

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 174 of 2012

Tillu @ Shiv Kumar Nishad S/o Buddhu Ram Nishad, aged about 29 years,
R/o Karhi Bazar, Thana Baloda Bazar (wrongly mentioned in the impugned
order as Baloda) Distt. Raipur C.G.

---- Appellant

Versus

State Of Chhattisgarh through : Station House Officer, Police Station-
Masturi, District- Bilaspur

---- Respondent

For Appellant : Shri Dhirendra Pandey and Shri R.V. Rajwade,
Advocates

For State : Shri Lalit Jangde, Dy. Govt. Advocate

**D.B. :Hon'ble Mr. Justice Manindra Mohan Shrivastava &
Hon'ble Mrs. Justice Vimla Singh Kapoor**

Judgment On Board

23/03/2021

Per Manindra Mohan Shrivastava, J.

1. In this appeal, Shri Dheerendra Pandey, Advocate appears under instructions from Shri Deepak Jain, counsel for the appellant as also Shri R.V. Jajwade, Advocate who was requested to assist the Court yesterday when there was no appearance on behalf of the appellant.
2. This appeal is directed against the judgment of conviction and order of sentence dated 22nd October 2011 passed by learned Third Additional Sessions Judge, Bilaspur (CG) whereby and whereunder the appellant has been held guilty of commission of offence punishable under Section 302 read with Section 34 IPC and sentenced to undergo life imprisonment with fine of Rs.100/- and in default of payment of fine, additional RI for 1 month.

3. The prosecution story, as unfolded from the records of the case is that the dead body of deceased Dr. Gopal Vishwas was found by the side of Arpa River in village- Thakurdeva, which led to initiation of proceedings of inquest by the police after giving notices to the witnesses. The dead body was sent for postmortem and postmortem was conducted and a report in that regard was prepared by Dr. A.K. Sanyal (PW4). Upon examination of the deceased, which comprised of internal as well as external examination, injuries were found and according to the doctor, death was as a result of head injury caused within 24 hrs. and was homicidal in nature. During inquiry, present appellant and another co-accused Gambhir Nishad emerged as suspects. The weapon allegedly used in the commission of offence was said to have been seized from co-accused Gambhir. As far as present appellant is concerned, prosecution case was that he was also involved in the alleged incident of murder of deceased Gopal along with co-accused Gambhir and blood stained clothes of the appellant were also seized from his possession in the presence of witnesses. A mobile phone said to be owned by deceased-Gopal was also seized from Kaliram (PW2). After completion of investigation, charge sheet was filed. Appellant Tillu @ Shiv Kumar Nishad and co-accused Gambhir Nishad @ Rupendra Nishad both were tried for alleged commission of offence of murder of Dr. Gopal. The prosecution case rested on circumstantial evidence. The trial Court convicted both appellant- Tillu and co-accused Gambhir based on recovery, last seen and a motive on the part of Gambhir to kill the deceased. This conviction of the accused gave rise to two appeals, one filed by accused/appellant- Tillu and other by co-accused Gambhir Nishad.
4. The two appeals were listed for hearing together but later on, appellant-accused Gambhir in CRA No.840 of 2011 died, therefore, his appeal stands abated and this order shall govern disposal of CRA No.174 of 2011 filed by appellant- Tillu @ Shiv Kumar Nishad.
5. Learned counsel for the appellant would argue that the learned trial Court has ordered conviction of Tillu @ Shiv Kumar Nishad on extremely doubtful circumstantial evidence, which has failed to translate suspicion into truth

so as to warrant conviction. Contention is that the prosecution case of recovery of blood stained shirt and pant of the present appellant from his possession is not free from doubt because the manner in which the independent witnesses of seizure namely Chhedilal Dewangan (PW12) and Narayan (PW13) have stated before the Court cannot be said to have supported the prosecution case of recovery from the possession of the appellant Tillu. Therefore, the FSL report of clothes found stained with blood does not connect appellant -Tillu with the alleged commission of offence. Next limb of submission is that though Kaliram (PW2) states that when in the night, he rang up Dr. Gopal, Dr. Gopal as well as Tillu both talked to him and Tillu told him not to disturb them for some time and the evidence of Kamal Kumar (PW7) that in the evening of 16.11.2010, deceased was seen along with appellant- Tillu near Guha Chat Bhandar, that by itself does not complete the chain of circumstances so as to base conviction only on that basis. As far as evidence of Kaliram (PW2) that in the next morning of 17.11.2010, appellant -Tillu came there to handover mobile phone of deceased Gopal to him, is also not free from doubt because of the doubtful conduct of Kaliram (PW2). Learned counsel for the appellant submits that mobile phone of Dr. Gopal was seized from possession of Kaliram (PW2) at the time when dead body was recovered and, therefore, Kaliram himself was a suspect which is clear from evidence of the prosecution witnesses. In any case, it is argued, circumstance, instead of incriminating the appellant, is more compatible with the hypothesis of innocence because if at all Tillu was involved in the alleged commission of offence, there was no reason for him to handover the mobile phone of the deceased after killing him, in the hands of Kaliram (PW2). On such doubtful circumstances, conviction of the appellant could not be sustained, particularly when the common thread running from the evidence of the prosecution is that there was existence of dispute and recent history of quarrel between the deceased and Gambhir, the co-accused and the recovery of weapon alleged to be used in the commission of offence is not found from the possession of present appellant but from co-accused Gambhir. It is also argued that none of the prosecution

witnesses has stated that when the present appellant met with the deceased at Guha Chat Bhandar on 16.11.2010 at about 7:00 in the evening, Gambhir was also present and that deceased -Gopal, present appellant-Tillu and co-accused Gambhir left the place and thereafter, deceased disappeared. Therefore, the prosecution case is full of doubts, suspicion and unanswered questions, benefit of which should be extended to the present appellant Tillu.

6. Per contra, learned counsel for the State would submit that though according to case of the prosecution, Gambhir is the main accused who is alleged to have assaulted and killed the deceased because of pre- existing dispute, the involvement of the present appellant in the alleged commission of offence is based on proof of various circumstantial evidence by reliable evidence. Learned counsel for the State argues that even though there may be some doubt with regard to evidence of independent witnesses of seizure namely Chhedilal (PW12) & Narayan (PW13) with regard to seizure of blood stained clothes from the possession of the appellant, the investigating officer has clearly deposed that recovery of blood stained clothes was made from the present appellant. The FSL report clearly proves presence of blood stains in the full shirt seized from the possession of present appellant which the appellant has failed to explain. The evidence of Kaliram (PW2) and Kamal Kumar (PW7) proves that both, the deceased and present appellant Tillu were not only seen together near Guha Chat Bhandar at around 7:00 in the evening but, later on, upon being contacted, the deceased and present appellant talked to Kaliram from same phone and, thereafter, Dr. Gopal did not return, eloped and then his dead body was found on the next day. Kaliram (PW2) has clearly stated that mobile of the deceased was brought in the morning by appellant Tillu and, therefore, though it has been seized from possession of Kaliram, the evidence of mobile phone brought by the appellant constitutes an incriminating circumstance. As such, the conviction of the appellant does not warrant any interference.

7. We have heard learned counsel for the parties and perused the records.

8. The entire case of the prosecution rests only on circumstantial evidence against the present appellant as also deceased, co-accused.

9. To begin with, common thread runs through the evidence of prosecution witnesses that the deceased had some dispute with co-accused Gambhir Nishad. In para-3 of his evidence, Rajaram Patel (PW3) states that a quarrel had taken place between the deceased accused- Gambhir and Gambhir had sustained injury on his face. Thereafter, their friendship was broken.

Billu Ram Sen (PW6) has stated in para-2 of his evidence that one or two days before the date of incident, a quarrel had taken place between deceased Gopal and co-accused Gambhir.

10. The evidence of aforesaid witnesses goes to show that the deceased had some dispute with co-accused Gambhir (since dead). We could not find from the evidence of any of the witnesses that the present appellant had any enmity with the deceased Gopal or that he had any motive to kill the deceased. The involvement of the appellant in the present incident is along with the main accused- Gambhir.

11. As far as evidence of recovery of blood stained clothes from the possession of the appellant is concerned, the evidence of independent witnesses Chhedilal (PW12) and Narayan (PW13) renders the case of the prosecution doubtful.

Chhedilal (PW12) has stated in his evidence that no clothes or any article were seized in his presence from appellant -Tillu. He states that police had shown him and other witness Narayan, a shirt and a pant in the police station and obtained his signature stating that this article is being seized. He has stated that clothes were shown to him in Karhi Police Station.

The evidence of this witness does not show that the clothes were seized from the accused from his house or that these clothes were worn by the appellant which were taken out from his body in the presence of witnesses and then seizure effected.

12. As far as Narayan (PW13), the other seizure witness is concerned, he states

that in the presence of this witness and other witness Chhedilal (PW12), a shirt and a pant was seized from appellant in Masturi Police Station. However, in cross-examination, he states that he did not go to Masturi Police Station but had signed the seizure memo in Police Station – Karhi-Bazar. He further adds that cloths were brought in the police station, kept on a stool and his signatures were obtained by stating that seizure is being prepared.

13. The evidence of these two witnesses only proves that seizure was made in the police station and in the presence of appellant, but that falls short of an evidence of recovery of clothes from the possession of appellant- Tillu. It is important to note that there is no evidence to the effect that these clothes were recovered from the house of the appellant or the clothes were actually worn by the appellant, which were taken out and then seizure was effected. If that be so, in a case where the prosecution intends to prove involvement in the alleged offence of murder, it is not safe to rely upon such evidence and recovery, merely because the investigating officer states recovery of clothes when he does not give specific details of the place where from recovery was made.

14. The other evidence is of last seen as stated by Kamal Kumar Jagat (PW7), who has deposed that on 16.11.2010, after purchasing vegetables, when he was returning from Karhi Bazar market, he purchased liquor from *Karhi Bhatti* and there, he met with Dr. Gopal (the deceased) and Rajaram and another person and he was offered for company by Dr. Gopal. He further deposed that they all sat together and consumed liquor for 30-35 minutes and then, on the request of Dr. Gopal, he gave him lift in his motorcycle and dropped him near Guha Chat Bhandar and there, he found that Dr. Gopal (deceased) was talking to a tall and fair boy whose name he came to know later as Tillu, the present appellant. He further deposed that while Tillu was talking to Dr. Gopal, Dr. Gopal inquired about number of this witness and then in order to check, the other boy made a call to the mobile phone of this witness from the mobile phone of Dr. Gopal and, thereafter, he went to his house Amakoni. He has stated that when he dropped the

deceased near Guha Chat Bhandar, appellant was present there and has further stated that his meeting with the appellant was formal in nature. The evidence of this witness to the extent that when this witness dropped the deceased at Guha Chat Bhandar, there the deceased met with the appellant and further that in order to check mobile number of the witness, appellant made a call on the mobile of this witness from the mobile of the deceased, is reliable.

15. There is another set of evidence as deposed by Kaliram (PW2) with whom deceased used to reside. He has stated that Dr. Gopal left the place along with Rajaram (PW3). When doctor Gopal did not return in the night, he called him at about 8:00 pm and then Dr. Gopal, the deceased, picked up phone, talked to him and then from the same phone, appellant also talked to him and said that they are in the village- Oteband and will come after some time and they should not be disturbed for some time. According to this witness, on that day, Dr. Gopal did not return and the next day, appellant came to his house to return the mobile phone of Dr. Gopal and then went away. In the cross-examination, however, this witness makes a contradictory statement that in the evening, deceased Gopal talked to him from the mobile phone of Rajaram and said that he will be returning after meeting with Rajaram. Thus, while in the examination-in-chief, he states that he rang up the deceased and then deceased talked to him as also the present appellant, in the cross-examination, he admits that Gopal has informed by calling from the mobile phone of Rajaram. The evidence of this witness raises a doubt because of this peculiar conduct. According to this witness, deceased was residing with him. Though the deceased had talked to him in the night, but he did not return and next day, the appellant came to return mobile of the deceased, there is nothing in the evidence of this witness that he inquired from the appellant regarding the whereabouts of the deceased. It is quite curious that Kaliram (PW2) did not make any inquiry from the appellant when appellant came to him to return the mobile of the deceased in the next morning as to how he was in possession of mobile of the deceased, where is the deceased and what has happened and no immediate steps were taken to report the matter to the police

suspecting the role of present appellant. But the evidence of Kaliram (PW2) is that when the appellant met in the morning to return mobile of deceased, he quietly accepted the mobile without making any inquiry regarding whereabouts of the deceased.

16. Further more, this circumstance of appellant returning the mobile of the deceased in the morning to Kaliram (PW2) is more compatible with the innocence of the accused because if at all the appellant-accused was involved in the offence of murder of the deceased Gopal, he would have never returned mobile of the deceased to Kaliram (PW2) so as to create evidence against himself.

17. We are thus left only with the evidence of last seen of the deceased with the appellant Tillu, as stated by Kamal Kumar Jagat (PW7). As far as evidence of Kaliram (PW2) that he had talked to Dr. Gopal and from the same mobile, appellant also talked to him is not free from doubt because of the contradictory statement given by Kaliram (PW2) in the cross-examination that he talked to Gopal from the mobile of Rajaram.

18. Rajaram (PW3) has deposed in his evidence that he, the deceased and Kamal Jagat consumed liquor and then he left the place alone leaving behind deceased Gopal and Kamal Jagat. He does not talk of presence of present appellant or that the present appellant and deceased had left for somewhere alone. There is no evidence also that present appellant, co-accused Gambhir and Dr. Gopal (the deceased) were seen together at any place and thereafter they proceeded to unknown destination and thereafter deceased Gopal eloped and then dead body was found.

19. In the case of **Rambraksh alias Jalim Vs. State of Chhattisgarh** (2016) 12 SCC 251, Their Lordships in the Supreme Court settled the legal position as below:-

“12. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only

circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.”

20. In the present case also when all other evidence led by the prosecution to prove other circumstances are doubtful, only on the evidence of last seen together that too in crowded place, in Bazar, conviction of the appellant would not be safe. If we may say so, the evidence led by the prosecution falls short of the legal requirement as adumbrated by the Supreme Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra**, AIR 1984 SC 1622, wherein Hon'ble the Supreme Court, delineated the principles and laid down as to what is required to be proved by the prosecution to base conviction on circumstantial evidence. In para 152 of the said judgment, it was held as below -

“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) 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.”

21. In the result, impugned judgment of conviction and order of sentence is held unsustainable in law and the same is, therefore, set aside. As the appellant is already on bail on account of suspension of sentence under the bail order of this Court, the bail bond stands discharged.

22. The appeal is accordingly allowed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge