

(2022) 08 CHH CK 0031

In the Chhattisgarh High Court

Case No : Criminal Appeal No. 894 Of 2011, 203 Of 2012

Charaku @ Nandprasad Cherawa

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 16-08-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302

Code Of Criminal Procedure, 1973 — Section 313, 374(2), 437A

Citation : (2022) 08 CHH CK 0031

Hon'ble Judges : Sanjay K. Agrawal, J; Sanjay S. Agrawal, J

Bench : Division Bench

Advocate : Rishi Rahul Soni, Anmol Sharma

Final Decision : Allowed

Judgement

Sanjay K. Agrawal, J

1. Since both the above criminal appeals have arisen out of one and same judgment dated 9-11-2011 passed by the 1st Additional Sessions Judge, Ambikapur in Sessions Trial No.518/2009 and since common question of fact and law is involved in both the appeals, they have been clubbed together, heard together and are being disposed of by this common judgment.

2. These two criminal appeals have been preferred by the accused / appellants under Section 374(2) of the CrPC against the impugned judgment convicting them for the offence punishable under Section 302 read with Section 34 of the IPC and sentencing them to undergo imprisonment for life with fine of ₹ 1,000/- each, in default, to further undergo rigorous imprisonment for two months.

3. Appellant in Cr.A.No.203/2012 namely, Charaku @ Nandprasad Cherawa (A-1) and appellant in Cr.A.No.894/2011 namely, Ignasius Kerketta (A-3) have assailed their conviction for offence under Section 302 read with Section 34 of the IPC.

4. Case of the prosecution, in brief, is that in the intervening night of 16th & 17th

October, 2009, in furtherance of common intention, the two appellants herein along with seven other accused persons, who were acquitted by the trial Court by its impugned judgment, caused the death of Tius Yadav @ Deviprasad and thereby committed the offence punishable under Section 302 read with Section 34 of the IPC. Further case of the prosecution, in brief, is that on 13-10-2009, the deceased (Tius Yadav) had committed sexual intercourse with the daughter of Charku @ Nandprasad Cherva (A-1), aged about 16 years, and thereafter, absconded and in protest thereof and to take revenge of that reason, on 14-10-2009, the two appellants herein along with the acquitted accused, reached to the house of deceased Tius Yadav @ Deviprasad and enquired about deceased Tius Yadav @ Deviprasad from his wife Somari Bai (PW-8), his daughter-in-law Smt. Pushpavati (PW-3) & his son Premasagar (PW-4) and thereafter, they caught hold of Premasagar (PW-4) and on protest being made by Somari Bai (PW-8) & Smt. Pushpavati (PW-3), they did not take Premasagar (PW-4) along with them, but went away from the spot after threatening that they will come tomorrow and if the deceased is not traced out and informed to them, they have to suffer consequences. This matter was reported on 16-10-2009 by Premasagar (PW-4) along with his wife Smt. Pushpavati (PW-3) pursuant to which rojnamcha sanha Ex.P-35C was registered. Thereafter, it is the case of the prosecution that in the intervening night of 16th & 17th October, 2009, Tius Yadav @ Deviprasad was staying with his co-brother Haricharan (PW-6) in his house at Village Songara and in that intervening night, at 11.30 p.m., the two appellants herein along with other acquitted accused, reached to the house of Haricharan (PW-6) and knocked the door and when the door was opened by Haricharan, they informed that Tius Yadav @ Deviprasad has committed sexual intercourse with A-1's daughter and caught hold of Tius Yadav @ Deviprasad and took him along with them. On the next day, Haricharan (PW-6) informed the incident to Kedar Yadav (PW-1), Premasagar (PW-4), Smt. Pushpavati (PW-3), Somari Bai (PW-8) & neighbour Daya Prasad @ Girwar Prasad Yadav (PW-2) and thereafter, one of the accused Ignasius Kerketta (A-3) informed Girwar @ Gayaprasad (PW-2) over phone that the dead body of the deceased is lying near the nursery of Phoolwar Road, then Kedar Yadav (PW-1), Daya Prasad @ Girwar Prasad Yadav (PW-2), Premasagar (PW-4), Dilip Yadav (PW-5), Haricharan (PW-6) & Dhaneshwar Yadav (PW-7) went to the spot and noticed the deceased lying dead having suffered grievous injuries and at that time, accused Charku @ Nandprasad (A-1), Karmu Cherva (A-2) & Forest Guard Ignasius Kerketta (A-3) were present. The matter was informed to Inspector J.S. Saggi (PW-12) over phone who reached on the spot and on the report of Kedar Yadav (PW-1), dehati morgue intimation Ex.P-1 and dehati nalsi Ex.P-2 were registered and spot map was prepared vide Ex.P-5. Inquest was conducted vide Ex.P-4 and after returning to the police station, morgue Ex.P-18 and first information report (FIR) Ex.P-7 were registered. Statements of the witnesses were recorded and on 19-10-2009, memorandum statement of acquitted accused Karmu (A-2) was taken vide Ex.P-8 and similarly, memorandum statement of accused Charku @ Nandprasad (A-1) – the present appellant, was taken vide Ex.P-10 pursuant to which wooden stick and Hero

Honda Majestic vehicle were seized vide Ex.P-11 from the possession of Charku @ Nandprasad (A-1), but nothing was recovered from the possession of appellant Ignasius Kerketta (A-3). Thereafter, after usual investigation, the present two appellants and seven other accused persons were charge-sheeted for the aforesaid offence.

5. In order to bring home the offence, the prosecution has examined as many as 14 witnesses and exhibited 35 documents Exs.P-1 to P-35. The defence has examined none, but exhibited three documents Exs.D-1 to D-3 i.e. statements of Smt. Somari Bai, Santoshi Bai and Kedar Yadav.

6. The trial Court after appreciating oral and documentary evidence on record, convicted and sentenced the appellants herein under Section 302 read with Section 34 of the IPC in the manner mentioned in the opening paragraph of this judgment against which these appeals have been preferred and rest of the accused persons were acquitted finding no evidence.

7. Mr. Rishi Rahul Soni, learned counsel appearing for the appellants, would submit as under: -

1. Motive as alleged by the prosecution that deceased Tius Yadav @ Deviprasad had committed rape with the daughter of Charku @ Nandprasad Cherva (A-1) and therefore he has murdered Tius Yadav @ Deviprasad is not established, as such, motive of the offence is not established.

2. The trial Court has even recorded a finding in paragraph 23 that though pursuant to the memorandum, wooden stick has been recovered, but no blood has been found on the wooden stick and only on the basis of recovery of wooden stick from house which is a common article usually kept in villages by most of the villagers and the possession of which is not uncommon, the trial Court has declined to record conviction.

3. Merely on the basis that on 13-10-2009, the appellants had allegedly approached the house of the deceased, which is established by Pushpa (PW-3) – daughter-in-law of the deceased, even though it is held to be proved, the appellants cannot be convicted for offence under Section 302 of the IPC unless incriminating circumstances are proved beyond reasonable doubt.

4. The prosecution has failed to establish that the present appellants are the person who have forcefully taken / kidnapped the deceased and thereafter murdered him and therefore the appellants cannot be convicted for offence under Section 302 of the IPC, though death of deceased Tius Yadav @ Deviprasad was homicidal in nature.

8. Mr. Anmol Sharma, learned Panel Lawyer appearing for the State / respondent, would submit that the trial Court is absolutely justified in convicting the present two appellants for the offence in question, as they had taken the deceased along with them in the intervening night of 16th & 17th October, 2009 and thereafter, murdered him, as such, the theory of last seen is established and

motive is also established, as the deceased had committed sexual intercourse with the daughter of Charku @ Nandprasad Cherva (A-1) and that is the reason for offence, as such, the appeals deserve to be dismissed.

9. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

10. The first question is, whether the death of the deceased was homicidal in nature?

11. The trial Court relying upon postmortem report Ex.P-15 in which mode of death is said to be coma due to head injury and nature of death to be homicidal and also taking into consideration the statement of Dr. Anupam Minj (PW-11) who conducted postmortem on the dead body of the deceased, came to the conclusion that death of the deceased was homicidal in nature which has even not been seriously controverted by learned counsel for the appellants, as such, we are of the opinion that the trial Court is absolutely justified in holding that nature of death was homicidal. The said finding is a finding of fact which is neither perverse nor contrary to the record and we hereby affirm the said finding.

12. Now, the question is, whether the appellants are authors of the crime in question as held by the trial Court?

13. The trial Court has relied upon four incriminating circumstances to hold the appellants guilty which we will deal with one by one.

Motive of the offence: -

14. The trial Court has recorded in paragraph 2 of its judgment that deceased Tius Yadav @ Deviprasad has committed rape with the daughter of Charku @ Nandprasad Cherva (A-1) on 13-10-2009 which is admitted fact and that is the motive for commission of offence by appellant Charku @ Nandprasad Cherva (A-1) which has seriously been disputed by learned counsel appearing for the appellants stating that there is no iota of evidence to prove the fact that the deceased had committed sexual intercourse with the daughter of Charku @ Nandprasad Cherva (A-1) on 13-10-2009, as there is no copy of FIR produced and marked as exhibit by the prosecution, otherwise, it could have easily been produced by the prosecution to establish such fact. However, it is pertinent to note that while replying to question No.10 put to appellant Charku @ Nandprasad Cherva (A-1) in his statement recorded under Section 313 of the CrPC, he has stated that it is correct that Tius Yadav has committed sexual intercourse with his daughter and thereafter, in reply to question No.141, he has clearly stated that he made report to the police station that Tius Yadav has committed sexual intercourse with his daughter, therefore, he has been falsely implicated. As such, in view of the explanation of appellant Charku @ Nandprasad Cherva (A-1), it is established by the prosecution that A-1 (Charku) has made report against Tius Yadav @ Deviprasad that Tius Yadav has committed sexual intercourse with his

daughter. Thus, the prosecution has established the motive for commission of offence by appellant Charku @ Nandprasad Cherva (A-1) to commit the murder of Tius Yadav @ Deviprasad. It is well settled law that motive is a weak piece of evidence and it is one of the incriminating circumstances, but conviction cannot rest solely on the basis of proof of motive by the prosecution.

15. The trial Court has recorded finding that the offence of rape was committed by Tius Yadav @ Deviprasad upon the daughter of Charku @ Nandprasad Cherva (A-1) on 13-10-2009 and thereafter, on 14-10-2009, the present two appellants and other accused persons reached to the house of Tius Yadav and asked his whereabouts from his wife Somari Bai (PW-8), his daughter-in-law Smt. Pushpavati (PW-3) & his son Premasagar (PW-4) and wanted to forcefully take away his son Premasagar (PW-4), but somehow, on protest by all the three, they did not take Premasagar (PW-4) along with them, but threatened them with consequences if the whereabouts of Tius Yadav are not known to them and report to this effect was lodged on 16-10-2009 vide Ex.P-35C by Premasagar (PW-4) and Pushpa Yadav (PW-3). The said fact is proved, but the trial Court has rightly held the said established fact as one of the incriminating circumstances, however, its effect on the appellants' conviction will be discussed in the later paragraphs.

Last seen theory: -

16. It is the case of the prosecution that in the intervening night of 16th & 17th October, 2009, the present two appellants along with the acquitted accused persons came to the house of Haricharan (PW-6) – co-brother of the deceased with whom the deceased was staying at Village Songara and they knocked the door and asked Haricharan (PW-6) to open the door and when Haricharan opened the door, they said that Tius Yadav has committed sexual intercourse with the daughter of Charku @ Nandprasad Cherva (A-1) and they have come from police station and they took Tius Yadav along with them. On the next day morning, Haricharan (PW-6) informed Kedar Yadav (PW-1), Premasagar (PW-4), Smt. Pushpavati (PW-3), Somari Bai (PW-8) & Daya Prasad @ Girwar Prasad Yadav (PW-2) that on the previous night the accused persons have taken Tius Yadav from his house forcibly. Meanwhile, Ignasius Kerketta (A-3) informed Girwar @ Gayaprasad (PW-2) over phone that the dead body of Tius Yadav was lying near nursery of Phoolwar Road and they all went together on the spot and saw the dead body of the deceased where accused Charku @ Nandprasad (A-1), Karmu Cherva (A-2) & Ignasius Kerketta (A-3) were present. Kedar Yadav (PW-1) informed about the incident to Inspector J.S. Saggi (PW-12) over phone who reached to the spot and the wheels of investigation started running. So the entire prosecution case rests on the testimony of Haricharan (PW-6) – co-brother of the deceased with whom the deceased was staying on the relevant night.

17. It is pertinent to mention that Haricharan (PW-6) in his statement before the Court has admitted that earlier, on 27-10-2010, when he was coming to the court for recording his evidence, he was kidnapped by some unknown persons in

Maruti car, therefore, he could not reach to the court and it was reported by his son Kanhaiyalal vide Article 'A' and thereafter, he was escorted to the court by police constable and his statement was recorded on 29-3-2011, but on that day (29-3-2011), he has turned hostile and has not supported the case of the prosecution, though he has thrown some light with regard to motive of the offence qua rape by the deceased with the daughter of Charku @ Nandprasad Cherva (A-1), but he has not at all supported the case of the prosecution. As per the case of the prosecution, he has seen the deceased being taken by the accused persons and informed the incident to Kedar Yadav (PW-1), Premasagar (PW-4), Smt. Pushpavati (PW-3), Somari Bai (PW-8) & Daya Prasad @ Girwar Prasad Yadav (PW-2). In that view of the matter, the evidence of other witnesses to whom Haricharan (PW-6) has informed becomes hearsay evidence, as Haricharan (PW-6) has turned hostile and has not supported the case of the prosecution, and would not have much relevance so far as the question of taking away the deceased forcefully by the present two appellants and other accused persons are concerned. Though the fact remains that some persons took away the deceased forcefully from the house of Haricharan (PW-6), where the deceased was staying, on the intervening night of 16th & 17th October, 2009, but no test identification proceeding was conducted to identify that it is the appellants who have taken away the deceased from the house of Haricharan (PW-6). As such, the case of the prosecution as found proved by the trial Court that the two present appellants have taken the deceased forcefully from the house of Haricharan (PW-6) in the intervening night of 16th & 17th October, 2009 and thereafter, the dead body of the deceased was found, is not established beyond reasonable doubt in absence of any oral and documentary evidence, as Haricharan (PW-6), who is star witness of the prosecution and on whom the prosecution case rests, has turned hostile and has not supported the case of the prosecution at all and his evidence is of no use.

18. The next circumstance that has been found proved by the trial Court is that pursuant to the memorandum statement Ex.P-10, wooden stick was recovered vide Ex.P-11, but neither it was sent to forensic examination nor blood was found on it. The trial Court has also recorded finding that in villages, it is not uncommon to have wooden stick in houses and conviction cannot be based upon it when it was neither stained with blood nor sent for forensic examination. In our considered opinion, merely because wooden stick has been recovered from the possession of Charku @ Nandprasad Cherva (A-1), it cannot be held that it is appellant Charku (A-1) who has committed the murder of Tius Yadav.

19. Concludingly, it is held that though the prosecution has been able to prove that there was strong motive on the part of Charku @ Nandprasad Cherva (A-1) to commit the murder of the deceased, as the deceased had committed sexual intercourse with his daughter, but only on the basis of motive, howsoever strong it may be, the appellant – Charku cannot be convicted and secondly, merely because the present two appellants have also approached the house of the deceased on 14-10-2009 and enquired about the whereabouts of the deceased

and also threatened the family members of the deceased of consequences if the whereabouts of the deceased are not known to them, no conviction can be recorded against them and at the most, the State could have proceeded against them for threatening and abusing, which the State has not proceeded. Furthermore, the fact of the appellants having taken away the deceased forcefully from the house of Haricharan (PW-6) in the intervening night of 16th & 17th October, 2009 is also not established by any circumstantial evidence. Finally, mere recovery of wooden stick pursuant to the memorandum statement of the accused on which blood stains were not found, would not complete the chain of circumstances to hold that it is only and only the appellants who have committed the murder of the deceased and they are perpetrators of the offence in question. Consequently, we hold that the prosecution has failed to bring home the offence beyond reasonable doubt and the trial Court is absolutely unjustified in convicting and sentencing the appellants under Section 302 read with Section 34 of the IPC.

20. Resultantly, the impugned judgment dated 9-11-2011 passed by the 1st Additional Sessions Judge, Ambikapur in S.T.No.518/2009 is hereby set aside. The appellants are acquitted of the charge alleged against them. They are on bail. They need not surrender. However, their bail bonds shall remain in force for a period of six months in view of the provision contained in Section 437A of the CrPC.

21. The criminal appeals are allowed to the extent indicated herein-above.