

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on : 13/07/2020

Judgment delivered on : 06/08/2020

CRA No. 732 of 2011

- Sushila Sen, W/o Ramsanehi Sen, aged about 44 years, R/o Village Magarghata, Distt. Durg (CG)

---- Appellant

Versus

- State Of Chhattisgarh Through Police Station Nandghat, Distt. Durg (CG)

---- Respondent

CRA No. 757 of 2011

- Manohar Yadav, S/o Ramsanehi Yadav, aged about 35 years, R/o Village Magarghata, P.S. Nandghat, Distt. Durg (CG)

---- Appellant

Versus

- State Of Chhattisgarh Through Police Station Nandghat, Distt. Durg (CG)

---- Respondent

For Appellants	:	Shri Samir Singh, Advocate.
For Respondent/State	:	Smt. Fouzia Mirza, Addl. A.G.

Acquittal Appeal No. 229 of 2012

- Pradeep, S/o Paras Nishad, aged about 22 years, R/o Magarghata, Post Office and Police Station Nandgaot, Distt. Durg (CG) (Now District Bemetara)

---- Petitioner

Versus

1. Sushila Sen, W/o Ramsnehi Sen, aged about 40 years, R/o Village Magarghata, Distt. Durg (CG) (Now District Bemetara)

2. State Of Chhattisgarh Through Police Station Nandghat, Distt. Durg (CG)

---- Respondent

For Petitioner	:	Shri S.P. Sahu, Advocate.
For Respondent No.1	:	Shri Samir Singh, Advocate.
For Respondent/State	:	Smt. Fouzia Mirza, Addl. A.G.

Hon'ble Shri Prashant Kumar Mishra &

Hon'ble Shri Gautam Chourdiya, JJ

C.A.V. Judgment By Justice Gautam Chourdiya

The appeal was heard through video conferencing.

02. Since all the above three appeals arise out of the common judgment of conviction and order of sentence dated 13.9.2011 passed by Additional Sessions Judge, Bemetara, Distt. Durg (CG) in ST No.33/2011, they are being disposed of by this common judgment. By the impugned judgment, appellant Manohar Yadav was convicted under Section 302 of IPC and sentenced to undergo imprisonment for life, pay a fine of Rs.500/-, in default whereof to suffer additional RI for one month. Appellant Manohar Yadav along with appellant Sushila Sen has also been convicted under Section 201/34 of IPC and sentenced to undergo RI for two years, pay a fine of Rs.300/-, in default whereof to suffer additional RI for 15 days.

03. CrA No.732/2011 has been filed by accused/appellant Sushila Sen and CrA No.757/2011 by accused/appellant Manohar Yadav challenging their conviction and sentence by the trial Court whereas Acquittal Appeal No.229/2012 has been filed by Pradeep (son of the deceased) challenging the acquittal of accused Sushila Sen of the

charge under Section 302/34 of IPC.

04. As per the prosecution case, merger intimation Ex.P/4 was lodged by Santu, son of Baisakhu Nishad, on 17th February, 2011 at 8.45 am informing the police that at Village-Magarghat one dead body of unknown person, aged about 25-30 years, in burnt condition was found in the barn of Santu Nishad. The dead body was identified by Pradeep Nishad as that of his father Paras Nishad, vide Ex.P/1. Dehati Nalishi Ex.P/21A was registered on 17.2.2011. After merger inquiry, FIR (Ex.P/22) was registered on 17.2.2011 against unknown person under Sections 302 & 201 of IPC. Inquest over the dead body was prepared in presence of witnesses vide Ex.P/5. Postmortem on the dead body was conducted on 17.2.2011 by PW-9 Dr. PC Thakur vide Ex.P/15 wherein he noticed that the body was 55% burnt and there were following injuries:

1. Antimortem lacerated wound on the back of the head, 5" x 1" x 1/2" x clot blood,
2. Antimortem lacerated wound on the frontal of the head 5" x 1" x 1/2" x clot blood,
3. penetrating wound just below right mandible 3" x 1/2" x 1/2" clot blood,
4. one depressed bruise mark on right side of the thyroid,
5. three bruises mark on the left side of neck parallel to each other, average size of the bruises about 1 1/2 " x 1" and antimortem. Tongue was between the teeth.

In his opinion, the cause of death was asphyxia due to throttling, nature of death was homicidal and the time lapsed since death was

about 12-24 hours from postmortem.

05. During investigation, spot map Ex.P/6 was prepared by PW-7 Prakash Singh Thakur, Patwari and another spot map Ex.P/19 was prepared by PW-14 Anup Bajpai (IO). Vide Ex.P/8 a piece of burnt wood having blood stains, plain and bloodstained soil were seized from the place of occurrence. Memorandum of accused Manohar Yadav (Ex.P/9) was recorded wherein he stated that while he was having intercourse with accused Sushila Sen in the field of one Santu Nishad, at that time Paras Nishad (deceased) came there and assaulted him with club and in turn, he also assaulted upon head of Paras Nishad with a club. He further stated that he also pressed the neck of Paras Nishad as a result of which he died and thereafter, with the help of accused Sushila, deceased Paras Nishad was burnt in the paddy straw with intent to conceal his identity. Pursuant to the said memorandum, his *Baniyan* worn at the time of incident having bloodstains was seized vide Ex.P/10. Both the appellants were arrested vide arrest memo Ex.P/11 & P/12. As per FSL report Ex.P/25, blood was found Articles A, B, C, D, F1, F2 & F3 i.e. *Baniyan* of accused Manohar, club seized from spot, a piece of *Chhena* seized from spot, bloodstained soil seized from spot, full-pant, underwear & shirt of the deceased respectively. However, group or origin of the said blood was not mentioned in the said report.

06. After completion of investigation charge sheet was filed against both accused persons under Sections 302, 201 read with Section 34 of IPC followed by framing of the charges accordingly by the trial Court. The accused persons denied the charges, pleaded innocence and

prayed for trial.

07. So as to hold the accused persons guilty, the prosecution examined 14 witnesses in all. Statements of the accused/appellants 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. However, no witness was examined by them in defence.

08. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellants as mentioned above.

CrA Nos. 732/2011 & 757/2011

09. Learned counsel for the appellants submits that in this case no evidence was adduced by the prosecution to prove involvement of the appellants in commission of murder of the deceased or causing disappearance of evidence of the crime. Even no motive has been successfully proved by the prosecution against the appellants. Only on the basis of memorandum Ex.P/9 of accused/appellant Manohar, consequent to which his bloodstained *Baniyan* was seized (Ex.P/10), the trial Court has held the appellants guilty of the offence. However, the said evidence is also not conclusive for the reason that neither the group nor the origin of the said blood has been proved and further, no new fact pursuant to the said memorandum of the appellant was discovered. Memorandum of another accused/appellant Sushila Sen was not recorded by the police. There is also no last seen of the appellants with the deceased. Therefore, the trial Court has wrongly

convicted and sentenced the appellants by the impugned judgment which is liable to be set aside.

10. On the other hand, learned counsel for the State submits that as per postmortem report, the cause of death of the deceased was asphyxia due to throttling and it was homicidal in nature. The appellant Manohar in his memorandum disclosed this fact that the deceased was throttled to death and thereafter burnt with intent to cause disappearance of the evidence with the help of appellant Sushila Ben. The aforesaid facts were within the exclusive knowledge of appellant Manohar Yadav and were discovered on the basis of his memorandum. Therefore, the trial Court has rightly convicted and sentenced the appellants which does not call for any interference.

Acq. A. No.229/2012

11. Learned counsel for the petitioner submits that as per memorandum statement of accused/appellant Manohar, he along with appellant Sushila Ben committed murder of the deceased and thereafter burnt him with intent to conceal his identity and cause disappearance of evidence of the crime. Thus, from his memorandum it is clear that at the time of commission of the crime, both the appellants were together and helped each other in commission of the crime. Therefore, the trial Court was not justified in acquitting appellant Sushila Ben of the charge under Section 302/34 of IPC and she is also liable for conviction under the said section.

12. Shri Samir Singh, learned counsel appearing for accused/appellant Sushila Sen contended that in this case, there is no evidence whatsoever against accused/appellant Sushila Ben. Her

conviction under Section 201/34 of IPC is also unsustainable because the same is based only on the memorandum of co-accused Manohar Yadav which is contrary to law. He submits that present being a case based on circumstantial evidence, the prosecution was required to establish a complete chain of circumstances pointing towards the guilt of appellant Sushila Ben which it has failed to do and therefore, her acquittal of the charge under Section 302/34 of IPC is just and proper and needs no interference.

13. Learned counsel for the State submits that the State has not filed any appeal against acquittal of accused Sushila Ben of the charge under Section 302/34 of IPC and it supports the impugned judgment.

14. Heard counsel for the respective parties and perused the material on record.

15. Admittedly, there is no direct evidence against the appellants connecting them with the crime in question and their conviction rests upon circumstantial evidence i.e. memorandum of accused Manohar Yadav, seizure of his bloodstained *Baniyan* and the FSL report.

16. So far as homicidal death of deceased Paras Nishad is concerned, as per merged intimation Ex.P/4 lodged by PW-2 Santu Nishad he found one dead body lying in burnt condition in the paddy straw and informed about the same to the police. The dead body was identified by PW-1 Pradeep as that of his father Paras Nishad vide Ex.P/1. Both these witnesses have proved the above documents. As per inquest report Ex.P/5 prepared in presence of witnesses injuries over the head and neck of the deceased were noticed and he was

found in burnt condition. The aforesaid fact is not disputed by counsel for the parties. Spot maps Ex.P/6 & P/19 have been duly proved by PW-7 Prakash Singh Thakur, Patwari and PW-14 Anup Bajpai (IO) respectively which remain uncontroverted in cross-examination. Further, as per evidence of PW-9 Dr. PC Thakur, autopsy surgeon, he found certain injuries over person of the deceased as mentioned above and opined that the cause of death was asphyxia due to throttling and the death was homicidal in nature. The medical evidence also remains unchallenged by the defence. Therefore, considering the above documentary and medical evidence on record, it stands proved beyond all reasonable doubt that death of Paras Nishad was homicidal in nature.

17. The main piece of evidence adduced by the prosecution against the appellants is the memorandum Ex.P/9 of accused/appellant Manohar, consequent to which his bloodstained *Baniyan* which he was wearing at the time of incident, was seized vide Ex.P/10 and the FSL report Ex.P/25 which confirms presence of blood on it. Witnesses to memorandum and seizure namely PW-3 Sukhdev Sahu and PW-12 Jaipal have proved the same and PW-14 Anup Kumar Bajpai (IO) has also stated that the said memorandum was recorded at the instance of appellant Manohar and consequent to which his bloodstained *Baniyan* was seized.

18. From perusal of the said memorandum it is evident that it was recorded on 19.2.2011 at 16:00 hours whereas as per Identification Panchanama, the merg intimation Ex.P/4, the inquest Ex.P/5, Spot Panchanama Ex.P/7 and other documents on record, the dead body

was already recovered on 17.2.2011. Likewise, the broken piece of club was also seized on 17.2.2011 from the spot. Postmortem on the body of the deceased was conducted on 17.2.2011 vide Ex.P/15 which disclosed the number and nature of injuries as well as the part of the body where such injuries were caused. Thus, from the above, it is clear that all the facts, except the fact that appellant Manohar had kept the bloodstained *Baniyan* which he was wearing at the time of incident in his house, were already known to the police prior to recording of his memorandum.

19. As per FSL report Ex.P/25, though presence of blood on the seized *Bainiyan* was confirmed but the group or origin of the said blood has nowhere been mentioned in the said report in absence of which it cannot be conclusively held that the said recovery has any bearing on the crime in question.

20. In the matter of *Sharad Birdhi Chand Sarda vs State Of Maharashtra* reported in **1984 AIR 1622**, the Hon'ble Supreme Court while dealing with the case of circumstantial evidence held that before a case against an accused resting on circumstantial evidence can be said to be fully established, the following conditions must be fulfilled:

- “1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
2. The facts so established should be consistent with the hypothesis of guilt and 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. In the matter of ***Navaneethakrishnan Vs. State*** *By Inspector of Police*, reported in **(2018) 16 SCC 161**, the Hon'ble Supreme Court while dealing with a murder case based on circumstantial evidence of last seen and recovery of certain articles at the memorandum of the accused persons, held as under:

“It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone can't discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration. In absence of any other material evidence against appellant-accused, they cannot be convicted solely on basis of evidence of last seen together with deceased. Hence conviction of appellants stand set aside under Sections 302/34, 364 and 379 of IPC.”

“Information given by accused person to a police officer leading to discovery of a fact which may or may not prove incriminatory has been made admissible under Section 27 of the Evidence Act. Section 27 is applicable only if confessional statement leads to discovery of some new fact. Its relevance is limited as relates distinctly to fact thereby discovered in relation to the crime. In absence of any connecting link between the crime and things recovered/facts discovered thereby, recovery of objects at behest of accused will not have any material bearing on

facts of the case, as in present case.”

22. In the matter of ***Kansa Behera Vs. State of Orissa, AIR 1987 SC 1507***; while dealing with recovery of bloodstained articles the Supreme Court held as under:

“11. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.”

23. In the case of ***Rabindra Bisi Vs. State of Orissa*** reported in **2020 Cri.L.J. (NOC) 3 (Ori.)**, it was held as under:

“Murder - Circumstantial evidence – Accused allegedly murdered deceased with an axe – Discovery of weapon allegedly at the instance of accused – Blood-stains found on the apparels of accused – Prosecution witness claiming to be eye-witness admitting in cross-examination that he came to know about death of deceased next day making his testimony unreliable – Alleged recovery of axe with blood-stains at the instance of accused from open space accessible to all not reliable – Witness to recovery not supporting prosecution case - Failure of prosecution to determine blood group of accused to wash out possibility of his own blood-stains on his wearing apparels – Chain of circumstances not fully

established – Accused entitled to acquittal.”

24. In the matter of ***Kusal Toppo and another Vs. State of Jharkhand*** reported in **(2019) 13 SCC 676**, the Hon'ble Supreme Court while dealing with a case based on circumstantial evidence, observed in relation to evidentiary value of statement under Section 27 of the Evidence Act in paras 26, 27 & 28 as under:

“26. The basis premise of Section 27 is to only partially lift the ban against admissibility of inculpatory statements made before the police, if a fact is actually discovered in consequence of the information received from the accused. Such condition would afford some guarantee. We may additionally note that, the courts need to be vigilant while considering such evidence.

27. This Court in multiple cases has reiterated the aforesaid principles under Section 27 of the Evidence Act and only utilized Section 27 for limited aspect concerning recovery (*refer Pulukuri Kotayya V. King Emperor, 1946 SCC OnLine PC 47; Jaffar Hussain Dastagir V. State of Maharashtra, (1969) 2 SCC 872*). As an additional safeguard we may note that reliance on certain observations made in certain precedents of this Court without understanding the background of the case may not be sustainable. There is no gainsaying that it is only the *ratio* which has the precedential value and the same may not be extended to an *obiter*. As this Court being the final forum for appeal, we need to be cognizant of the fact that this Court generally considers only legal aspects relevant to the facts and circumstances of that case, without elaborately discussing the minute hyper-technicalities and factual intricacies involved in the trial.

28. Coming back to the factual aspects of this

case, on the basis of the above confession of Chanchal Bhaskar (A-3), the only recovery which was made was one rope, which was used in committing the offence, which the counsel rightly pointed, is a common material or thing which is available anywhere in the market or at every household. Further, we may note that, there is no investigation to link the rope recovered with the crime as no report concerning the forensic aspects of the fibre or any recovered strands are part of the record. Therefore, the major condition for application of Section 27 of the Evidence Act is not fulfilled. Accordingly, we cannot append any value to the confession of Chanchal Bhaskar (A-3).

25. In the case in hand, as per MLC report (Ex.P/13) of accused Manohar Yadav, swelling with contusion and abrasions were noticed on his body by PW-8 Dr. Sanjay Kumar. Likewise, this doctor also examined accused Sushila Sen vide MLC report (Ex.P/14) and noticed no external injury on her person except body ache. The above medical reports have been proved by PW-8. However, presence of injuries on their person cannot be treated as an incriminating circumstance against the appellants for the reason that the prosecution has not proved that these injuries on the person of the appellants had any nexus with the crime in question. Even the prosecution has not attributed any motive to the appellants for commission of the crime.

26. Further, as per the spot maps Ex.P/6 & P/19 prepared by the Patwari and the Investigating Officer respectively, the deceased was not owner of the land where his dead body was found. Neither prior to the incident nor after the incident, the appellants were last seen with the deceased nearby the place of occurrence. Accused/appellant

Sushila, with whom appellant Manohar Yadav was having intercourse as disclosed by him in the memorandum, was not the relative of the deceased. There appears to be no occasion for the deceased to reach at the place of occurrence, that too at 4 am and therefore, the story put forth by the prosecution seems to be doubtful.

27. In this case, even memorandum of accused/appellant Sushila Sen has not been recorded and inference of her guilt has been drawn from the memorandum of accused/appellant Manohar Yadav. In the matter of ***Sushil Kumar Sharma Vs. State of Madhya Pradesh*** reported in ***1996 (41) MPLJ 926***, the High Court of MP observed as under:

“On perusing the FIR, lodged by Smt. Kamlesh Tiwari, it is found that in the report only a vague suspicion was expressed by the informant against four persons including the petitioner. Police Rajim, during the course of investigation and after recording the statement of witnesses, did not find the available material sufficient for filing charge-sheet against any of the four persons, mentioned in the FIR. The only piece of evidence considered sufficient by the Magistrate for taking cognisance against the petitioner is the mention of the petitioner's name in the memorandum of co-accused Kumud Alka Sona, recorded under Section 27 of the Evidence Act, to the effect that the petitioner joined Kumud Alka Sona in concealing the stolen property. Shri Khare, the learned Govt. Advocate could not dispute the legal position, as contended by Shri Kochar the learned counsel for the petitioner, that the above evidence is clearly inadmissible and cannot be proved against the petitioner, at the trial.

28. Thus having examined the evidence in the present case in light of the aforesaid principles of law, we are unable to hold the appellants

guilty of the crime in question. None of the circumstances relied upon by the trial Court has been proved to the hilt by the prosecution so as to exclude the possibility of any person other than the appellants being the perpetrator of the crime beyond the shadow of all reasonable doubt. Though the circumstances, if taken together, raise suspicion against the appellants but mere suspicion can not be the basis of conviction, howsoever strong it may be. Being so, the benefit of doubt must be credited to the appellants and they deserve to be acquitted of the charges leveled against them.

29. In the result, both the appeals i.e. CrA No.732/2011 & 757/2011 succeed and are, accordingly, allowed acquitting the appellants of the charges leveled against them. Consequently, Acq.A.No.229/2012 being without any substance is hereby dismissed. The appellants are reported to be on bail, therefore, their bail bonds shall remain in operation for a period of six months from today in view of provisions of Section 437A of CrPC.

Sd/

(Prashant Kumar Mishra)
Judge

Sd/

(Gautam Chourdiya)
Judge