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HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 19 of 2012

- Gainduram Tekam, S/o Sher Singh, Caste Gond, aged about 55 years, R/o Tekadhodha, Police Station Doundi, District Durg (CG)

---- Appellant

Versus

- State Of Chhattisgarh, through the Police Station Doundi, District Durg (CG)

---- Respondent

CRA No. 371 of 2013

- Hinsa Ram Bhuarya S/o Salikram Halba Aged About 26 Years R/o Village Hathigorra, Police Station Dondi, Distt. Durg (C.G.)

---- Appellant

Versus

- State Of Chhattisgarh Through Station House Officer, Police Station Dondi, Distt. Durg (C.G.)

---- Respondent

For Appellants : Mr. B.P. Singh, Advocate.

For Respondent : Ms. Fouzia Mirza, Additional Advocate General

Proceeding Through Video Conferencing

**Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Gautam Chourdiya, JJ**

Judgment On Board By Prashant Kumar Mishra, J

04/08/2020 :

1. In these two connected appeals which are arising out of same judgment of conviction and sentence, the appellants have called in question the legality and validity of impugned judgment of conviction and sentence dated 21.12.2011 passed by the Additional Sessions Judge Balod, District Durg, in ST No.54/2011 wherein the appellants have been convicted under Section 302 of the IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.100/- each, in default of payment of fine to further undergo RI for 3 months each.
2. As per the prosecution case, the appellants committed murder of deceased Tulsa Bai, between 8-10 am on 27.6.2010. According to the prosecution, accused Gainduram is the *Baiga*. Accused Hinsaram and Gainduram conspired to sexually exploit the deceased by calling her in the house of Gainduram in the morning of 27.6.2010 on the pretext of performing some rituals. Hinsaram went to the house of Tulsa Bai to invite her to a place named Chetna Kendra. When Tulsa reached there, Gainduram requested for sexual favour to which Tulsa Bai retaliated by filthily abusing the accused persons, on which both the accused persons dashed her head on a wall and thereafter struck repeated blows over her head by means of stone. She was also injured over her neck and

abdomen by means of Murga Kati and thereafter she was throttled to death.

3. Merg intimation (Ex.-P/1) was lodged by one Bhalesh Kumar. Memorandum statement of Hinsaram was recorded vide Ex.-P/3 consequent to which Murga Kati was seized vide Ex.-P/4. Memorandum statement of Gainduram was recorded vide Ex.-P/3 consequent to which one Kurta and Dhoti was recovered vide Ex.-P/11. In the postmortem report (Ex.-P/16), the deceased was found to have sustained 16 injuries and death was opined to be due to asphyxia, on account of strangulation (throttling), homicidal in nature. There is no FSL report for proving the presence of blood over Murga Kati or over Kurta and Dhoti recovered from Gainduram. FIR (Ex.-P/21) was registered on 28.6.2010 against unknown persons. Dehati Nalishi (Ex.-P/22) was also registered against unknown persons.
4. In course of trial, the prosecution examined as many as 13 witnesses to bring home the charges. On the other hand, the accused persons examined 3 defence witnesses in support of their plea of innocence.
5. The trial Judge has convicted the appellants against which the present Appeals have been preferred on submission that there being no eyewitness to the crime and the chain of circumstantial

evidence not being complete, conviction and sentence imposed upon the appellants deserve to be set aside. Shri B.P. Singh, learned counsel for the appellants, has argued that conviction only on the basis of seizure of Murga Kati or wearing apparels is not permissible in the absence of FSL report proving that Murga Kati has been used for committing murder.

6. Per contra, Ms. Fouzia Mirza, learned Additional Advocate General would support the impugned conviction and sentence.
7. Admittedly, there is no eyewitness to the crime nor there is any evidence of last seen together or extra judicial confession. Thus, the entire prosecution case rests on the evidence of memorandum statement and consequent seizure of Murga Kati and wearing apparels.
8. The law as to when conviction can be sustained on the basis of circumstantial evidence has been settled by the Hon'ble Supreme Court in the celebrated case of **Sharad Birdhichand Sarda Vs. State of Maharashtra**¹, wherein the Hon'ble Supreme Court has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-152 as under:

“152.A close analysis of this decision would show that the following conditions must be

¹ AIR 1984 SC 1622

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 the case at hand, memorandum statement of Hinsaram was recorded on 27.7.2010 whereas that of Gainduram was recorded on 28.6.2010. Shobhit Ram (PW-3) and Dev Singh Thakur (PW-6) are witnesses to the memorandum statement of seizure memo, however, both these witnesses have turned hostile without supporting the prosecution at any stage of their examination. Moreover, even if seizure of Murga Kati and wearing apparels is treated to be proved, there is no FSL report to prove the presence of human blood of the same origin.
10. It is thus seen that in the case at hand, there is no evidence of last seen together or extra judicial confession. Seizure of Murga Kati from Hinsaram and seizure of Kurta & Dhoti from Gainduram have not been supported by the independent witnesses. Over and above, the seized articles were not sent for FSL examination. Thus, there is absolutely no evidence against the appellants to connect them with the murder of deceased Tulsa Bai.
11. In the result, conviction and sentence imposed upon the appellants under Section 302 of the IPC are set aside and they are acquitted of the said charge. The appellants are on bail. Surety and personal bond earlier furnished at the time of suspension of sentence shall remain operative for a period of 6 months in view

of the provisions of Section 437-A of the Cr.P.C. The appellants shall appear before the higher Court as and when directed.

12. The Appeals are accordingly allowed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge

Barve