

(2011) 11 CHH CK 0036

In the Chhattisgarh High Court

Case No : Criminal Appeal No's. 876 and 610 of 1995

Brijlal Sahu

APPELLANT

Vs

State of Madhya Pradesh (now Chhattisgarh)

RESPONDENT

Date of Decision : 29-11-2011

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 11 CHH CK 0036

Hon'ble Judges : Sunil Kumar Sinha, J; R.S. Sharma, J

Bench : Full Bench

Advocate : Ram Krishna Sharma, for the Appellant; Ajay Dwivedi, Deputy Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.S. Sharma, J.—Against judgment dated 9-3-1995 passed by 4th Additional Session Judge, Raipur in Session Trial No. 244/1994 (State vs. Brijlal Sahu), accused/appellant Brijlal Sahu has preferred two appeals, i.e., Criminal Appeals No. 876/1995 and 610/1995. Shri Ram Krishna Sharma, Advocate has been engaged by the High Court Legal Services Committee to appear and argue on behalf of the appellant.

This judgment shall govern disposal of both the appeals.

By the impugned judgment, accused/appellant Brijlal Sahu has been convicted u/s 302, Indian Penal Code and sentenced to undergo imprisonment for life.

Case of the prosecution, in brief, is as under:

Deceased Sona Bai was wife of the appellant. The appellant used to suspect that there was illicit relationship between the deceased and his son Radhe Shyam, one Ishwar and other villagers and, therefore, quarrel had taken place between them many times. On the date of incident, i.e., 1-3-1994, the appellant and the deceased had gone to sell Chanaboot. The appellant had taken a Tangiya hiding

it with him. At the time of returning home, at about 9 P.M., the appellant committed murder of the deceased near the agricultural field of Sapurna Sahu with the Tangiya and thereafter threw the Tangiya in the house of Badrinath Nirmalkar (PW-4). Villagers reached the place of occurrence and saw there a shoe and a tobacco-case belonging to the appellant. Merg Intimation (Ex. P-15) was lodged by the appellant in Police Station Abhanpur on 1-3-1994 at 10:45 P.M. expressing suspect of killing of the deceased by someone. Thereafter, First Information Report (Ex. P-16) was registered on 1-3-1994 itself at 10:55 P.M. The Investigating Officer reached the place of occurrence, gave notice (Ex. P-1) to Panchas and prepared inquest (Ex. P-2) on the body of the deceased. Dead body of the deceased was sent for post-mortem examination to D.K. Hospital, Raipur vide Ex. P-12. The post-mortem was conducted by Dr. D.C. Jain (PW-19), who gave his report Ex. P-20. He found incised wounds (i) 2" x ?" x ?" at the middle of the left arm, (ii) 2" x ?" x ?" on left arm above injury No. (i), (iii) 2" x ?" x ?" on left arm above injury No. (ii), (iv) 2" x ?" x ?" on the left arm near injury No. (iii), (v) 2" x ?" x ?" on left side of the neck near sub-mandible, (vi) 2" x ?" x ?" on left temporal region above ear, (vii) 2" x ?" x ?" on left temporal region above injury No. (vi), (viii) 2" x ?" x ?" on left parieto-temporal region, (ix) 3" x 1" x 1" on left shoulder-back, (x) 2" x ?" x ?" on left scapular region, (xi) 2" x ?" x ?" on left scapular region above injury No. (x), (xii) 2" x ?" x ?" on left scapular region above injury No. (xi), (xiii) 2" x ?" x ?" on right shoulder and (xiv) 2" x ?" x ?" on back of the neck. He opined that the cause of death was coma due to injury to brain and the death was homicidal in nature.

In further investigation, memorandum statement (Ex. P-4) of the appellant was recorded u/s 27 of the Evidence Act on 2-3-1994 and at his instance, a Tangiya was seized from the Well of Badrinath Nirmalkar (PW-4) vide Ex. P-5. Potato, Tomato and other vegetables were seized from the house of the appellant vide Ex. P-6. The house of the appellant was searched by the Investigating Officer D.S. Uikey (PW-20) and Search-Panchnama (Ex. P-7) was prepared. Kurta, white Dhoti and Lungi were also seized from the house of the appellant during the search vide Ex. P-8. After completion of the investigation, charge-sheet was filed against the appellant in the Court of Additional Chief Judicial Magistrate, Raipur, who, in turn, committed the case to the Court of Session, wherefrom 4th Additional Session Judge, Raipur received the case on transfer and conducted the trial and convicted and sentenced the appellant as mentioned above.

Charge u/s 302, Indian Penal Code was framed against the appellant. He abjured the guilt.

2. Shri Ram Krishna Sharma, learned counsel for the appellant argued that the finding of guilt recorded on the evidence of last seen together and on the basis of the memorandum statement and recovery of the shoes is unreasonable. The above circumstances are not proved beyond reasonable doubt. Even if the circumstances are taken on their face value, it cannot be said that it was the appellant who committed murder of the deceased. Learned counsel also argued

that one shoe, which was recovered from the place of occurrence, was not properly identified. He further argued that it is well settled that a strong suspicion is no substitute for a proof, therefore, the finding recorded by the learned Additional Session Judge is not sustainable and the appellant deserves to be acquitted.

3. On the contrary, Shri Ajay Dwivedi, learned Deputy Government Advocate for the State/respondent, supporting the impugned judgment, submitted that the conviction and sentence awarded by the learned Additional Session Judge to the appellant do not warrant any interference by this Court.

4. We have heard learned counsel for the parties at length and have perused the impugned judgment as also the record of the session case. Admittedly, there is no eyewitness to the incident and the case of the prosecution is based on the circumstantial evidence. Main circumstances, which the learned Additional Session Judge appears to have taken note of, are thus:

(i) The deceased was last seen in the company of the appellant.

(ii) A shoe was seized near dead body of the deceased, which belonged to the appellant.

(iii) On memorandum statement of the appellant and at his instance, a Tangiya was seized from the Well.

5. In *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, the Hon"ble Supreme Court has observed as under:

17.....The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are : (SCC p. 185, para. 153)

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(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.

6. In *Hatti Singh Vs. State of Haryana*, , the Hon"ble Supreme Court has

observed as under:

27. In Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, this Court noticed : (SCC p. 181, paras 27-28)

27. The last-seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration.

28. In State of U.P. Vs. Satish, this Court observed : (SCC p. 123, para 22)

22. The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.....

(See also State of Goa Vs. Sanjay Thakran and Another,

7. Now, we shall proceed to examine the circumstantial evidence adduced by the prosecution in order to prove the offence against the appellant and to see whether the prosecution has been able to prove the offence against the appellant in conformity with the above principles.

8. So far as the question of last seen together is concerned, it is not disputed that the deceased was wife of the appellant and they lived together. It is also not disputed that they used to sell Chanaboot. It is also not disputed that the death of the deceased was homicidal in nature.

9. Ghasiram (PW-3) deposed that on the fateful day, when he was going out on a bicycle at about 8-8:30 P.M., the appellant met him on the way and told him that his wife had been killed by someone. The appellant requested him to take him on the bicycle where he was going. They moved ahead. After some distance, 7-8 villagers met them. The appellant told them that his wife had been killed by someone and asked them for his help. He, Ramlal (PW-15), Pusau (PW-13) and 8-10 villagers went to see dead body of the deceased. The dead body was lying in the agricultural field of Sapuran Sahu. As soon as the appellant saw dead body of the deceased, he, embracing the deceased, started weeping. When the appellant met him, he did not see any blood stain on his clothes. It is true that dead body of the deceased was smeared with blood and the appellant had embraced the dead body in that condition itself.

10. Badrinath Nirmalkar (PW-4) deposed that on the fateful day, the appellant

and his wife had come to him to purchase Chanaboot. He had sold about 40 Kilograms Chanaboot to them for Rs. 100/-. They kept on going Raipur for selling the Chanaboot. A noise arose at about 7-8 P.M. that the deceased was murdered and her dead body was found lying in the field.

11. Ku. Tulsi (PW-18) deposed that her elder brother Meghnath (PW-8), Ishwar and Radhe Shyam resided in Nayapara. She, her brother Summendra and Domar were residing with the appellant and the deceased. She further deposed that in the night, her elder brother Meghnath (PW-8) came and asked her about whereabouts of her parents. She told that they had gone to sell Chanaboot. Thereafter, what happened, she did not know.

12. So far as the evidence of last seen together is concerned, the prosecution did not adduce any cogent evidence that on the fateful day, the appellant and the deceased had gone to sell Chanaboot together and the deceased was last seen in the company of the appellant.

13. Punitram (PW-1) deposed that on the fateful day, at about 8:30 P.M., he was sitting on Chabootara. The appellant was passing therefrom. His clothes were wet. He asked the appellant about where was he going. He replied that he was going to the house of Badrinath Nirmalkar (PW-4) to pay him price of Chanaboot. He further deposed that the appellant and the deceased kept on going Raipur to sell Chanaboot. Relation between them was cordial. When the appellant met him, there was no any blood stain on his clothes.

14. Ghanshyam (PW-16) deposed that on the fateful day, at about 11 P.M., his brother Meghnath Sahu (PW-8) came to his house and enquired about their mother (the deceased). He replied him that she had gone along with the appellant to sell Chanaboot. Then, Meghnath Sahu (PW-8) told him that the appellant had killed their mother (the deceased).

15. Meghnath Sahu (PW-8) deposed that he learnt on 1-3-1994 that his mother (the deceased) had been murdered. He reached the place of occurrence at about 11 P.M. In cross-examination, he deposed that he had been separated from his father since many years. A shoe and a tobacco-case of the appellant were lying at the place of occurrence. Ramlal Yadav (PW-15) deposed that a noise arose in the village that someone had killed a woman. Then, he, Ghasiram (PW-3), one Chunnuram and 3-4 villagers went to see the dead body. The dead body was found to be of Sona Bai, wife of the appellant. A shoe and a tobacco-case of the appellant were lying there. He further deposed that the appellant embraced the deceased and played to weep.

16. Ku. Tulsi (PW-18), daughter of the appellant and the deceased, deposed that normal altercation took place between the appellant and the deceased as happens in other families. They lived together happily. Relation between the appellant and Ghanshyam (PW-16) was strained. They used to quarrel. The appellant had not given him any share in the property.

17. None of the prosecution witnesses have stated anywhere in their evidence that on the fateful day they saw the appellant and the deceased going together to sell Chanaboot.

18. From the evidence of the prosecution, it is not proved that the deceased had gone along with the appellant to sell Chanaboot and she was last seen in the company of the appellant. Badrinath Nirmalkar (PW-4) deposed that the appellant and the deceased had come to him to purchase Chanaboot in the morning of the fateful day. At about 7-8 P.M., he heard a noise that a woman had been killed in the village. Badrinath Nirmalkar (PW-4) had seen the appellant and the deceased together in the morning of the fateful day and dead body of the deceased was found on that day itself at about 7-8 P.M., which goes to show that the gap between these two points of time was long. The time-gap between the point of time when the appellant and the deceased were last seen alive together and the deceased was found dead is so long that possibility of any person other than the appellant coming in between and being the author of the crime becomes possible.

19. Next circumstance is memorandum statement of the appellant and recovery of a shoe near dead body of the deceased and finding of it to be of the appellant.

20. The investigating officer D.S. Uikey (PW-20) deposed that he recorded memorandum statement of the appellant vide Ex. P-4 and at the instance of the appellant a Tangiya was seized from the Well vide Ex. P-5. He further deposed that a shoe and a tobacco-case were also seized near dead body of the deceased vide Ex. P-3. Harakhram (PW-6) deposed that at the instance of the appellant a Tangiya was seized from the Well of Badrinath Nirmalkar (PW-4) after taking out water therefrom. He further deposed that a bag was also seized from the appellant vide Ex. P-6. He further deposed that Kurta, Topi and Lungi were also seized from the house of the appellant vide Ex. P-8. D.S. Uikey (PW-20) deposed that during the search of house of the appellant, clothes worn by the appellant at the time of the incident were seized vide Ex. P-8. Harakhram (PW-6) deposed that it is true that the Well, out of which the Tangiya was recovered, was situated at an open place. It is also true that many articles were thrown and lying in the Well. The proceeding of recovery continued for two days and seizure of the Tangiya was made on third day of the incident. D.S. Uikey (PW-20) also deposed that the Well was situated at a public place.

21. The Well, out of which the Tangiya was recovered, was situated in the agricultural field of Badrinath Nirmalkar (PW-4), which is an open place. The Well was not in possession of the appellant. It was accessible by anybody else. There is possibility of throwing a Tangiya in the Well as it is a common article used by villagers/farmers for agricultural purposes. The prosecution has not been able to prove that the seized Tangiya contained human blood.

22. There is no evidence on record to the effect that the seized articles Tangiya, Lungi, Dhoti, Topi and Kurta were sent for chemical examination. No report of

Forensic Science Laboratory is produced on record. The prosecution has not been able to prove that the above seized articles contained human blood.

23. Now, we shall examine whether conviction of the appellant can be based on seizure of a shoe near dead body of the deceased?

24. In *Ashish Batham Vs. State of Madhya Pradesh*, the Hon'ble Supreme Court held that mere suspicion, however, strong or probable it may be is no effect substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

25. Loorsingh (PW-5) deposed that one pair shoes and one pair of lady chappal were seized near dead body of the deceased. It is true that similar shoes are available in the market as were seized near the dead body. Ghanshyam (PW-16) also deposed that similar shoes are available in the market as were seized from the place of occurrence. Ghasiram (PW-3) deposed that none of the persons present at the place of occurrence identified the shoe.

26. Meghnath Sahu (PW-8) deposed that he saw a plastic shoe and a tobacco-case at the place of occurrence, which belonged to the appellant. He deposed that similar shoes are available in the market. Pusau (PW-13) deposed that a shoe was lying near dead body of the deceased and similar shoes are available in the market. Ramlal Yadav (PW-15) deposed that a shoe and a tobacco-case of the appellant were lying at the place of occurrence.

27. The prosecution has led evidence to the effect that it had seized a shoe of the appellant from the place of occurrence. D.S. Uikey (PW-20) deposed that he did not compare the shoe of the appellant seized from the place of occurrence with another shoe worn by the appellant at the time of incident. It appears that the shoe seized from the place of occurrence was not compared and identified.

28. The circumstance of finding of a shoe near dead body of the deceased, which, according to the prosecution was of the appellant, which was worn by the appellant on the date of occurrence, is insufficient. It is difficult to connect that the shoe seized near dead body of the deceased was worn by the appellant. It is difficult to rely upon it as an incriminating circumstance. It was not proved that shoe seized from the place of occurrence was of the appellant. Therefore, the circumstantial evidence of memorandum statement and recovery of shoe and tobacco-case from the place of occurrence is not convincing and reliable and cannot be based for conviction of the appellant.

29. We have carefully examined the entire evidence available on the record. We are of the view that the Additional Session Judge has erred in law in resting the conviction on the circumstantial evidence of last seen together and recovery of shoe from the place of occurrence and Tangiya from the Well. We are of the view that on the above circumstantial evidence, the conviction of the appellant cannot be sustained. In the result, the appeals are allowed. The conviction and sentence awarded to the appellant u/s 302, Indian Penal Code are set aside. He is acquitted of the charge framed against him. Presently, he is on bail. His bail bonds are cancelled and surety stands discharged.