

(2012) 02 CHH CK 0060
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 415 of 1994

Hariram Chainamal and Another

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 07-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2012) 2 CGBCLJ 278 : (2012) CriLJ 3752

Hon'ble Judges : Rajeev Gupta, C.J.; Sunil Kumar Sinha, J

Bench : Full Bench

Advocate : Neeraj Mehta, for the Appellant; Kishore Bhaduri, A.A.G., for State, for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—This appeal is directed against the judgment dated 31st of March, 1994 passed in Sessions Trial No. 41/1992 by the Additional Sessions Judge, Dhamtari. By the impugned judgment, the appellants have been convicted u/Ss. 302/34 and 201, IPC and sentenced to undergo imprisonment for life and R.I. for 5 years with a direction to run the sentences concurrently.

2. The facts, briefly stated, are as under:

Appellant No. 1 was owner of a retail grocery shop. Appellant No. 2 was servant in the shop of appellant No. 1. Deceased-Anand Ram Motwani was a whole seller of grocery items. The case of the prosecution is that the deceased had to receive Rs. 56,000/- from appellant No. 1 on account of various items supplied by him to the shop of appellant No. 1. Appellant No. 1 wrote a letter to the deceased and called him to his shop on 23-8-1991 at about 7.00 p.m. the deceased went to the shop of appellant No. 1 at the said date and time, thereafter, he was missing. A missing report (Ex. P-26) was lodged by his brother Mohanlal Motwani (P.W. 28) on 24-8-1991. On 26-8-1991, dead body of the deceased was found near canal of Rudri Dam. Aaju Ram (P.W. 25), a time keeper of Irrigation Department,

gave intimation to the concerned police. Merg Intimation (Ex. P-36) was lodged and the body was sent for postmortem examination. It revealed in the postmortem examination that it was a homicidal death. The prosecution came with the case that the deceased was called by the appellant No. 1; he was last seen in the company of appellants; appellant No. 1 had motive to kill the deceased because he had to pay Rs. 56,000/- to the deceased; appellant No. 1 made extra-judicial confession before the prosecution witnesses while going to the police Station on 10-9-1991, therefore, the appellants were liable for punishment under the aforementioned sections of IPC. Admittedly, there was no eye-witness to the incident and the case of the prosecution was based on circumstantial evidence. Following are the circumstances, on which, the learned Session Judge relied and convicted and sentenced the appellants.

- (i) The death was homicidal;
- (ii) Appellant No. 1 wrote a letter to the deceased and called him at his shop;
- (iii) The deceased was lastly seen in the company of the appellants;
- (iv) Recovery of various articles from the possession of the appellants;
- (v) Appellant No. 1 had strong motive to kill the deceased because he had to pay heavy amount to the deceased;
- (vi) Appellant No. 1 had made extra-judicial confession before three prosecution witnesses while going to the police station on 10-9-1991.

3. Mr. Neeraj Mehta, Learned Counsel for the appellants, argued that except the circumstances of last seen and extra-judicial confession, other circumstances are not incriminating against the appellants; there is long time gap between the deceased seen alive in the company of the appellants and the dead body recovered; the evidence of extra-judicial confession is shaky and witnesses thereto are not reliable; and the motive set-forth is insufficient, therefore, the impugned judgment suffers with illegality and infirmity and deserves to be set aside.

4. On the other hand, Mr. Kishore Bhaduri, learned Additional Advocate General appearing on behalf of the State, opposed these arguments and supported the judgment passed by the Sessions Court.

5. We have heard the Learned Counsel for the parties at length and have also perused the records of the Sessions case.

6. In *Dhananjay, Chatterjee v. State of W.B.* (1994) 2 SCC 22 : (1995 AIR SCW 510), the Supreme Court held "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence

must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the Court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

7. In *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, the Supreme Court laid down that there is no doubt that conviction can be based solely on circumstantial evidence but the conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are:

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.

About the last seen theory, the Supreme Court held that the 1st seen theory comes into play where the time gap between the point of time when the accused and 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 author of 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 accused and deceased were last seen together, it would be hazardous to come to a conclusion of a guilt in those cases. Almost similar view was taken in *State of Goa Vs. Sanjay Thakran and Another*,

8. In *Sk. Yusuf Vs. State of West Bengal*, , the Supreme Court further reiterated the same principal and held that the last seen theory comes into play where the time gap between the point of time when the accused and 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.

9. *Gautam (P.W. 9)* and *Raju Tiwari (P.W. 20)* have been examined as the witnesses of last seen. *Gautam (P.W. 9)* deposed that on the fateful day at about 7.00-7.30 p.m., one person came to the shop of the appellant No. 1 on his

scooter. He talked with appellant No. 1 in Sindhi language. Thereafter, the said person and the two appellants came out from the shop and went together to some other place. Raju Tiwari (P.W. 20) deposed that on the fateful day, deceased-Anand Ram Motwari came to the shop of appellant No. 1, talked with appellant No. 1 in Sindhi language, and thereafter appellants and the deceased came out from the shop. Gautam (P.W. 9) and Raju Tiwari (P.W. 20) were servants in the shop of appellant No. 1. Gautam (P.W. 9) did not identify the person, who visited the shop of appellant No. 1. Raju Tiwari (P.W. 20) identified him as the deceased. These witnesses had seen the deceased in company of the appellants at about 7.00-7.30 p.m. on 23-8-1991 and the dead body of the deceased was seen by, Aaju Ram (P.W.-,25) at about 2 p.m. on 26-8-1991. Therefore- there is a long time gap between the deceased seen alive in the company of the appellants and the dead body found, and possibility of other persons coming in between cannot be fully ruled out. We note that the prosecution has not fixed the time of the death also, therefore, there is no proximity between the time when the deceased and the appellants were last seen together and the time of death of the deceased. We further note the dead body of the deceased was found at a very long distance from the shop of appellant No. 1. In view of all this, we are of the opinion the circumstance of last seen together would be of no significance and the Session Judge erred in law in holding it to be incriminating against the appellants.

10. For proving the next circumstance of extra-judicial confession, the prosecution has examined three witnesses namely -- Gopichand (P.W. 1), Narayan Das (P.W. 26) & Mohan Lal (P.W. 29). The case of the prosecution is that on 10-9-1991 at about 1.45 p.m. these witnesses were going to police Station Dhamtari. On the way appellant No. 1 met them and made extra-judicial confession about commission of murder of the deceased. Section 161, Cr. P.C. statement of Narayan Das (P.W. 26) was recorded on 7-10-91. Why there was delay in recording his statement, has not been explained. According to Narayan Das (P.W. 26), when he met with the appellant No. 1, he was in hesitating condition and he told to him that police has called him as it has been known to the police that he has committed murder of the deceased. On further talking, he made confession in clear words that he along with his servant has committed murder of deceased-Anandram Motwani. Gopichand (P.W. 1) deposed that on the fateful day at about 1.45 p.m. he was going to police Station along with Mohanlal (P.W. 29). On the way, they met with appellant No. 1. Appellant No. 1 stated that he has committed murder of the deceased with the help of appellant No. 2. He further added that they have committed murder on 23-8-1991 and prayed for saving them. Mohanlal (PW-29) deposed that on the fateful day, when he was along with Gopichand (P.W. 1). appellant No. 1 met them near Kachari Chowk and said to save him and confessed before them that he has committed murder of Anandram Motwani with the help of his servant-Sukhdev. Mr. Mehta has argued that appellant No. 1 was brought to the police station in police custody, therefore, there is no question of making extra-judicial confession before the

above witnesses on the way to the police station. He drew our attention to para 67 of the evidence of A.S. Gill (P.W. 31). A.S. Gill (P.W. 31) was the Station House Officer, who had conducted the investigation. He deposed in para 67 that on 10-9-1991, he had called the appellant No. 1 at police station. He had sent sub-inspector Subhash Choudhary to bring the appellant to the police station. Appellant-Hariram was brought to the police station by Sub-inspector Subhash Choudhary. He was called in connection with the present case. Sub-inspector Subhash Choudhary had brought appellant-Hariram to the police station at about 1.30-2.00 p.m. By the above admission of A.S. Gill (P.W. 31) two things are clear. First Sub-inspector Subhash Choudhary was accompanying appellant Hariram while he was being brought to the police station, and the second, if any extrajudicial confession was made by him, it was in presence of the police or in other words when Hariram was in police custody.

11. Ex. P.2 is the seizure memo of the letter written by appellant-Hariram. This seizure memo was prepared in the police Station at about 2.00 p.m. on 10-9-1991. Gopichand (P.W. 1) and Mohanlal (P.W. 29) are the two eye-witnesses of the seizure memo. The letter was allegedly seized from the possession of appellant-Hariram. The seizure memo (Ex. P-2) bears the signature of all the three persons. The seizure was made by S.H.O. A. S. Gill (P.W. 31). It is a matter of common knowledge that some time must have been consumed in actual seizure of the letter and preparation of seizure memo by the concerned police officer. If the above proceedings were completed at about 2.00 p.m. it becomes suspicious to believe that at about 1.45 p.m. (just 15 minutes prior to the seizure) appellant-Hariram would have met with the above witnesses. This creates a doubt on the above evidence of these witnesses, who say that at about 1:45 p.m. appellant-Hariram made extra-judicial confession before them at Kachari Chork.

12. In *Sk. Yusuf (supra)*, the Supreme Court held that the extra-judicial confession is weak type of evidence. It must be established to be true and made voluntarily in a fit state of mind. The words of witness must be clear, unambiguous and clearly convey that accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility. Reference has been made to *State of Rajasthan Vs. Raja Ram*, and *Kulvinder Singh and Another Vs. State of Haryana*, .

13. In the instant case, if we look into the evidence of above three witnesses of extrajudicial confession, it does not inspire the confidence. On account of above discussion relating to time of extra-judicial confession and presence of the police officer at the time of alleged confession, about which these witnesses did not depose at all, makes their evidence shaky and un-reliable. We are of the view that in the above facts and circumstances the learned Session Judge erred in law in believing the evidence of extra-judicial confession against the appellants.

14. So far as recovery of letter and arrears of outstanding amount of Rs. 56,000/- are concerned, in absence of any other incriminating evidence against

the appellants, they would hardly be of much importance. Such letters are written by the businessmen in normal course. As per evidence of prosecution witnesses, appellant-Hariram was running a big grocery shop as he had kept 3-4 servants in his shop. Outstanding amount of Rs. 56,000/- in such situation would hardly be taken as sufficient motive to commit murder of the deceased. In a case entirely based upon circumstantial evidence, motive has greater relevancy or significance. But the significance or relevancy of motive would primarily depend upon the facts and circumstances of a given case (See Dharnidhar Vs. State of U.P. and Others, In the facts and circumstances of the present case, we do not find the above motive to be sufficient to commit murder of the deceased.

15. A knife was seized from the possession of appellant-Hariram. Certain clothes were also seized from the possession of the appellants. All above articles were sent for their chemical examination to Forensic Science Laboratory (FSL), Sagar. FSL report is Ex. P.110. According to this report, blood stains were not found on the knife. Though, blood stains were found on the clothes of the appellants, but no report relating to their origin or group was filed by the prosecution.

16. On due appreciation of the entire material available on record, we find that the circumstances, from which, the conclusion of guilt has been drawn, have not been fully established. The circumstances are not of conclusive nature and tendency. It is not a case, in which, the circumstances are not capable of being explained. The dead body of the deceased was found at an open place near the canal of Rudri Dam, which is at a very long distance from the shop of the appellant No. 1. We are of the view that in the instant case, chain of circumstantial evidence is not complete and the circumstances are not sufficient to hold the appellants guilty of the aforesaid offences. For the foregoing reasons, we allow this appeal and set aside the conviction and sentences awarded to the appellants under Sections 302/34 & 201, IPC and direct that the appellants are acquitted of the charges framed against them. It is stated that the appellants are on bail, their bail bonds are cancelled and sureties stand discharged.