

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURCRA No. 890 of 2015

1. Jothram Agariya S/o Ghasiram Aged About 25 Years
2. Nandlal S/o Mangluram Agariya Aged About 27 Years

Both R/o Village Turikatra, P.S. Kartala, District Korba, Civil
And Revenue District Korba, Chhattisgarh

---- Appellants

Versus

1. State Of Chhattisgarh Through Station House Officer, Kartala,
Police Station Kartala, District Korba, Chhattisgarh,

---- Respondent

For Appellants	Shri C.J.K. Rao, Advocate
For Respondent/State	Shri Pawan Kesharwani, Panel Lawyer
For Objector	Shri Sameer Singh, Advocate

Hon'ble Shri Prashant Kumar Mishra, J.Hon'ble Shri Gautam Chourdiya, J.Judgment on BoardByPrashant Kumar Mishra, J.18-10-2019

1. The appeal is posted for hearing on I.A.No.2 for suspension of sentence and grant of bail to the appellants, however, with the consent of learned counsel for the parties, we have heard the appeal itself on merits.

2. Appellants would call in question the legality and validity of the impugned judgment whereby the trial Judge has convicted the appellants for committing offence under Section 458 read with Section 34 and under Section 302 read with Section 34 of the Indian Penal Code (for short 'the IPC') and have sentenced them to undergo RI for 14 years and to undergo imprisonment for life respectively for the said offences with usual default stipulations.
3. The appellants were sent for trial for committing murder of Trilokchand Agrawal (since deceased) during the intervening night of 29th/30th August, 2013 at about 12'O clock. As per the prosecution case, the deceased was having illicit relation with the mother of the appellant No.1 Jothram Agariya (for brevity 'A1'), therefore, A1 and his friend i.e. appellant No.2 Nandlal (for brevity 'A2') wanted to eliminate the deceased and to achieve the said common object they entered the shop-cum-house of the deceased at about 12'O Clock during the intervening night of 29th/30th August, 2013 when he was sleeping alone and they attacked him by means of knife and *farsi*. Mere intimation (Ex.P/3) was recorded at the instance of PW-2 Harishchandra Agrawal and immediately, thereafter, the First Information Report (FIR) (Ex.P/4) was registered having similar contents. In both the documents the assailants

are not named and the report was registered against unknown persons.

4. In course of investigation, appellants were taken into custody and their memorandum statements were recorded vide Ex.P/8 & Ex.P/9, consequent to which blood stained *sando banyan* was recovered from A1 vide Ex.P/13 and from A2 vide Ex.P/12. Knife & *farsi* were recovered from the spot and all these articles were sent for Forensic Science Laboratory (for short 'the FSL') examination. While 'B' group blood was found there over the knife (Article 'A') and *farsi* (Article 'B'), the report was negative in respect of *sando banyan* recovered from the appellants.
5. The prosecution examined 11 witnesses in course of trial and based on the evidence, the trial Judge has convicted the appellants as stated *supra*.
6. Shri C.J.K. Rao, learned counsel for the appellant, would submit that there is absolutely no evidence to connect the appellants with the crime, therefore, they deserve to be acquitted.
7. Shri Pawan Kesharwani, learned counsel for the State and Shri Samir Singh, learned counsel for the Objector, would

oppose the prayer on the submission that the memorandum witnesses PW-3 Vijay Kumar & PW-7 Malik Das have supported the prosecution, therefore, coupled with the motive for commission of crime the appellants have rightly been convicted.

8. Admittedly, there is no ocular version of the crime, as no witness has seen the appellants committing the crime. Case of the prosecution is, therefore, rests on circumstantial evidence. The principle as to when an accused can be convicted on the basis of circumstantial evidence has been propounded by the Supreme Court in the celebrated case of *Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*, wherein it has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-153 as under:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in Shivaji Sahebrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

‘certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and must be’ is long and divides vague conjectures from sure conclusions.’

- (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.”

9. In a recent judgment in *Nathiya Vs. State represented by Inspector of Police, Bagayam Police Station, Vellore, (2016) 10 SCC 298*, the Supreme Court has reiterated the above principles.
10. When we examined the evidence in the case at hand on the touchstone of law laid down by the Supreme Court, we find that none of the prosecution witness would make any direct allegation against the appellants. PW-2 Harischandra Agrawal, son of the deceased, who lodged the FIR, would state that since his father had illicit relation with the mother of A1, he had informed the police that A1 and his friend A2 have committed the murder. Significantly, he has not named the present appellants in the FIR. It may be possible that he might have informed the police subsequently but his case diary statement (Ex.D/1) also would not reflect that he had informed the police about the above aspect of the crime.

11. Similarly, PW-4 Chiranjeev Kumar, another son of the deceased, would project himself to be a witness of extra judicial confession, however, in his case diary statement (Ex.P/16) he has not informed the police about any such extra judicial confession made by the accused to him.
12. True it is that PW-3 Vijay Kumar & PW-7 Malik Das, who are witnesses to the memorandum statements (Ex.P/8 & Ex.P/9) and consequent seizure of *sando banyan* (Ex.P/13 & Ex.P/12), have supported the prosecution, however, the seizure of *sando banyan* is of no significance for the simple reason that during FSL examination blood was not found over these two articles in the FSL report dated 22-9-2014, which has not been exhibited during the trial, but finds mention in the impugned judgment of the trial Court.
13. It is the well settled proposition of law that the conviction only on the basis of memorandum and consequent recovery is not permissible unless the recovery is of any article which properly connects the accused to the commission of crime and is duly corroborated with other clinching evidence. The weapon used for commission of crime has not been recovered from the appellants. The *banyan* recovered from them was not found to be containing blood, much less human blood or

blood belonging to the same group as that of the deceased.

14. Moreover, there is no evidence of last seen together or evidence of any other scientific or technical nature, which may connect the appellants with the crime. The present is a case of absolute lack of evidence against the appellants. They have wrongly been convicted by the trial Court and hence they deserve to be acquitted of the charges.
15. Accordingly, conviction and sentence imposed on the appellants are hereby set aside and they are acquitted of the said charges. The appellants are in jail. They be released forthwith if not required in any other case, on each of them furnishing a personal bond for a sum of Rs.25,000/- with one surety each in the like sum to the satisfaction of the trial Court. The bail bond shall remain in operation for a period of six months as required under the provisions of Section 437-A of the Cr.P.C. The appellants shall appear before the higher Court as and when directed.
16. In the result, the instant criminal appeal is allowed.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Gautam Chourdiya)
Judge

Ankit