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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.785 of 2019**

- Pitamber @ Gandhi, S/o Garibdas Manikpuri, Aged about 46 years, R/o- Village Bahunwagaon, P.S. Bemetara, District Durg (now Bemetara), Chhattisgarh

---- Appellant

Versus

- State of Chhattisgarh, Through- Police Station Dhadhi, District Durg (now Bemetara), Chhattisgarh

---- Respondent/State

For Appellant	: Shri Pawan Shrivastava, Advocate
For Respondent/State	: Shri Rajnish Singh Baghel, Deputy Advocate General

Hon'ble Shri Justice Prashant Kumar Mishra, J**Hon'ble Shri Justice Gautam Chourdiya, J****Judgment on Board by Justice Gautam Chourdiya****21.08.2019**

This appeal is listed for hearing on I.A. No.2 of 2019 application for suspension of sentence and grant of bail to the appellant, however, with the consent of learned counsel for the parties, it is heard finally.

2. Challenge in this appeal is to the judgment of conviction and order of sentence dated 07.09.2011 passed by learned Additional Sessions Judge, Bemetara, District Durg (C.G.) in Sessions Trial No. 16 of 2010, whereby the appellant stands convicted under Sections 302 and 120B of IPC for committing murder of Bihari Das and sentenced to undergo life imprisonment and fine of Rs.500/-, in default of payment of fine to undergo further rigorous imprisonment for two months on each counts. The appellant has been further convicted under Section 404 of IPC and sentenced to undergo rigorous imprisonment for three years, with direction to run all the sentences concurrently.

3. However, the trial Court has convicted and sentenced two accused persons namely Pitamber @ Gandhi (present appellant herein) and co-accused Bharat Das under the aforementioned Sections of IPC. The appeal i.e. Cr.A. No. 774 of 2011 filed by co-accused Bharat Das was dismissed on merits by this Court on 06.07.2017.

4. Deceased Bihari Das was the father-in-law of co-accused Bharat Das.

5. The facts, briefly stated, are as under:-

About a week prior to the date of incident i.e. 08.09.2009, deceased Bihari Das had gone to village Hirapur to get his pension amount and after getting pension, he went to the house of his son Mohan (PW-10) where he stayed for about 3-4 days and thereafter gone to the house of his daughter Champabai (PW-8) situated at village Bahunawagaon. When Bihari Das was staying in the house of Champabai, Jagmohan (PW-2), son of deceased, made a telephone call and talked to Bihari Das who informed him that he would come back after 1 or 2 days. However, when Bihari Das did not return for about 3 days then said Jagmohan again talked to his sister and brother-in-law on telephone and they informed him that said Bihari Das had already left for his house. Thereafter, the deceased was searched but his whereabouts could not be traced and therefore a missing report was lodged by Jagmohan (PW-2) on 22.09.2009 in police station Bemetara.

On 09.09.2009 one unknown body of a male was recovered from near the Dam at Bandhakhaar and accordingly a merg intimation (Ex.-P/22) was recorded at the instance of one Hiralal, son of village Kotwar. The Investigating Officer gave notice (Ex.-P/18) to the *Panchas* and prepared inquest (Ex.P/19) on the body of the deceased. The dead body of the deceased was sent for its postmortem to Government Hospital Bemetara vide Ex.-P/21, where the postmortem examination was conducted by Dr. A.M. Shrivastava (PW-11), who prepared his report Ex.-P/8. In the postmortem examination, cause of death could not be ascertained, hence viscera was preserved for chemical examination. Viscera was chemically examined and the Forensic Science Laboratory, Raipur in its report (Ex.-P/27) reported that aluminum phosphide poison (sulphas) was found in the contents sent for examination.

In the course of investigation of missing report of the deceased lodged by Jagmohan (PW-2), co-accused Bharat Das was interrogated on the basis of suspicion. The disclosure statement (memorandum) of co-accused was recorded at

about 09:40 am on 23.09.2009 vide Ex.-P/2 wherein he disclosed that on 08.09.2009 while he along with present appellant Pitamber was going to drop the deceased at village Badhuli, on the way they purchased sulphas from the medical shop situated near Ballar Hotel, Bemetara and after that they purchased country-made liquor, disposable glasses and snacks at village Birsinghi. They sat near Birsinghi Khaar Dabri to drink liquor where he mixed the pesticide (sulphas) in the liquor of deceased and the deceased died after drinking poison laced liquor. Thereafter, both co-accused and accused Pitamber got removed the golden ornaments and cash of Rs.2,500/- of deceased and buried the same in a corner of his house after keeping it in the cash-box. On the same day, at 10:00 am memorandum (Ex.-P/14) of appellant Pitamber was also recorded based on which gold ornaments, packet containing sulphas and case of Rs.2,500/- were seized at the instance of appellant Pitamber vide seizure memo of Ex.-P/15. The police had shown Jagmohan (PW-2) photograph of the dead body recovered on 09.09.2009 from Birsinghi Khaar forest and he identified the photograph as of his father Bihari Das. Unnumbered FIR (Ex.-P/13) was registered on the basis of missing report against both the accused persons under Sections 302, 328 & 397 of IPC. On 27.10.2009 identification of recovered articles was done by the Tahsildar (PW-15) vide Ex.-P/5) and the ornaments have been identified to be that of deceased by PW-8 Champabai, PW-10 Mohan Satnami and PW-13 Sukhdev Satnami.

6. After completion of usual investigation, the charge-sheet was filed against the accused persons and the trial Judge framed the charges under Sections 120B, 302 & 404 of IPC against them. In order to prove guilt of the accused persons, the prosecution examined as many as 23 witnesses. Statements of the accused persons were recorded under Section 313 of Cr.P.C. where they denied the circumstances appearing against them and pleaded innocence and false implication.

7. The trial Court after hearing the counsel for the parties in the matter and considering the material available on record, by the impugned judgment convicted

and sentenced the present appellant Pitamber @ Gandhi (appellant herein) and co-accused Bharat Das (appellant in Cr.A. No. 774 of 2011) in the manner as described above, hence this appeal.

8. Admittedly, there are no eye-witnesses in this case and the conviction of present appellant Pitamber @ Gandhi is based upon the circumstantial evidence, last seen and recovery of golden ornaments belonging to the deceased, one packet containing sulphas and cash of Rs.2,500/- from the possession of the accused/appellant Pitamber.

9. Counsel for accused/appellant submits that:-

- the appellant has been convicted solely on the basis of circumstantial evidence but the circumstances relied upon by the prosecution, being not of conclusive nature, are not sufficient to convict the appellant for the offence like murder.
- Identification of articles allegedly recovered at the instance of accused/appellant has not been done as per procedure prescribed under the law because the police was present at the time of identification. Even, for the sake of argument, if the recovery of ornaments is admitted, then also the appellant could not be convicted under Section 302 of IPC and at best he could be convicted for stealing the articles belonging to the deceased.
- Prosecution has failed to establish beyond reasonable doubt that the deceased was last seen in the company of the appellant as the statements of witnesses of last seen i.e. PW-7 and PW-8 have been recorded after much delay and the prosecution failed to explain the delay in recording the statements of these witnesses.
- There is absolutely no motive proved by the prosecution as against the appellant and therefore the entire case of prosecution fails to the ground.

10. On the other hand, supporting the impugned judgment learned counsel for the State submits that:

- conviction of accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
- Packet containing sulphas was seized from the possession of accused/appellant and as per report of the chemical analyst (Ex.-P/27), poisonous substance i.e. aluminium phosphide insecticide (sulphas), was

found in the viscera of the deceased which was sent for chemical analysis.

- Articles belonging to the deceased were seized at the instance of accused/appellant and these articles were duly identified by the witnesses to be that of the deceased. No explanation was given by the accused in his statement under Section 313 Cr.P.C. as to how he came into possession of the articles belonging to the deceased.
- “last seen evidence” given by the wife and son of co-accused Bharat Das is perfectly reliable and there are no contradictions in their statements. Their statements are quite natural and trustworthy.
- Delay in recording the statements of some witnesses is required to be ignored in the light of fact that FIR itself was registered on 23.09.2009 after conducting due enquiry.

11. We have heard learned counsel for the parties and have also perused the records of the Sessions Court.

12. Baran Singh (PW-21) is the witness of seizure memo (Ex.-P/15) and memorandum of appellant Pitamber (Ex.-P/14). He has stated that police had seized golden ornaments, packet containing sulphas and 25 currency notes of 100 denomination at the instance of accused/appellant Pitamber. Similarly, PW-22 Inderbhan Singh is also the witness of seizure (Ex.-P/15) and memorandum of appellant Pitamber (Ex.-P/14) and he would also support the memorandum statement and the recovery. PW-21 and PW-22 both have admitted their signatures over the Ex.-P/14 & Ex.-P/15.

13. Jagmohan Satnami (PW-2), son of deceased, is the person who lodged missing report of deceased on 22.09.2009. He is also witness of identification memo of photograph (Ex.-P/3). According to this witness, his father (deceased) left the house saying that he is going to village Hirapur to collect his pension and after that he would go to village Bahunawagaon where his sister (daughter of deceased) is residing along with her family. He has further stated that after about eight days, he made a telephone call at the house of his sister which was attended by his sister and thereafter he had talked to his father also who told him that he will come after one or two days. He has further stated that two days thereafter co-accused Bharat

Das (in Cr.A. No. 774 of 2011) informed him on telephone that he made his father board the bus. However, when he did not find his father at home, he again enquired from co-accused Bharat Das who again told him that he made his father board the bus. Thereafter, he started searching his father (deceased) and when his whereabouts could not be traced, he lodged a missing report in the police station.

14. Saroj Bai Barle (PW-3), wife of Jagmohan (PW-2), has supported the version of her husband that the deceased had gone to the house of co-accused Bharat Das and thereafter he went missing.

15. Chitadas Anant (PW-4) is the witness of identification memo of articles (Ex.-P/5). He has stated that at the time of identification, the police was also present but he clarifies that the entire proceeding was being carried out by the Tahsildar. In the cross-examination, he has not stated that there was no interference by the police officer in the identification proceedings.

16. Kamlesh Kumar Sahu (PW-5) is also a witness of identification memo of ornaments (Ex.-P/5). He has also made almost similar statement as has been made by PW-4 Chitadas Anant. According to this witness also, at the time of identification of ornaments, though the SHO was also present but he has not taken part in the proceedings.

17. Amir Chand Satnami (PW-7), aged about 12 year, is the minor son of co-accused Bharat Das. He has been examined by the prosecution as witness of last seen. This witness has stated that last year at the time of immersion of Lord Ganesha idol, his maternal grand-father (deceased) had come to his house and stayed with them for four days. His grand-father was wearing three lockets of gold and a golden earring. He has further stated that his father (co-accused Bharat Das) along with present appellant Pitamber had gone to drop his grand-father, however, his father (co-accused Bharat Das) did not return on that day and came on the next day and informed him that he (co-accused) dropped his grand-father. He has further stated that thereafter behaviour of his father got changed and he used to be remain quite. Nothing incriminating could be elicited in the cross-examination of this

witness which makes the testimony of this witness unreliable or untrustworthy.

18. Champa Bai (PW-8), wife of co-accused Bharat Das, is a witness to identification of articles Ex.-P/5. She has stated that when her father (deceased) came to her house, he was wearing gold ornaments. She has stated that her husband (co-accused Bharat Das) had gone to drop her father at the bus stand, but he did not return home on that day. He returned on the next day and being asked, he (co-accused Bharat Das) told that he had dropped her father (deceased) at Ghotiya. After one or two days thereafter her brother Jagmohan (PW-2) made a telephone call and enquired about her father and then she informed him that her husband had gone to drop the deceased. In answer to the question put by the Court to this witness regarding behaviour of co-accused Bharat Das after his return, this witness has replied that he used to be remain silent. She has further stated that she along with his brother Jagmohan (PW-2) had gone to the police station and lodged missing report showing her suspicion on co-accused Bharat Das and present appellant Pitamber. In the cross-examination of this witness, the defence has not been able to elicit anything incriminating which makes her testimony unreliable or untrustworthy.

19. Mohan Satnami (PW-10), son of deceased, has identified the body as his father Bihari Das vide Ex.-P/3. He is also witness of identification memo of ornaments (Ex.-P/5). Sukkdev (PW-13) is also witness of identification memo of ornaments (Ex.-P/5). Both PW-10 & PW-13 statements are also similar to that of Jagmohan (PW-2).

20. Vijay Verma (PW-12) is a shopkeeper from whose shop the poisonous substance Sulphas was purchased by the accused/appellant. He has stated that the said chemical was purchased by appellant Pitamber and co-accused Bharat Das saying that the same will be used by them for preserving gram.

21. Ashok Kumar Tiwari (PW-15) is the Tahsildar who conducted identification proceedings of seized articles vide Ex.-P/5. He has stated that gold ornaments were duly identified by PW-8 Champa Bai wife of co-accused Bharat Das, PW-10

Mohan Satnami, son of deceased, and PW-13 Sukkdev, another son of deceased.

22. The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

23. Keeping the above in view, now let us consider the evidence. Amir Chand Satnami (PW-7), a minor son of co-accused Bharat Das whose evidence was recorded by the Court after satisfying itself of the fact that he understands the duty to speak truth and is able to rationally answer the questions put to him. He has stated that on 08.09.2009 co-accused Bharat Das along with accused/appellant Pitamber had gone to drop the deceased, but Bharat Das did not return on that day and returned on the next day and informed him about the dropping of his grandfather (deceased). Champa Bai (PW-8), wife of co-accused Bharat Das, has also made almost similar statement. According to this witness (PW-8), her husband (co-accused Bharat Das) told her that he would go to drop her father. She has further stated that after returning from the field, when she asked from her son (PW-7) regarding whereabouts of her husband (co-accused), she was informed by her son that they have not returned yet. According to this witness (PW-8), her son (PW-7) informed her that co-accused Bharat Das and accused/appellant Pitamber both have gone to drop the deceased. She has further stated that co-accused returned on the next day and he informed her that he had dropped her father at Ghothiya. It is deducible from the evidence of these two witnesses (PW-7 & PW-8) that the co-

accused along with accused/appellant Pitamber took the deceased along with them from co-accused house to make deceased board the bus and thereafter the deceased was not seen alive by anyone till recovery of his body on 09.09.2009 from near the dam situated at Birsindhikhaar. These witnesses (PW-7 & PW-8) are family members of co-accused Bharat Das and before the incident in question, the relation between these witnesses and the co-accused was cordial and therefore, there does not appear any reason to disbelieve their evidence. Their evidence remain unshattered even in the cross-examination by the defence. Thus, from the evidence of aforesaid witnesses, it is established that the co-accused and accused/appellant Pitamber took the deceased along with them from co-accused house to drop the deceased and thereafter the deceased was never found alive. Even on a specific question as to what the accused/appellant Pitamber had to say in this regard, except saying that it was incorrect, the accused/appellant gave no further explanation in his statement recorded under Section 313 Cr.P.C., whereas, once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive.

24. True it is that the diary statement of Champa Bai (PW-8) was recorded after about one month from the date of death of the deceased. However, during trial neither an explanation was sought from this witness as to why her diary statement was recorded with such delay nor the investigating officer was questioned about the delay in recording statement of the aforesaid witness and therefore, the delay in recording statement of PW-8 cannot be held to be fatal to the prosecution. The law is settled in this regard that unless the Investigating Officer is asked questions about delay in recording statements and explanation is sought from the witnesses as to why their statements were recorded late, the statements by themselves did not become suspicious or concocted. For this view we are fortified from the decisions of the Hon'ble Supreme Court in the matters of **State of UP Vs. Satish** reported in **(2005) 3 SCC 114** and **Vijay Kumar Arora Vs. State Govt. of NCT of Delhi** reported in **(2010) 2 SCC 353**.

25. That apart, the accused/appellant Pitamber herein led the police party to his house and gave recovery of packet containing sulphas, 25 currency notes of 100 denomination and also gave recovery of gold ornaments worn by the deceased which were duly identified by the sons & daughter of the deceased as belonging to the deceased. We have carefully examined the manner in which the proceeding of identification of ornaments was conducted by Ashok Kumar Tiwari (PW-15) and we have no reason to doubt the identification of ornaments by the prosecution witness as belonging to the deceased.

26. Admittedly, at the time of identification proceedings of articles the police was present, but mere presence of the police in the courtyard/premises where the identification proceedings of articles was being conducted by the Tahsildar (PW-15) is not enough to discard the entire identification proceedings as of no value. The principle underlying the exclusion of the police from the identification parade is twofold : *first*, to remove any undue influence of the prosecuting or investigating agency on the identifying witnesses; and, *secondly*, to comply with the provisions of Section 162 of the Code of Criminal Procedure which prohibits the conduct of identification parades by police officers. In the present case also, there is no whisper in the testimonies any of the witnesses to the effect that police officer had exerted any undue influence on anybody or taken effective part in the parade. According to the Tahsildar (PW-15), who conducted the identification proceedings of articles, the police was not present in the Court and the entire proceedings was conducted by him only.

27. Now the next question arises for consideration of this Court is whether mixing of the poison in the alcohol by the co-accused was within the knowledge of accused/appellant Pitamber and they made the deceased drink the same as a result of which he died and thus the accused persons committed murder of the deceased?

28. The Supreme Court in ***Sharad Birdhichand Sarda Vs. State of Maharashtra*** reported in **(1984) 4 SCC 116**, in the case of death by poisoning held

that the Court must carefully scan the evidence and determine the following four important circumstances which can justify a conviction:

- i. the accused had the poison in his possession.
- ii. the deceased died of poison said to have been administered.
- iii. Accused had an opportunity to administer the poison to the deceased.
- iv. there is a clear motive for the accused to administer poison to the deceased.

29. In the present case, to prove the above circumstances the prosecution has relied upon the evidence of PW-7 Amir Chand Satnami, PW-8 Champa Bai and PW-12 Vijay Verma as well as medical evidence, besides seizure memos of Ex.-P/1 and Ex.-P/15. According to Vijay Verma (PW-12), who was running a medical shop, the accused/appellant Pitamber and co-accused Bharat Das sought for pesticides by saying that the same will be used by them for preservation of gram and accordingly he gave them packet of sulphas worth Rs.10/-. This witness (PW-12) is an independent witness and had no reason to give false evidence against the accused/appellant herein. Nothing incriminating could be elicited by the defence in the cross-examination of the aforesaid witnesses so as to make his testimony unreliable or untrustworthy. The accused/appellant in his statement recorded under Section 313 Cr.P.C. did not offer any explanation with regard to recovery of sulphas at his instance, except making a bald denial. Thus, the fact that the accused persons had purchased sulphas stands proved by the examination of PW-12.

30. According to Doctor A.M. Shrivastava (PW-11), who conducted autopsy, there was no external or internal injury found on the body of the deceased. Since the cause of death of the deceased could not be ascertained, as is evident from postmortem report Ex.-P/8, viscera was preserved and sent for chemical analysis. Report of FSL (Ex.-P/27) makes it clear that aluminium phosphide (sulphas) in the viscera of deceased was found. It is, therefore, clear that the deceased died due to poisoning. The proved circumstance that the deceased was last seen alive in the company of the accused/appellant Pitamber and co-accused Bharat Das is sufficient to hold that the co-accused along with accused/appellant Pitamber had all

the opportunities to administer poison to the deceased by mixing it in alcohol. As per seizure memo (Ex.-P/15), it was also proved that golden ornaments, packet containing sulphas and 25 currency notes of 100 denomination were seized at the instance of accused/appellant Pitamber to connect him with crime in question.

As regards the motive, normally, there is a motive behind every criminal act. However, this does not mean that where prosecution has failed to prove motive, the offender cannot be convicted. It is well known that motive is always hidden in the heart of the culprit and the prosecution is not always obliged to prove motive. However, in the present case, the gold ornaments and cash of deceased were found missing and the same were got recovered from the specified place by the accused/appellant on the basis of his disclosure statement (Ex.-P/14). Thus, it is clear that the appellant had motive to commit the crime. The motive was to steal the gold ornaments and cash of the deceased.

31. From the above, we are of the opinion that all the above four circumstances have been established by the prosecution by leading proper evidence and the trial Court has not committed any illegality in placing reliance on the prosecution evidence while convicting the accused/appellant for the murder of Bihari Das.

32. The calculative effect of the above is that the circumstances from which the conclusion about the guilt of the accused/appellant is to be drawn are fully proved. The circumstances proved are conclusive in nature and are consistent with the hypotheses of guilt of the accused/appellant and inconsistent with his innocence. Therefore, we do not find any reason to interfere with the findings recorded by the trial Court.

33. In the result, the appeal has no substance, the same is liable to be dismissed and is hereby dismissed. Accused/appellant is already in jail, therefore, no separate direction regarding his surrender etc. is needed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge