Ps Pakhanjoor, Distt. North Bastar Kanker C.G.

---- Respondent

Cr. A. No.336 of 2014

For Appellant : Smt. Savita Tiwari, Advocate
 For Respondent/State : Shri Anupam Dubey, GA

Cr. A. No.430 of 2014

For Appellant : Shri S. K. Guha, Advocate
 For Respondent/State : Shri Anupam Dubey, GA

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Order on Board**Per Manindra Mohan Shrivastava, J.****26/10/2018**

This appeal is directed against the impugned judgment of conviction and order of sentence dated 01-02-2014 passed by the Additional Sessions Judge,

(FTC), Uttar Bastar, Kanker in Sessions Trial No.74/2012, whereby and whereunder the appellants have been held guilty for commission of offence under Section 302/34 & 201/34 of IPC and sentenced them, as described below-

Section-302/34 Life Imprisonment and fine of Rs.100/-, in
IPC default of payment of fine, additional RI for six
month

Section-201/34 Rigorous Imprisonment for 3 years and fine of
IPC Rs.100/-, in default of payment of fine,
additional RI for one month

Both sentences were ordered to run concurrently.

2. The prosecution story, as unfolded from the impugned judgment and records of the case is that upon receiving an information regarding dead body lying in an open place from Jeevan Mandal, PW-1, a dehati nalishi, (Spot FIR) Ex.P-1 was recorded and on the basis of dehati nalishi, dehati morgue intimation, Ex.P-2 was recorded at the spot. On the basis of those informations, a numbered FIR, EX.P-3 was registered in the police station.

During investigation, it was suspected that the appellants had illicit relations and the appellant Madan murdered Samir, husband of the co-accused- Smt. Pavitra Malakar. After preparing the inquest report over the dead body, which was without the head of the deceased, memorandum of appellant-Madan was taken in Ex.P-13, in the presence of witnesses and that of Smt. Pavitra Malakar also in Ex.P-14 in the presence of witnesses. Further case of the prosecution is that on the basis of memorandum statement so recorded, chopped of head of the deceased was recovered at a distance of 300 meters away from the place, where the dead body was found. The chopped off head was buried under the sand and it is the case of the prosecution that it was dug out at the instance of appellant-Madan and then seized. The prosecution is said

to have recovered the weapon i.e. *Sabbal* (long iron rod with sharp end) and short sword like weapon (*Katar*) from the house of the deceased. Dead body was sent for postmortem. Dr. S. Shende, PW-6 conducted postmortem and gave report in Ex.P-25. According to the doctor, cause of death of the deceased was homicidal in nature. The prosecution story was that the appellants Madan and Pavitra Malakar had developed illicit relations and the deceased-Samir, who was the husband of the co-accused-Smt. Pavitra Malakar, was eliminated by the appellant-Madan. After completion of usual investigation, charge sheet was filed before the Jurisdictional Magistrate, who in turn, committed the case to the Court of Sessions for trial. On the basis of the material contained in the charge sheet, learned Additional Sessions Judge framed the charges under Section 302/34 & 201/34 of IPC. The appellants abjured guilt and they were subjected to trial. In order to prove its case, the prosecution examined as many as 12 witnesses. The appellants were separately examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against them in the evidence led by the prosecution. The appellants came out with the defence that they are innocent. No defence witness was examined. Relying upon the evidence led by the prosecution witnesses as also recovery of chopped off head of the deceased from the ground, at the instance of the appellant-Madan and the motive of two appellants having illicit relations, held the appellants guilty of commission of offence of murder of Samir and sentenced them, as described above, giving rise to this appeal.

3. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel appearing for the appellant-**Madan** argued that the entire case of the prosecution is based on suspicious circumstances and there is no eye witness in this case. Circumstantial evidence of motive and recovery are not only doubtful, but also not by sufficient itself to

result in conviction of the appellant, because even if it is proved, it may only lead to a case of very strong suspicion short of proof beyond reasonable doubt so as to warrant his conviction. It is further submitted that the prosecution witnesses of recovery have not supported the case of the prosecution and therefore, conviction of the appellant is unsustainable in the eye of law.

4. Learned counsel appearing for the appellant-Smt. Pavitra Malakar would submit that even according to the case of the prosecution, as disclosed from the memorandum statement, Ex.P-13 & P-14, this appellant had no role to play and so far as assault is concerned, appellant-Madan had murdered the deceased and this appellant was woken up by the appellant-Madan, after killing Samir, therefore, against the present appellant-Pavitra Malakar, at the most, a case under Section 201 of IPC could be made out and nothing more.

In support of their submissions, learned counsel for the respective appellant have placed reliance on decisions in the cases of ***Prem Prakash Mundra v. State of Rajasthan and another*¹, *Samaru and another v. State of Madhya Pradesh (now CG)*², *Karlus v. State of M.P.(now CG)*³ and *Vijay Thakur v. State of Himachal Pradesh*⁴.**

5. On the other hand, learned State counsel would support the impugned judgment of conviction and order of sentence by submitting that the prosecution has not only proved by relying upon the evidence that on the basis of disclosure statement given by the appellants-Madan and Smt. Pavitra Malakar, chopped off head, buried under the ground was recovered, but also that there was illicit relations between them. It is also argued that the weapon alleged to be used in the commission of offence were also seized from the house of the appellant-Smt. Pavitra Malakar, therefore, on the basis of such incriminating

1 AIR 1998 SC 1189

2 Cr. A.No.2578 of 1997, decided by this Court on 04-04-2013

3 Cr. A.No.2242 of 1998, decided by this Court on 04-03-2014

4 (2015) 1 SCC (Cri) 454

circumstantial evidence of motive and recovery, conviction of the appellants does not warrant any interference.

6. Having heard learned counsel for the parties, we have perused the records.

7. According to the prosecution case, both the appellants-Madan and Smt. Pavitra Malakar had illicit relations, which was objected to by the deceased-Samir. Udhav Haldhar, PW-11 has deposed that the appellant-Madan had a dispute with the deceased-Samir concerning wife of Samir. The appellant-Madan used to mix-up with the wife of Samir and they had relations like husband and wife. The aforesaid facts were stated by Samir to the head of the village and in that meeting, Head of the village had instructed Madan. This witness says that in a meeting, he was personally present. He further deposed that 2-4 days thereafter, Samir came to home and informed that Madan had threatened him to kill and said that it doesn't look proper that Madan has such relations. This emphatic evidence with regard to existence of illicit relations between the two appellants, there being dispute between Samir and Madan and that they were called in a meeting and instruction was given to the appellant-Madan to behave properly and further that Samir was threatened by the appellant-Madan that he would be killed, have remained uncontroverted in the cross-examination of this witness. There is no reason as to why this witness should falsely implicate the appellant. He appears to be an independent witness.

8. Phani Sarkar, PW-3 has stated that his statement was taken by the police, in which, he had disclosed that Madan was frequently going to the house of Samir and it was a known fact amongst people that Madan was having illicit relations with the wife of Samir and he had also instructed Madan. This part of the evidence of this witness has remained uncontroverted in his cross-

examination.

9. From the uncontroverted testimony of aforesaid two prosecution witnesses, it is proved that Madan and Smt. Pavitra Malakar were strongly suspected having illicit relations and due to this act, there was a dispute existing between the appellant-Madan and the deceased-Samir and further that this fact was disclosed by Samir to Udhav Haldhar, PW-11 and also threat of life was given by Madan to Samir and attempt was made to resolve their dispute by the Head of the Village in a meeting, in which, Udhav Haldhar was personally present.

10. The prosecution has come out with the case that after appellant-Madan murdered Samir, his dead body was filled in a gunny bag and kept in the cycle and taken it to a distant place, where the head was chopped off. Further case is that chopped off head was buried under the sand 250-300 meters away, where the dead body was found on the side of the road. Memorandum of Madan has been recorded in Ex.P-13 in the presence of witnesses.

11. Chandrasekhar Dhruw, PW-12 has deposed in para 3 of his evidence that he had taken memorandum statement of Madan in the presence of witnesses and it was recorded as stated by him that chopped off head of the deceased-Samir was buried near *nala*. His further evidence is that on such disclosure statement, the appellant-Madan was taken to the spot and chopped off head was dug out from the place as stated by the appellant. Memorandum statement of another accused-Smt. Pavitra Malakar was also recorded. Udhav Haldhar, PW-11, who is an independent witness of memorandum of Ex.P-13 of the appellant-Madan, has clearly deposed that on 01-05-2012, Madan as well as Pavitra Malakar, both were interrogated by the police in his presence and when appellant-Madan was asked regarding the dead body, it was informed that the dead body was thrown near Alvar nala. When police further asked Madan as to

where chopped off head was lying, the appellant had taken them to a place about 300 meters away from the place where the beheaded body was lying and then under the sand, after digging, the chopped off head was recovered. In his cross-examination, he has denied suggestion that no memorandum statement of Madan and Pavitra Malakar was recorded in his presence. Though a suggestion has been given that he has having inimical relations with the appellants, this suggestion has been denied. No evidence has been led nor any suggestion is there to doubt the testimony of this witness on the ground that he had any inimical relation or definite motive to falsely implicate the appellant-Madan.

12. Baramadagi Panchnama, Ex.P-15 of the head has been duly proved by the Investigating Officer-Chandra Sekhar Dhruw, PW-12 and the witness of Baramadagi Panchnama, Udhav Haldhar, PW-11, which shows that chopped off head of the deceased-Samir was recovered, after it was dug out from the earth.

13. The other prosecution witness-Phani Sarkar, PW-3 has also stated in his examination-in-chief that after dead body of Samir was recovered, upon being enquired, the appellant -Madan had disclosed to the police regarding the place where the chopped off head was buried, which according to him was 200-250 meters away from the place, where beheaded body was recovered. This witness further says that the appellant got the chopped off head recovered after the same was dug out from the sand. In the cross-examination, however, this part of the evidence that the appellant Madan had disclosed regarding the place where the chopped off head was buried, is an improvement. But, as Udhav Haldhar, PW-11 and Chandra Sekhar Dhruw, PW-12 both have remained firm on the aspect of disclosure statement, the evidence of Phani Sarkar, PW-3 only corroborates the evidence of other witnesses that the appellant-

Madan had given disclosure regarding burial of chopped off head of the deceased-Samir.

14. The recovery of weapon i.e. *sabbal and katar* from the house of the deceased assume importance, in view of the background of the case that wife of the deceased, namely Pavitra Malakar, one of the appellants here and other appellant-Madan had illicit relations.

15. The recovery of chopped off head of the deceased from the ground, though at the instance of the appellant-Madan is, thus, proved by the prosecution by cogent and reliable evidence of prosecution witnesses including independent witnesses.

16. It is not a case where the chopped off head of the deceased was found lying around the place where the remaining part of the dead body (beheaded body) was found, but in view of the evidence which has come on record, it is clearly proved that the chopped off head was buried at a instance of about 300 meters from there. However, the fact which is proved is that the appellant Madan was knowing about the same. The evidence is that the chopped off head was buried, after opening a pit of 3-4 feet, which was dug out by the appellant in the presence of witnesses. This constitutes very incriminating circumstance pointing towards the guilt of the appellant-Madan.

17. Though, number of judgments cited before us by learned counsel for the appellants, present is not a case where only on the ground of recovery of the dead body, conviction of the appellant-Madan is sustained. As we have discussed hereinabove, there is unimpeachable evidence of Pavitra Malakar and Madan having illicit relations as also a dispute between Madan and Samir and further that Madan had given threat of life to Samir. This coupled with the recovery of the chopped off head of the deceased at the instance of the appellant-Madan makes the prosecution case concrete and proved beyond

reasonable doubt the involvement of the appellant Madan in murder of the deceased-Samir.

18. However, as we see, it is the prosecution's own case and disclosed from the two memorandum statements, Ex.P-13 & P-14, that it is the appellant-Madan, who had killed the deceased. Even according to the memorandum statement, which is prosecution case, Pavitra Malakar came out to see the dead body only when she was woken up by the appellant-Madan, after killing Samir. However, looking to the fact that the memorandum statement of Pavitra Malakar and Madan, which were simultaneously recorded, disclosed the place where the dead body was thrown as also the place where the chopped off head was buried, it could only make out a case of commission of offence under Section 201 of IPC. Further more, we do not find that the prosecution has come out with any evidence to even draw a reasonable inference that Pavitra Malakar shared common intention to murder her husband. Nothing could be brought before the Court as to how Pavitra Malakar played any role in murder of her husband. Coupled with this prosecution document, memorandum statement of Pavitra Malakar only alleges that she was asked at the spot, after waking her up by appellant Madan, after Madan had assaulted Sameer. Therefore, conviction of the appellant Pavitra Malakar under Section 302 of IPC cannot be sustained. However, her conviction under Section 201 of IPC has to be sustained and upheld.

19. In the result, the appeal of appellant-Madan is dismissed and his conviction under Section 302/34 & Section 201/34 of IPC is affirmed. As far as the appellant-Pavitra Malakar is concerned, her conviction under Section 302 of IPC is set aside, but her conviction under Section 201 of IPC is affirmed. Considering that Pavitra Malakar has been convicted and sentenced for a period of three years R.I. for commission of offence under Section 201 of IPC,

which she has already undergone by now, therefore, the appellant-Pavitra Malakar shall be set at liberty forthwith.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Rajani Dubey)
Judge