

AFR

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No. 511 of 2002**

- Goverdhan Tirki, S/o Dilsai Tirki, aged 25 years, R/o Tusva-ama, P.S. Pathalgaon, District Jashpurnagar(C.G.)  
(Accused No.1)

---- Appellant

**Versus**

- State of Chhattisgarh, Through the S.H.O. P.S. Pathalgaon (C.G.)

---- Respondent/State

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| For Appellant/Accused (A-1) : | Shri Rajesh Ranjan Sinha, Advocate |
| For Respondent/State :        | Shri Ashish Gupta, Panel Lawyer    |

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**Hon'ble Shri Justice Gautam Chourdiya, J**

**Judgment on Board**

**20.01.2020**

- This appeal arises out of the judgment of conviction and order of sentence dated 26.03.2002 passed by the Additional Sessions Judge, Jashpurnagar (C.G.) in Sessions Trial No. 148 of 2001, whereby Appellant Goverdhan Tirki (A-1) stands convicted and sentenced as under:-

| <b><u>Conviction</u></b>                                                      | <b><u>Sentence</u></b>                                                                                            |
|-------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| <u>Accused/Appellant Goverdhan Tirki:</u>                                     |                                                                                                                   |
| Under Section 457 of Indian Penal Code (hereinafter referred to as the 'IPC') | R.I. for fifty days and pay a fine of Rs.100/-, in default of payment to further undergo R.I. for 15 days.        |
| Under Section 380 of IPC                                                      | R.I. for fifty days and pay a fine of Rs.100/-, in default of payment to further undergo R.I. for fifteen days.   |
| Under Section 304 Part-II of IPC                                              | R.I. for five years and pay a fine of Rs.1,000/-, in default of payment to further undergo R.I. for three months. |
| All the sentences to run concurrently                                         |                                                                                                                   |

- In the present appeal, there are two accused persons namely Goverdhan Tirki (A-1) and Subanram (A-2). Vide order of this Court dated 15.11.2002,

the appeal filed on behalf of accused Subanram (A-2) had been withdrawn with liberty to file the revision petition and his name has been deleted from the cause-title. Therefore, the appeal on behalf of accused Goverdhan Tirki (A-1) is being heard for final disposal.

3. Facts of the case in brief are that merg intimation (Ex.-P/15) and F.I.R. (Ex.-P/2) were lodged by PW-2 Lohar Sai on 17.03.2001 at about 07:45 am informing the police that he is *Kotwar* of village Beldegi. Deceased Nawal Sai aged about 37 years is his cousin brother. On 16.03.2001 at about 10:00 pm, he (PW-2) was in his home, he heard the cries like *chor-chor* from *Shiksha Gaurantee Prathmik Pathsala, Beldagi*, hearing this, he and Phool Sai went to the field of one Somaru and saw that Nawal Sai was lying on the field of Somaru. At that time, Nawal Sai was alive where Roop Sai and Ramsuchit were also present there. Roop Sai told him (PW-2) that two persons entered the school and seeing the light of torch, Nawal Sai, Roop Sai and Ramshuchit reached near the school, then both the thieves ran away from the school. When Nawal Sai, Roop Sai and Ramshuchit chased the thieves, then one of thieves gave knife blow on the stomach of Nawal Sai. Nawal Sai fell down on the ground (field) and succumbed to knife injury. These facts were informed to Sarpanch Kunwar Sai, Panch Bandhan Sai and other villagers. The F.I.R. (Ex.-P/2) was registered against two unknown persons.
4. The investigating officer reached the place of occurrence, gave notice to the *panchas* vide Ex.P/16 and prepared inquest on the dead body of Nawal Sai vide Ex.-P/3. Dead body of deceased Nawal Sai was sent for postmortem examination to Community Health Centre, Pathalgaon vide Ex.-P/6A. Postmortem examination was conducted by PW-7 Dr. L. Banoda who gave his report vide Ex.-P/6 finding following injuries on the body of the deceased:-

1. Incised (stabed) wound of size of 3cm x  $\frac{3}{4}$  cm x 6 cm over front

of left side of abdomen (hypochondrial umbilical region), reddish coloured, loops of small intestine protruding out of the wound of dark reddish brown coloured.

2. Clotted blood present around the wound. Dissection showing cutting of peritoneal layer and abdominal muscle layer (wall) and wounding going to depth upto stomach where incised wound of 2.5cm x ¾cm + over potero interior aspect of greater curvature of stomach. Food material undigested food material came out in abdominal cavity.

Doctor opined that the cause of death was due to abdominal injury (vital organ- stomach, omentum & intestine involved). Mode of death was due to shock and coma and was homicidal in nature. The death had occurred within 24 hours prior to postmortem examination.

5. During investigation, two bicycles, one bag ((bora) containing 5 kg rice (*usna*-rice), one *gamchha* (towel), ½ kg pulse (*masoor-daal*), one iron lock and half-burnt paper which was burnt inside the school & match-box were seized vide Ex.P/9; one ever-ready torch was seized from the place of occurrence (from the field of Somaru) vide Ex.-P/12. *Nazri-naksha* was prepared by Patwari Vetram Bhagat (PW-8) vide Ex.-P/17.
6. Accused Goverdhan (A-1) was taken into custody on 18.03.2001 and his memorandum statement (Ex.-P/10) was recorded consequent to which a knife was recovered from his possession vide Ex.-P/11. Test identification of two bicycles was conducted on 18.03.2001 in the presence of police at the ground in front of primary school, village Turvaama vide Ex.-P/13 & Ex.-P/14 and the bicycles belonging to accused (A-1 & A-2) were duly identified by accused Goverdhan Tirki (A-1) and one Laloram. Accused Subanram (A-2) was taken into custody on 28.03.2001 and his memorandum statement (Ex.-P/4) was recorded consequent to which an iron rod was recovered from his possession vide Ex.-P/5.
7. After completion of investigation, charge-sheet was filed for the offence

under Sections 460, 302, 457, 380 read with Section 34 of IPC against the accused persons.

8. While framing charge, the learned Additional Sessions Judge, Jashpurnagar (C.G.) framed the charges against the present accused/appellant Goverdhan Tirki (A-1) and accused Subanram (A-2) under Sections 457, 380 and 302 alternatively Section 302 read with Section 34 of IPC.
9. So as to hold the accused (A-1 and A-2) guilty, the prosecution examined 11 witnesses in support of its case. Statements of the accused 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. No defence witness has been examined on behalf of the accused persons.
10. After appreciation of the evidence available on record, the learned Additional Sessions Judge, Jashpurnagar (C.G.) by the impugned judgment, while acquitting the appellant Goverdhan Tirki of the charge under Section 302 alternatively Section 302 read with Section 34 of IPC, convicted and sentenced him as mentioned in para- 1 of this judgment, hence this appeal.
11. Shri Rajesh Ranjan Sinha, learned counsel appearing on behalf of appellant Goverdhan Tirki (A-1) submits that in this case no any witness to the incident who has seen the offence committed by present appellant Goverdhan Tirki has been examined, nor the chain of circumstances to connect the present appellant is complete to prove his involvement in this crime. He further submits that it is against the law that appellant Goverdhan Tirki was compelled to give evidence against him as the identification of bicycles conducted by Sarpanch Kunwar Sai (PW-10) in presence of police vide Ex.-P/13 and it is not admissible as per the provisions of Article 20 (3) of the Constitution. He further submits that as per Ex.-P/14, identification of bicycles, one Laloram has identified the bicycles belong to accused persons (A-1 & A-2), but Laloram has not been examined by the prosecution.

Therefore, no any opportunity was afforded to the appellant Goverdhan Tirki to cross-examination Laloram as to how Laloram identified the bicycles belonging to the accused persons, nor any evidence is produced by the prosecution to connect the appellant/accused with the present crime. He also submits that the deceased Nawal Sai sustained knife injury and knife was seized from accused Goverdhan Tirki (A-1), but no blood stain was found on the knife. He further submits that as per Ex.-P/9, Ex.-P/11 & Ex.-P/12 seizure of bicycles, food-grains, *gamcha*, broken-lock, knife, torch batter etc. was made and produced before the trial but the same were not identified by any person. Therefore, there is no cogent and clinching evidence against the present appellant adduced by the prosecution and the trial Court has wrongly convicted and sentenced the present appellant Goverdhan Tirki (A-1) for the offence under Sections 457, 380 & 304 Part-II IPC.

**12.** Shri Ashish Gupta, learned Panel Lawyer appearing on behalf of State opposes the contention made by learned counsel for the appellant and submits that as per postmortem report, incised (stab) wound by knife found on the body of the deceased and knife was seized from accused Goverdhan Tirki according to his memorandum statement, therefore, there is specific evidence against accused Goverdhan Tirki. He further submits that as per seizure memo (Ex.-P/9), two bicycles were seized from the place of occurrence near school on 17.03.2001 and that both bicycles belong to accused persons (A-1 & A-2) and was also identified by accused Goverdhan Tirki (A-1) himself and one Laloram by way of test identifications (Ex.-P/13 & Ex.-P/14) that one of the bicycles belonged to accused Goverdhan Tirki. The learned trial Court has rightly convicted and sentenced the accused persons (A-1 & A-2) for offence under Sections 457, 380 & 304 Part- II of IPC, therefore, the impugned judgment of the trial Court needs no interference by this Court.

- 13.** Having heard rival contentions of the parties, I have perused the record of Sessions Trial No. 148/2001.
- 14.** It is not disputed by learned counsel for the parties that deceased Nawal Sai has died due to knife injury on his abdomen. Inquest (Ex.-P/3) has been proved by PW-3 Sukhu Uraon and postmortem report (Ex.-P/6) has been duly proved by PW-7 Dr. L. Banoda where he found incised (stabbed) wound of size of 3cm x  $\frac{3}{4}$  cm x 6 cm over front of left side of abdomen and due to that injury deceased Nawal Sai died.
- 15.** It is also not disputed by the State counsel that as per Ex.-P/13 identification of two bicycles was made by the witness in the presence of the police, in which one bicycle belonging to accused Goverdhan Tirki was identified by him and another bicycle belonging to accused Subanram was also identified. Appellant Goverdhan Tirki was arrested on 18.03.2001 at about 18:30 hours from village Tuswaama and accused Subanram was arrested on 28.03.2001 at about 22:45 hours. Admittedly, when accused Goverdhan Tirki gave statement regarding involvement of the bicycles in the crime in question, he in police custody and as such the confessional statement so made by the accused being hit by the provisions of Article 20(3) of the Constitution of India as well as Sections 25 and 26 of the Evidence Act is not admissible in evidence and cannot be taken against him.
- 16.** Looking to the facts and circumstances of the case, PW-10 Kunwar Sai has admitted in paras 2, 3, & 4 that the police officer had mixed 5-6 bicycles in the test identification of the bicycles and Goverdhan Tirki identified his bicycle and bicycle of accused Subanram in identification parade conducted by witnesses in the presence of police officer on 18.03.2001. As per Ex.-P/14, another test identification of bicycles was conducted in which one Laloram has duly identified the bicycles belonging to Goverdhan Tirki and Subanram. PW-10 Kunwar Sai has also admitted that at the time of test identification of bicycles, accused Goverdhan Tirki was in custody of police.

Therefore, it is not admissible evidence against accused Goverdhan Tirki as on the compulsion of police, accused Goverdhan Triki has given evidence against him and identified the bicycles belonging to himself and accused Subanram and it is hit by Article 20(3) of the Constitution and Sections 25 and 26 of the Evidence Act.

**17.** Further, no identification was conducted by the police regarding food-grains etc (rice & *masoor-daal*) seized from the place of occurrence that the articles so seized (rice & *masoor-daal*) belonged to *Shiksha* Guarantee, Primary School or any other person.

**18.** PW-3 Sukhu Uraan has stated that on the date of incident, he was sleeping at his home and when at about 09:00 pm, Nawal Sai seeing the light towards *shiksha* guarantee school woke him up, then, he and Nawal both went towards school from where two persons ran away from inside the school, seeing this Nawal Sai chased them. When Nawal Sai tried to catch the thief, one of the thieves gave knife blow on the abdomen of Nawal Sai. PW-3 stated that after the death of Nawal Sai i.e. next day of the incident, two bicycles, one bag containing rice and pulse were seen in the school. But, no any evidence was adduced by the prosecution that the said rice and pulse belonged to any person or school, or that the other articles belong to the ownership and possession of the school. Therefore, no any specific evidence adduced by the prosecution for the offence under Section 457 & 380 IPC against appellant Goverdhan Tirki that he committed lurking house-trespass or house breaking by night or theft in dwelling house etc., nor any article was proved to have been stolen by accused Goverdhan Tirki which belonged to the school or any person.

**19.** Only one circumstantial evidence available against appellant/accused Goverdhan Tirki is that on his memorandum statement (Ex.-P/10), one knife was recovered (seizure memo Ex.-P/11) at his instance, just after his arrest on 18.03.2001, but that seizure of said knife was not sufficient evidence to

connect appellant Goverdhan Tirki with crime because no blood stain was found on the knife and FSL report has not supported the case of prosecution

20. To bring home the charge for committing murder on the basis of circumstantial evidence, the prosecution has to prove chain of circumstantial evidence which only proves the guilt of the accused to the exclusion of any other person who might have committed the crime. The principle has been succinctly laid down by the Supreme Court in ***Sharad Birdhichand Sarda v. 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 v. 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.”

**21.** Learned trial Court has specifically mentioned in its judgment in para 3 that the knife seized from accused Goverdhan Tirki was sent for FSL examination, but as per FSL report, no blood stains was found on the knife. There is no eyewitness in this case, nor any evidence regarding the deceased being last seen with accused Goverdhan Tirki and stolen property not proved by the prosecution, nor any article produced and exhibited before the trial Court. Only bicycles seized from the place of occurrence were said to be identified by accused Goverdhan Tirki himself who was at that time in custody of police and as such, it is not admissible in evidence.

**22.** For the foregoing reasons and discussions, the appeal is allowed. The conviction and sentence awarded to appellant Goverdhan Tirki (A-1) under Section 457, 380 & 304 Part-II of IPC are set aside. Appellant Goverdhan Tirki is acquitted of the said charges framed against him. If fine amount has been deposited by the appellant, the same be refunded to him.

**23.** The appellant is reported to be on bail, therefore, his bail bonds shall continue for a period of six months from today in view of the provisions of Section 437A of Cr.P.C.

Sd/-  
**(Gautam Chourdiya)**  
Judge