

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURCRA No. 572 of 2019

1. Atwarsai @ Atwar S/o Late Keshaw Ram Aged About 30 Years R/o Village Namna, Badkapara, P.S. Premnagar, District Surajpur Chhattisgarh.
2. Parbatiya W/o Late Agarsai Aged About 50 Years R/o Village Shyampur, P. S. Premnagar, District Surajpur Chhattisgarh.

---- Appellants

Versus

1. State Of Chhattisgarh Through Police Station Premnagar, District Surajpur Chhattisgarh

---- Respondent

For Appellants

Shri Jeet Patel, Advocate

For Respondent/State

Shri Vikas Shrivastava & Shri Santosh
Bharat, Panel Lawyer

Hon'ble Shri Prashant Kumar Mishra, J.Hon'ble Smt. Rajani Dubey, J.Judgment on BoardByPrashant Kumar Mishra, J.8-7-2019

1. The appeal is posted for hearing on I.A.No.1 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 appellant No.1–Atwarsai @ Atwar for committing offence under Section 302 of the Indian Penal Code (for short 'the IPC') and the appellant No.2 – Parbatiya for committing offence under Section 302 read with Section 120-B of the IPC and have been sentenced to undergo imprisonment for life.
3. The indisputable fact is that Agarsai (since deceased) was the father-in-law of appellant No.1 and husband of the appellant No.2.
4. It was alleged by the prosecution that during the period 4.00 pm of 25-12-2017 to 10.00 am of 26-12-2017 the appellants have assaulted the deceased over his face & head and also pressed his neck by legs causing his murder and the dead body was thrown near Maniharidand road. Khelsai (PW-6) lodged the merg intimation on 26-12-2017 and thereafter, the First Information Report (FIR) (Ex.P/7) was registered on 14-1-2018. In the FIR the complainant stated that the appellant No.2, deceased and his younger brother Muneshwar were residing in one house whereas he resides at a new house situated at a distance of 500 mtrs. At about 4.00 pm on 25-12-2017 Shanti Bai, W/o Siyaram witnessed the deceased

going towards Bhelpara. He did not return to his house in the night but no search was made as the deceased was in the habit of staying over night in the house of relatives. Fulchand (PW-5) witnessed the dead body of the deceased when at about 10.00 am he was returning from forest after fetching fuel woods. Thus, neither the appellants nor any other person was named in the FIR.

5. Appellant No.1 was taken into custody and his memorandum statement was recorded on 15-2-2018 i.e. after about two months of the date of incident. Consequent upon the memorandum statement (Ex.P/14), shirt & club were recovered from the possession of the appellant No.1 vide seizure memos Ex.P/15 & Ex.P/16, respectively. The seized articles were sent for FSL examination, however, the FSL report (Ex.P/27) was rendered negative finding no bloodstains over both the articles.
6. In the postmortem report (Ex.P/18) the cause of death was opined as due to hemorrhage shock due to massive internal bleeding which looks like homicidal in nature. The stomach was found to be filled with Alcohol; blood and blood clots were found present in lungs, but trachea was intact. On external examination, the Doctor found bleeding from right

ear of the deceased. Right shoulder was dislocated and deformities were found in right elbow and both knee joint present; multiple continuations were found on back, chest and neck; peeling of skin from right forearm & abdomen. Abrasions were found on left arm.

7. Based on circumstantial evidence of seizure of shirt & club the trial Court has convicted the appellants for the aforementioned offences.
8. We have heard learned counsel appearing for the parties and on scrutiny of the record, it appears the prosecution did not rely on any ocular evidence. There is no evidence of extra judicial confession nor there is evidence of any suspicion in the FIR. The only evidence relied by the prosecution while sending the appellants for trial was in the nature of memorandum statement of appellant No.1 and the consequent seizure of club & shirt.
9. Admittedly, the shirt & club were sent for FSL examination, but the report thereof vide Ex.P/27 was in negative. Thus, the seizure of shirt & club at the instance of the appellant No.1 would not assist the prosecution to prove the case against the appellants. Except for these two seizures, there is no other incriminating evidence against the appellant No.1 much less

the appellant No.2 against whom there is absolutely no evidence in the charge sheet.

10. Before proceeding further, it would be apt to bear in mind the principle as to when a conviction on the basis of circumstantial evidence can be recorded against the accused.
11. In the matter of *Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116*, the Supreme Court 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.”

12. 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.
13. In the case at hand, the chain of circumstantial evidence sought to be relied by the prosecution was in the nature of dispute between the appellant No.2 and her husband i.e. the deceased due to which the appellant No.2 persuaded the appellant No.1 to eliminate the deceased, however, this dispute is not such strong motive for committing the murder of the deceased. Except for this dispute/motive there is no evidence in the nature of extra judicial confession or last seen together. The dead body was not found in the house of the deceased or the appellant No.2, therefore, it is not a case of house murder where the husband has been killed by the other member residing in the house.
14. The evidence of seizure of shirt & club at the instance of appellant No.1 is of no consequence for the simple reason that during the FSL examination both the articles were not found to be carrying blood much less human blood. Thus, the chain of circumstantial evidence is not so complete as to implicate

the appellants to the exclusion of any other persons. The guilt of the appellants has not been proved by the prosecution beyond reasonable doubt. Therefore, the trial Court has committed serious illegality while convicting the accused persons only on the basis of seizure of shirt & club.

15. Accordingly, conviction and sentence imposed on the appellant No.1 under Section 302 of the IPC and the appellant No.2 under Section 302 read with Section 120-B of the IPC are hereby set aside and they are acquitted of the said charge. 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/-

(Rajani Dubey)
Judge

Gowri