
(2017) 02 CHH CK 0020
In the Chhattisgarh High Court
Case No : 507 of 2007

Hemlal & ORS.

APPELLANT

Vs

The State Of Chhattisgarh

RESPONDENT

Date of Decision : 03-02-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 120B](#) -
[Section 302](#), [Section 34](#) - Punishment of criminal conspiracy - Punishment for murder - Acts done by several persons in furtherance of common intention
[Evidence Act, 1872](#), [Section 106](#) - Burden of proving fact especially within knowledge

Citation : (2017) 02 CHH CK 0020

Hon'ble Judges : Pritinker Diwaker, Rajendra Chandra Singh Samant

Bench : Division Bench

Advocate : Amiyakant Tiwari, Arvind Dubey

Judgement

1. This appeal arises out of the judgment of conviction and order of sentence dated 19.3.2007 passed by the Sessions Judge, Rajnandgaon (CG) in S.T. No.61/06 convicting the accused/appellants under Section 302/34 of the Indian Penal Code (for short "the IPC") and sentencing each of them to undergo rigorous imprisonment for life and fine of Rs.500/-, in default to undergo simple imprisonment for three months.

2. In the present case name of deceased is Kailash Bai, mother of accused/appellant No.1-Hemlal.

3. As per prosecution case, on 2.5.2006 in between 9.00 a.m. to 6.00 p.m. when the deceased was working in her field, the appellants reached there and committed her murder by strangulating her. At the instance of appellant No.1, merg intimation (Ex.P-25) was recorded on 2.5.2006 at 10.30 p.m. Inquest on the body of deceased was prepared on 3.5.2006 vide Ex.P-13. Body was sent for

post-mortem examination which was conducted by Dr. S.S. Devdas (PW-8) vide Ex.P-19 and as per postmortem report, the cause of death was asphyxia resulting from strangulation. On 6.5.2006 memorandum of accused/appellant No.1 was recorded vide Ex.P-7 which led to recovery of shirt and pant vide seizure memo of Ex.P-8. On the basis of disclosure statement of accused/appellant No.2, jeans pant & full shirt of which one button was missing were recovered. On 6.5.2006 itself on the basis of merg enquiry, FIR (Ex.P-22) was registered against the present appellants and one juvenile accused namely Chamman under Sections 302 & 120B IPC and Section 5 of Chhattisgarh Tonhi Pratadna Nivaran Adhiniyam.

4. On completion of investigation, charge sheet was filed against accused persons for the above offences, however, the trial Court, at the stage of charge, framed the charges under Sections 120B & 302/34 IPC against the accused persons. They denied the charges and claimed to be tried. The prosecution in order to bring home the charges levelled against the accused/appellants examined 14 witnesses in all. Statements of accused/appellants persons were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication in the crime in question.

5. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment, convicted & sentenced the accused/appellants as described above.

6. Learned counsel for accused/appellants submits that; i) there is no eyewitness to the incident and the whole case rests on circumstantial evidence but none of the circumstances has been proved by the prosecution beyond reasonable doubt and the trial Court erroneously convicted the appellants for the alleged offence under Sections 302/34, therefore, the judgment impugned is liable to be quashed.

ii) there is no evidence to conclude that the deceased was last seen alive in the company of appellants and thereafter her body was recovered. The witnesses of last seen have only seen the appellants coming from the side of field where the deceased was found dead.

iii) as regards the recovery of button allegedly belonging to the shirt of appellant-Shailendra, but in absence of any other clinching evidence connecting the appellant with crime in question, it cannot be treated as an incriminating piece of evidence against the appellant.

iv) absence of motive to commit the crime by itself is sufficient to acquit the appellant of the charge.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that the judgment impugned convicting & sentencing them as mentioned above being strictly in accordance with evidence of witnesses, calls for no interference in this appeal.

8. We have heard counsel for the parties and perused the evidence available on record.

9. Sevaram (PW-1) did not support the prosecution and as such declared hostile.

10. Ramchand (PW-3) is the village Kotwar. He is the witness of memorandums (Ex.P-7) and seizure memos of Ex.P-4, P-5, P-6, P-8, P-9, P-10, P-11 & P-16, spot map (Ex.P-12), arrest memos (Ex.P-14 & P-15).

11. Goverdhan (PW-4) is the witness of inquest (Ex.P-17).

12. Smt. Bhan Bai (PW-5) is the witness of last seen. She has stated that on the date of incident at about 10.00 a.m. when she was going towards her field, she saw the accused persons coming from the side of place of occurrence. She had talk to accused Hemlal who informed her that since the purchaser has not paid the amount to him, he told him not to cut the trees standing on his land and therefore he had gone to his field to see the trees. She has further stated that the very same evening accused Hemlal informed her that when the deceased did not return home, she was searched and they found her lying dead.

13. Gajlal Sahu (PW-6) has stated that after being informed by accused Hemlal about the non-return of deceased who had gone to the field in the morning, they started searching for the deceased and found her lying in the field and her face was covered with cloth.

14. Punaram (PW-7) did not support the prosecution and as such declared hostile.

15. Dr. S.S. Devdas (PW-8) is the person who conducted post-mortem examination over the body of deceased and opined the cause of death to be asphyxia due to strangulation.

16. Kanhaiyalal (PW-9) is the person who went in search of deceased along with Hemlal & Gajlal and found her dead body.

17. Banshilal (PW-10) is the witness of memorandum (Ex.P-7 & P-9), seizure memos (Ex.P-4, P-5, P-6, P-10, P-11), inquest (Ex.P-7). However, he has not supported the prosecution case and therefore declared hostile by the prosecution.

18. Dashru Singh Netam (PW-11) is the Patwari who prepared the spot map Ex.P-13.

19. Smt. Kanchan Bai (PW-12) is the another witness of last seen. She has stated that at about 10-11 a.m. in the morning she saw the accused persons going towards their field. At that time she was working in her field, whereas the deceased was cutting the crop in her field. Next day she came to know that the deceased has died.

20. Smt. Satrupa Taram (PW-13) is the investigating officer who has duly proved the prosecution case.

21. Babulal (PW-14) is the person who registered the merger Ex.P-25.

22. In the present case there is no eye witness to the incident and the whole case rests on circumstantial evidence. The law on the point is that in a case based on the circumstantial evidence the Court can record conviction but it must satisfy itself that the circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are not only of a conclusive nature but also complete the chain so fully as to unerringly point only the guilt of the accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused.

23. Now we shall proceed to examine the prosecution evidence. In order to prove the guilt of the accused/appellants the prosecution has adduced the evidence regarding the following circumstances :-- i) the witnesses have seen the accused persons going towards the place of occurrence and returning therefrom.

ii) button of the shirt of accused Shailendra was found at the place of occurrence.

iii) recovery at the instance of accused/appellant on the basis of their memorandum.

iv) unnatural conduct of accused Hemlal after the incident.

24. As far as the circumstance of last seen together is concerned, for proving this circumstance it is essential for the prosecution to prove two things, being that the accused was seen alone in the company of the deceased and at a place where no other person is expected to interfere. Once this is proved the burden of proof under Section 106 of the Indian Evidence Act, 1872, falls upon the accused to prove his innocence. It is pertinent to mention that the first burden of proof is on the prosecution to prove the above said elements and it is only after the prosecution successfully proves them that the burden shifts on the accused to prove his defence. In the instant case, the prosecution in order to prove the "last seen" circumstance has examined three witnesses namely Sevaram (PW-1), Smt. Bhan Bai (PW-5) & Smt. Kanchan Bai (PW-12). Sevaram (PW-1) has though stated that he saw the accused/appellants going towards their field and at that time the deceased was working in another field, but he did not support the prosecution case and as such declared hostile. According to Smt. Bhan Bai (PW-5), on the date of incident at about 10.00 a.m. when she was going towards her field, she met the accused/appellants, who were coming from the side of their field, and being asked, accused Hemlal informed her to have sold the trees standing on his field but as the purchaser did not make the payment thereof the said trees were not to cut off by the purchaser and for that he had been there to see to it. Smt. Kanchan Bai (PW-12) in her examination-in-chief has stated that while working in the field at about 10-11 a.m. she saw the accused persons going towards their field and at that time the deceased was cutting bankh (root of Parsa tree) in the field and next day she came to know that the deceased has died. From the statements of the above witnesses it is clear that none of them has seen the appellants and the deceased together at the field and they had only

seen the accused/appellants either going towards the field or coming back from there. Thus, no evidence is available on record to conclude that the deceased was last seen alive in the company of accused/appellants, rather as per evidence of PW-5 & PW-12 the time gap between the appellants' going to the field and returning therefrom is not as such which could suggest that they were the perpetrators of crime, on the contrary it justifies the stand taken by accused/appellant No.1 while answering Question No.3 put to him at the time of recording of statement under Section 313 Cr.P.C. that he immediately returned from the field. Thus, in absence of definite evidence of appellants having been seen in the company of deceased it would be unsafe to come to the conclusion that the appellants are responsible for the murder of the deceased.

25. As regards the recovery of button from the spot, unfortunately there is no report of FSL on record opining that buttons of the shirt seized from this appellant were identical to the one seized from the spot and in absence thereof, this circumstance cannot also be considered as a piece of evidence against the accused/appellants. This apart, the prosecution has produced two witnesses to prove the recovery but unfortunately one has been declared hostile and other being a frequent visitor to the police station and used to dance to the tune of police persons cannot be held as a reliable witness to prove the factum of recovery of button in question. Even if we assume for the sake of argument that button recovered belonged to accused/appellant No.1, it cannot give a rise to a definite conclusion of his complicity in crime in question, especially when he himself has admitted about going to the field. There may be variety of reasons for his button falling into the field but it does not mean that it is he who is the author of the crime in question.

26. As regards the conduct of accused/appellant No.1, though it has come in the evidence that being asked by the villagers, the appellant No.1 had refused to see the body of deceased and that it is he who asked Ganjalal to search the deceased near the Babool tree i.e. the place where deceased was lying dead, but in absence of any positive proof against the appellants, only on account of aforesaid conduct of appellant No.1, it cannot be held proved that the appellants must have committed murder of deceased. This apart, the prosecution has failed to lead any evidence to indicate or even suggest as to what was or could be the motive that impelled the appellant No.1 to take such unnatural step of killing his mother. Furthermore, nothing has come in the Court evidence of the independent prosecution witnesses which may suggest that there was some occasion for the accused/appellant No.1 to bear suspicion, hatred or grudge against his mother which might have induced him to commit the offence.

27. Thus the cumulative effect of the evidence adduced by the prosecution is that the prosecution has utterly failed to establish that it is the accused/appellants who were behind the death of the deceased and the Court below also does not appear to be justified in basing its conviction on the above circumstantial evidence. Since the prosecution has not been in a position to

prove its case beyond reasonable doubts, the benefit of doubt has to go to the accused/appellants. It is held thus.

28. For the foregoing, the appeal succeeds. Conviction & sentence of the appellant under Section 302/34 of the IPC are hereby set aside and they are acquitted of that charge by extending them benefit of doubt. They are reported to be on bail. Their bail bonds are discharged.