

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 69 of 2010**

1. Dharamlal, S/o Shri Chhedilal Koushik, aged about 25 years,
2. Chhedilal, S/o Shri Shobharam Koushik, aged about 50 years, (wrongly mention in impugned order Kashyap)
3. Haridayal, S/o Ramadhar Koushik, aged about 28 years,

All are R/o village Deorikurd, Thana Thakatpur, District Bilaspur, C.G.

----Appellants

Versus

- State of Chhattisgarh, through the District Magistrate, District Bilaspur, C.G.

---- Respondent

For Appellants	Mr. Dheerendra Pandey, Advocate.
For Respondent/State	Ms. Fouzia Mirza, Additional A.G.

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Gautam Chourdiya****Judgment on Board by Justice Gautam Chourdiya****26/05/2020**

1. In this appeal filed under Section 374(2) Cr.P.C., the appellants have challenged the legality, validity and propriety of the judgment of conviction and order of sentence dated 04.12.2009, passed by the 8th Additional Sessions Judge (FTC), Bilaspur, District Bilaspur, C.G. in S.T. No.67/2009, whereby and whereunder the appellants stand convicted and sentenced as under:-

Conviction	Sentence
Under Section 302 read with 34 of IPC	Imprisonment for life and fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 6 months.

2. Case of the prosecution in brief is that on 26.11.2008 at 14:50 pm in Police Station-Takhatpur, PW-13 Sub- Inspector Shri S. Ekka received an information on telephone from complainant Vinod Kumar Koushik- nephew of Ashok Kumar Koushik (deceased) that someone had committed the murder of deceased. Receiving this information, Shri S. Ekka along with other police staff reached the place of occurrence. Thereafter, complainant Vinod Kumar Koushik lodged the unnumbered Dehati Nalishi Ex.D-2 stating that some unknown person had committed the murder of deceased. After that, FIR Ex.P-20 was registered on 26.11.2008 under Section 302 against the unknown person. The dead body of deceased was found near the agricultural field of Basant Gupta. The dead body of the deceased was examined by panch witnesses and inquest report was prepared vide Ex.P-3. The dead body was sent for postmortem examination to Primary Health Center, Takhatpur, District Bilaspur C.G. where PW-1 Dr. S.A. Siddiqui, conducted postmortem and found following injuries:-

1. Lacerated wound at right parital region.
(1. length 2 inch 2. depth 2 1/2 inch 3. width 1/2 inch)
Brain material seen & fracture of parital bone.
2. Lacerated wound at occipital region.
(1. length 2 inch 2. depth 1/2 inch 3. width 1/4 inch)
3. Cut (lacerated wound) at left side of nose.
(length 1/2 inch x width 1/4 inch x breadth 1/4 inch)

All injury margin was irregular. Age of injury about 6-8 hours.
No fracture of other bone.

He opined that cause of death is due to severe bleeding from skull & brain due to hypovolumic shock. The postmortem report is Ex.P-1. During investigation, spot map Ex.P-5 was prepared and dog

squad team was also called for investigation. Memorandum of the accused Dharamlal was recorded vide Ex.P-6, in pursuance of which one Nokia Company mobile and blood stained clothes of Dharamlal were seized vide Ex.P-12. Memorandum of Chhedilal was recorded vide Ex.P-7, pursuant to that one shirt was recovered by him Ex.P-9. Memorandum of Haridayal was recorded vide Ex.P-8, in pursuance thereof one full shirt was recovered vide Ex.P-10. Blood stained soil, plain soil, slippers of deceased and blood stained stone were seized from the place of occurrence as per Ex.P-11. Seized articles were sent for chemical examination to FSL. The accused/appellants were arrested vide arrest memo Exs. 13, 14 & 15.

3. Statements of the witnesses were recorded and charge sheet was filed against appellants under Sections 302 of IPC. The trial Court framed the charge under Section 302 read with 34 of IPC against the accused appellants which were denied by them and they prayed for trial.
4. So as to hold the appellants guilty prosecution has examined as many as 13 witnesses i.e. PW-1 Dr. S.A. Siddiqui, PW-2 Hareshwar, PW-3 Rajkumar Shrivastava, PW-4 Pradeep Das, PW-5 Panchram, PW-6 M.A. Abraham, PW-7 Vinod Kumar, PW-8 Sanat Kumar Koushik, PW-9 Sheetal Singh, PW-10 Purushottam Yadav, PW-11 Santosh Soni, PW-12 Shyam Avtar and PW-13 S. Ekka. The accused/appellants were examined under Section 313 of the Cr.P.C., in which, they denied the circumstances appearing against them and stated that they have been falsely implicated in the case. However, no defence witness has been examined by them. After completion of

trial, the appellants were convicted and sentenced as mentioned in para 1 of this judgment.

5. Learned counsel for the appellants submits that the appellants have been convicted and sentenced on the basis of suspicion that the deceased was 'last seen' with the appellants, but no 'last seen' and 'motive' was proved by the prosecution nor any reliable witness has been produced in this regard and further, there are contradictions and omissions in the statements of the witnesses. Learned counsel for the appellants submits that only on the basis of memorandum and seizure, trial Court has wrongly convicted the appellants. He also submits that though the seized articles were sent for chemical examination to the FSL but no FSL report is there on record connecting the said articles with the crime in question. He further submits that the chain of circumstantial evidence is not so complete to conclusively prove the guilt of the appellants. Therefore, trial Court has wrongly convicted and sentenced the appellants under Section 302 read with 34 of IPC.
6. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of the accused/appellants is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
7. We have heard learned counsel for the parties, perused the judgment impugned and the evidence on record.
8. Homicidal death of the deceased is not in dispute. Even otherwise from the evidence of PW-1 Dr. S.A. Siddiqui, Autopsy Surgeon, the postmortem report Ex.P-1 and the inquest report Ex.P-3 which is

proved by PW-5 Panchram, the prosecution has successfully proved that the death of the deceased was homicidal in nature.

9. Prosecution case is mainly based on the circumstantial evidence of last seen of the appellants with the deceased, memorandum and recovery of articles.

10. PW-2 Hareshwar stated that about 3-4 months before at 7:30-8:00 pm, accused Dharamlal Koushik, Ashok Kumar Koushik and other persons were seen in front of his betel shop. Next day morning, he heard that someone had committed the murder of Ashok Kumar Koushik (deceased) and dead body was found near the agricultural field of Basant Gupta but as per the statement of PW-3 Rajkumar and PW-4 Pradeep Das both have stated that in betel shop of PW-2 Hareshwar only accused Dharamlal was there and some dispute arose between them regarding purchase of cigarette and match box and accused Dharamlal was not giving the amount of said article. After some time the said dispute subsided between them and Dharamlal went away from that place. PW-3 Rajkumar and PW-4 Parmeshwar Das have not stated that they had seen the deceased in front of the shop of PW-2 Hareshwar. Therefore, no last seen of the accused/appellants with the deceased was proved by the prosecution. According to PW-2 Hareshwar, at 7:30 pm deceased was there in front of his betel shop but there is no evidence adduced by the prosecution that both the accused Dharamlal and the deceased were coming and going together from that shop. Therefore, last seen of the accused/appellant with the deceased was not proved by the prosecution.

11. PW-3 Rajkumar and PW-4 Pradeep have not supported the prosecution case.

12. PW-5 Panchram is the witness of inquest Ex.P-3, search memo Ex.P-4, spot map Ex.P-5 and memorandum Exs. P-6 to P-8 and seizure Exs.P-9 to P-12. PW-5 Panchram was not the witness of last seen and he has not supported the memorandum statements of accused/appellants Chhedilal and Haridayal. This witness also denied that the seizure memo Ex.P-10 was prepared in his presence. He also stated that no seizure & memorandum statements were made in his presence of accused/appellants Chhedilal and Haridayal. This witness only stated that memorandum statement of Dharamlal Ex.P-6 was recorded in his presence and one mobile was seized from the accused Dharamlal as per Ex.P-12 but no evidence adduced by the prosecution that the seized mobile belongs to the deceased, neither any identification parade was conducted nor any document regarding the ownership of the mobile was produced or proved by the prosecution. Therefore, only seizure of one mobile is not sufficient to connect the appellant Dharamal with the crime in question unless that mobile is proved to be of the deceased. Further, there is no FSL report produced or proved by the prosecution to connect all the appellants with the crime based on the seizure made pursuant to their memorandum statements. The prosecution has failed to prove the nature and origin of blood found on the seized articles. In these circumstances, the memorandum Exs. P-6 to P-8 and seizure memo Exs.P-9 to P-12 have no substantial legal value and cannot be used against the appellants.

13. PW-6 M.A. Abraham (ASI) stated in his deposition that he brought the dog squad team on the place of occurrence and thereafter they reached the house of appellant Dharamlal. He admitted in para 2 of his deposition that only for the investigation purpose they brought the sniffer dog and it is not a conclusive proof or evidence. He admits that sometimes the search made by the sniffer dog is faulty and it is not always correct.
14. PW-7 Vinod Kumar stated at the time of incident at 6:00 pm he had seen the deceased along with Dharamlal Koushik, Chhedilal and Haridayal near the shop of PW-10 Purushottam Yadav but thereafter at 7:30 pm Ashok Kumar Koushik (deceased) was seen alive near the shop of PW-2 Hareshwar. PW-10 Purushottam Yadav has not supported the evidence of this witness. Therefore, the statement of this witness has no substance when the deceased was seen alive at 7:30 pm near the betel shop of PW-2 Hareshwar.
15. PW-8 Sanat Kumar Kaushik is the witness of spot map Ex.P-5 and he stated in his deposition that when sniffer dog was called by the police on the place of occurrence, at that time accused/appellant Dharamlal was there along with the villagers. Except this no any other evidence is given by this witness.
16. PW-9 Sheetal Singh is the witness of inquest Ex.P-3. PW-10 Purushottam Yadav and PW-11 Santosh Soni have not supported the prosecution case.
17. PW-12 Shayam Avtar Kaushik only supported the memorandum statement of accused Dharamlal Ex.P-6. This witness denied the

memorandum statements of accused Chhedilal and Haridayal and seizure memo Exs. P-9 to P-12.

18. PW-13 S. Ekka is the Investigating Officer, who has supported the prosecution case.

19. For the evidentiary value of the lead provided by the sniffer dog as one of the circumstance going against the accused, it will be profitable to refer some of the pronouncements of the Supreme Court.

20. In the matter of **Abdul Rajak Murtaja Dafedar vs. State of Maharashtra, 1969 (2) SCC 234**, the Supreme Court has held thus in para 11:

“11. It was lastly urged on behalf of the appellant that the lower courts ought not to have relied upon the evidence of dog tracking and such evidence was not admissible in order to prove the guilt of the appellant. The evidence of tracker dogs has been much discussed. In Canada and in Scotland it has been admitted. But in the United States there are conflicting decisions :

“There have been considerable uncertainty in the minds of the courts as to the reliability of dogs in identifying criminals and such conflict of opinion on the question of the admissibility of their actions in evidence. A survey of the cases, however, reveals that most courts in which the question of the admissibility of evidence of trailing by bloodhounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the persons trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the Crime.”

There are three objections which are usually advanced against the reception of such evidence. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross-examination, the dog's human companion must go into the box and report the dog's evidence and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inferences. And thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of the proportion to its true evidential value. In *R. V. Montgomery* a police constable observed men stealing wire by the side of a railway line. They ran away when he approached them. Shortly afterwards the police got them on a nearby road. About an hour and half later the police tracker dog was taken to the base of the telegraph pole and when he had made a few preliminary sniffs he set off and tracked continuously until he stopped in evident perplexity at the spot where the accused had been put into the police car. At the trial it appeared that other evidence against the accused that they had been stealing the wire was inconclusive and that the evidence of the behavior of the tracker dog was crucial to sustain the conviction. In these circumstances the Court of Criminal Appeal ruled that the evidence of the constable who handled the dog on its tracking and reported the dog's reactions was properly admitted. The Court did not regard its evidence as a species of hearsay but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in traffic case might have reported on the behaviour of his speedometer. It was argued in that case that the tracker dog's evidence could be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli. The comparison does not, however, appear to be sound because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. But dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever you have thought processes there is always the risk of error, deception and even self-deception. For these reasons, we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

21. In the matter of **Gade Lakshmi Mangaraju alias Ramesh Vs. State of A.P., (2001) 6 SCC 205**, the Supreme Court has held, thus, in paras 13, 17 & 18:

13. The weakness of the evidence based on tracker dogs has been dealt with in an article "*Police and Security Dogs*". The possibility of an error on the part of the dog or its master is the first among them. The possibility of misunderstanding between the dog and its master is close at its heels. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. Last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Police dogs engage in these actions by virtue of instincts and also by the training imparted to them.

17. We are of the view that criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above, although we cannot disapprove the investigating agency employing such sniffer dogs for helping the investigation to track down criminals.

18. Investigating agencies can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."

22. Admittedly, there is no direct evidence in this case to prove complicity of the accused/appellants in crime in question and the entire case is based upon circumstantial evidence. In the matter of ***Sharad Birdhichand Sarda Vs. State of Maharashtra***¹, 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 fulfilled before a case against an accused can be said to be fully established:

¹ AIR 1984 SC 1622

- (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."

23. In this case the prosecution has utterly failed to prove that it is the accused/appellants who were last seen with the deceased. Further, the prosecution has not attributed any motive to the appellants for commission of the offence and the prosecution has also not filed FSL report in this case. The memorandum statements of the appellants and the seizure made in pursuance thereof have also not been duly proved by the prosecution.

24. Thus, considering the nature and quality of evidence adduced by the prosecution in light of the principles of law laid down by the Hon'ble Supreme Court in the matters of *Abdul Rajak Murtaja Dafedar (supra)*, *Gade Lakshmi Mangaraju alias Ramesh (supra)* & *Sharad Birdhichand Sarda (supra)*, this Court is of the opinion that the prosecution has

miserably failed to prove the complicity of the accused/appellants in the crime in question on the basis of circumstantial evidence beyond all reasonable doubt. Being so, conviction of the accused/appellants under Section 302 read with 34 of IPC is not sustainable and they deserve to be acquitted of the said charge.

25. In the result, the appeal is allowed. The appellants are acquitted of the charge under Section 302 read with 34 of IPC. The appellants are reported to be on bail, therefore, their bail bonds shall continue for a period of six months from today in view of provisions of Section 437A of Cr.PC.

**Sd/-
(Prashant Kumar Mishra)
Judge**

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