AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 545 of 2021

(Arising out of judgment of conviction and order of sentence dated 22-3-2021 passed by the Additional Sessions Judge, Pathalgaon, District Jashpur, in ST No.7/2020)

1. Geeta Bai, W/o Sukhsay, aged about 47 years, R/o village Tildhega, Aamakaani, PS Pathalgaon, Dist. Jashpur (CG).

---- Appellant

Versus

1. State of Chhattisgarh Through – Police Station : Pathalgaon, District Jashpur (CG)

---- Respondent

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For Appellant : Mr. Rohit Sharma, Advocate
For Respondent/State : Mr. Prateek Singh Thakur, Panel Lawyer

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Hon'ble Shri Justice Goutam Bhaduri
Hon'ble Shri Justice Radhakishan Agrawal

Judgment on Board

Per Goutam Bhaduri, J.

23-4-2024

1. The present appeal is against the judgment of conviction and order of sentence dated 22-3-2021 passed by the Additional Sessions Judge, Pathalgaon, District Jashpur, in ST No.7/2020 whereby the appellant has been convicted under Sections 342, 302/34 and 302/201 of the Indian Penal Code (for short ‘the IPC’) and sentenced her to undergo R.I. for one year, Life Imprisonment and R.I. for five years respectively with usual default stipulations.

2. Case of the prosecution, in brief, is that on 30-10-2002 the complainant namely; Bandhu Ram (PW-1), who is the father of

Dinesh Kumar (since deceased) made a report at Police Station Pathalgaon, alleging that on 29-10-2002 between 10 to 11 pm the accused persons namely; Sukhsay (since absconding), Jalha @ Amarsingh and Geeta Bai in connivance with each other killed his son in their house and thereafter threw the dead body into the well. On the basis of that, the merg (Ex.P/2) and FIR (Ex.P/1) were registered. The map of the place of incident was also prepared. The dead body was subjected to postmortem and as per the postmortem report (Ex.P/21) the cause of death was homicidal in nature. On 30-10-2002 itself from the house of Sukhsay & Geeta Bai, bloodstained soil, plain soil and stones were recovered vide Ex.P/10. Thereafter, one accused Jalha @ Amarsingh was arrested and on his memorandum weapon used in the offence was seized. Subsequently, the charge sheet was filed. In the meanwhile, Sukhsay and his wife Geeta Bai (appellant herein) absconded.



3. Thus, earlier the trial was conducted only against Jalha @ Amarsingh bearing ST No.17/2004 wherein after conclusion of trial the said accused was acquitted by the Sessions Judge, Jashpur, by judgment dated 12-10-2004.

4. Since Sukhsay and his wife Geeta Bai were absconding permanent warrant was issued. Pursuant to the said warrant, on 10-8-2020 the appellant Geeta Bai was arrested and was produced before the competent Court. Thereafter, fresh trial bearing ST No.7/2020 commenced before the Court of Additional Sessions Judge, Pathalgaon, District Jashpur. On completion of trial, the appellant

Geeta Bai has been convicted and sentenced as stated *supra*. Thus, this appeal.

5. (i) Learned counsel appearing for the appellant would submit that on a similar set of facts and evidence one of the accused namely; Jalha @ Amarsingh was acquitted by the Sessions Judge in earlier trial by judgment dated 12-10-2004 rendered in ST No.17/2004. Subsequently, though further examination of PW-2 Jugan Sai and PW-9 J.P. Singh, Investigating Officer, was conducted, but no new facts came to fore. Despite the said fact, on the similar like situation and on the earlier set of evidence, the present appellant has been convicted. He would submit that the doctrine of parity and discrimination would apply, which has been considered by the Supreme Court in the matter of ***Javed Shaukat Ali Qureshi v State of Gujarat***[1]. Under the circumstances, the appellant cannot be convicted.



(ii) Learned counsel would submit that PW-1 Bandhu Ram, father of the deceased, is a hearsay witness about disclosure of fact that his son stayed in the house of Geeta Bai. He had made contradictory statement and his entire behaviour would show that it was unnuatural. He refers to certain paragraphs of evidence of PW-1 Bandhu Ram to submit that only on presumption on the subsequent date the statement was made against the present appellant and others. He would submit that the prosecution claims that the place of commission of crime is the house of the appellant, but there is no clinching evidence on record, as the dead body was found in a well at common place which

1 (2023) 9 SCC 164

is not in dispute. Learned counsel would submit that the statement of PW-1 Bandhu Ram would show that there is no animosity in between the deceased and the accused persons.

(iii) Referring to the statement of PW-2 Jugan Sai, learned counsel would submit that there exists certain material omission. As per statement under Section 161 CrPC he stated to have seen the offence wherein the presence of Geeta Bai is eliminated. He would submit that according to PW-2 Jugan Sai he had seen the happening of incident from the hole of a door, but PW-9 J.P. Singh, Investigating Officer, in para 24 of his statement completely eliminated the fact about presence of hole on the door. He would also submit that there is no further query made as to weapon which was alleged to be seized from other accused the injury could have been caused. He would submit that though the prosecution arrested the present appellant after a long time, but only oral statements have been made that she was absconding, but no document of panchnama about absconding is on record. He would submit that the memorandum statement is also quite week as it do not fulfill the principles laid down by the Supreme Court in the matter of ***Babu v State of Kerala***[2] and the prosecution has failed to prove the case beyond reasonable doubt, therefore, the presumption of innocence would follow. He strenuously laid emphasis upon the decision rendered by the Supreme Court in the matter of ***Sujit Biswas v State of Assam***[3] to submit that the circumstantial evidence has wrongly been narrated which is



2 (2010) 9 SCC 189
3 (2013) 12 SCC 406

completely against the earlier finding by the Court and on presumption the conviction has been made on the same set of evidence on which one of the accused namely; Jalha @ Amarsingh was acquitted. Learned counsel would also submit that the entire conviction is based on the presumption and hence no conviction could have been passed on this evidence. Therefore, the appeal deserves to be allowed by setting aside the impugned judgment of conviction and order of sentence.

6. Learned counsel appearing for the State, *per contra,* would submit that there is no plausible explanation by the accused about last seen theory. He would submit that even if the statement of the eyewitness of PW-2 Jugan Sai is ignored the fact that the deceased was last seen in the company of the appellant Geeta Bai is unrebutted, which is corroborated by the statement of PW-1 Bandhu Ram. He would submit that the spot map on the site would show that after the incident the dead body was thrown into the well and weapons were recovered at the instance of other co-accused. He refers to the judgment to submit that the circumstances which falls the chain of events have been narrated and the accused having failed to explain the same the conviction is correctly been inflicted. He would submit that the impugned judgment is well merited which do not call for any interference of this Court.



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

8. It is not in dispute that three accused were charged for murder of the deceased on 29-10-2002. According to the prosecution, after collection of evidence the charge sheet was filed. At that time the appellant and her husband Sukhsay were absconded. Sukhsay is still absconding as on date. According to the prosecution, the appellant was arrested pursuant to the permanent warrant issued against her as she was declared absconding. There is no document on record to substantiate the fact as to under what circumstances she was declared absconding. It is only oral statement of PW-9 J.P. Singh whereby the appellant was shown to be absconded and on the other hand, the appellant has rebutted the same in her statement under Section 313 CrPC.



9. We went through the judgment dated 12-10-2004 rendered by the Sessions Judge, Jashpur, in ST No.17/2004 wherein the co-accused Jalha @ Amarsingh has been acquitted. While discussing the evidence at para 11 the Court observed that the eyewitness produced by the prosecution namely; PW-2 Jugan Sai has not supported the case of prosecution and he was declared hostile. It further discussed that as per PW-1 Bandhu Ram, father of the deceased, he was informed by PW-2 Jugan Sai that accused Jalha @ Amarsingh, Sukhsay and Geeta Bai called the deceased and thereafter confined him to their house and assaulted, which he has seen from the hole of the door. The learned Sessions Judge further discussed the fact that PW-1 Bandhu Ram has not seen the incident and he was a hearsay witness. Statement of PW-2 Jugan Sai was not believed. The statement of PW-2 Jugan Sai was

also elaborately discussed that he and the deceased had *Gudakhu* (गुड़ाखू) in the house of the deceased. After that he felt hungry on which the deceased asked him to take food and thereafter the deceased left the place. When the deceased did not return till 10 – 11 pm he came out and near the house of the appellant he heard the sound of screaming as 'Ah' (आह) and he went to the house of appellant. At that time the sound had stopped. This witness saw from the hole of the door that Geeta Bai, Sukhsay and the deceased were there. Sukhsay assaulted the deceased with the axe and the appellant was searching for some weapon to assault the deceased.

10. We went through the statement of PW-2 Jugan Sai again. In the re-examination he has stated in para 9 that when he went to the house of the appellant, the door was closed and from the hole of the said door he saw only Sukhsay. He categorically stated that he has not seen others, thereby he eliminated the presence of Geeta Bai at the place of occurrence. This witness further stated at para 8 that after he watched the movie he and the deceased came back to Aamakani and at the borewell situated near the house of the appellant they had *Gudakhu* (गुड़ाखू) and thereafter, the appellant called the deceased. On which the deceased went to the appellant whereas this witness left the place; came back to house; had the meal; and slept. The statement of this witness would show that in the evening he and the deceased came back to village Aamakani and thereafter, at 9 – 10 pm he went to search the deceased. He heard of sound of 'Ah' (आह) near the house of the appellant.

11. As against the statement, PW-1 Bandhu Ram, father of the deceased, stated at para 13 that when his son was not found they searched him in the village for one hour. Thereafter, he went to lodge a report and in the night PW-2 Jugan Sai has disclosed this fact. At para 17 this witness admitted the fact that on the date of incident PW-2 Jugan Sai, who was said to be eyewitness, was sleeping in the house of one Babli. In re-examination at paras 24 & 25 it is manifest that on the second day he went for search of his son as in the night he was in drunken condition, therefore, he woke up in the next morning. Consequently, the disclosure made by the PW-2 Jugan Sai about the incident to PW-1 Bandhu Ram in the night is contradicted by the Statement of PW-1 Bandhu Ram.



12. On the earlier occasion, the eyewitness PW-2 Jugan Sai stated that he saw the incident from the hole of the door, however, at that first instance, he named Sukhsay & Geeta Bai and stated that Geeta Bai was there and was searching for some weapon to assault the deceased. Again in the re-examination, after the appellant Geeta Bai was tried, he stated that he has only seen Sukhsay. The earlier acquittal of Jalha @ Amarsingh was predominantly on the ground that his presence was eliminated. Likewise in the statement again the presence of Geeta Bai was eliminated by the eyewitness PW-2 Jugan Sai.

13. Apart from this fact, PW-9 J.P. Singh, Investigating Officer, at para 13 admitted that in the house of Sukhsay one door is there and in that door one hole exists, however, he has not prepared the panchnama. Likewise, at para 24 he completely eliminates the presence of hole on

the door and stated in the re-examination that no hole was present. He also admitted that the axe, which was seized, was not sent for query. The statements of PW-2 Jugan Sai and PW-9 J.P. Singh when are read together PW-2 Jugan Sai claims himself to be the eyewitness and stated that he has seen the incident through the hole of the door, but the presence of said hole is negated by PW-9 J.P. Singh, Investigating Officer and apart from that panchnama of the door, which is a most vital evidence, is also not prepared.

14. It is cardinal principle in the administration of criminal justice in cases where heavy reliance is placed on circumstantial evidence is that where two views are possible, one pointing to the guilt of the accused and the other towards his innocence, the one which is favourable to the accused must be adopted. This proposition has been been laid down by the Supreme Court in the matter of ***Kali Ram v State of H.P.***[4] and has been reiterated in the matter of ***Pradeep Kumar v State of Chhattisgarh***[5] wherein held thus at para 27 :



> "27. It is important to note that the cardinal principles in the administration of criminal justice in cases where heavy reliance is placed on circumstantial evidence, is that where two views are possible, one pointing to the guilt of the accused and the other towards his innocence, the one which is favourable to the accused must be adopted."

15. The other important aspect would show that on an earlier occasion when Jalha @ Amarsingh was tried on the same set of evidence he was acquitted by giving benefit of doubt, however, on the second stage of trial, when on the same evidence though the witnesses were

4 (1973) 2 SCC 808
5 (2023) 5 SCC 350

re-examined, no new fact came to fore. How the trial Court came to a different opinion we are unable to accept the same.

16. The Supreme Court in the matter of ***Javed Shaukat Ali Qureshi*** (supra) has held that when there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. The Supreme Court held thus at para 15 :

> 15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.



17. Now coming back to the facts of the present appeal, the Court has drawn presumption on the circumstantial evidence. The submission of the State that the last seen theory is to be pressed into motion, but PW-2 Jugan Sai, who claimed to be eyewitness and was accompanying the deceased, stated that he left the deceased in the company of Geeta Bai and it was in the evening and thereafter at 9-10 pm he again went to search the deceased then he heard the sound of assault whereas at para 15 he denied the fact about assault. The dead body was found on the next day from the well of Surjit.

18. The Circumstantial evidence regarding last seen together alone is not sufficient to hold the accused guilty of the offence. Last seen together does not by itself and necessarily lead to the inference that it was

accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible. (See : ***Digamber Vaishnav v State of Chhattisgarh***[6]***, State of Goa v Pandurang Mohite***[7] and ***Nizam and Another v State of Rajasthan***[8]).

19. In the instant case if the statement of PW-2 Jugan Sai is believed then in such case he left the deceased in the evening in the company of the present appellant and according to this witness he had seen the assault at 9-10 pm, but surprisingly it was not disclosed to any one and presence of the appellant Geeta Bai is eliminated.



20. Further more the dead body of the deceased was found on the next day in a well not in the night, therefore, the principles as has been laid down by the Supreme Court in the aforesaid decisions the last seen theory cannot be pressed into motion as the close proximity between the time of last seen alive and recovery of dead body to constitute the last seen factor as incriminating circumstance is missing.

21. Another aspect proceeded by the prosecution is that the cow dung moping was found. The said articles were collected and when it was sent for FSL as article 'F5' it does not support presence of blood in it. Even the moping of cow dung on the floor how the crime can be connected with its presence, we are unable to convince ourselves.

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6 AIR 2019 SC 1367
7 AIR 2009 SC 1066
8 (2016) 1 SCC 550

Apart from this fact, soil of the floor, part of blanket, which were recovered from the alleged place of incident though was having blood but whether it was human blood or what was group of it with the deceased, which was found near the well is also not connected.

22. The Supreme Court recently in the matter of ***Boby v State of Kerala***[9] at para 16 has laid down its parameters to be considered in a case of circumstantial evidence which is quoted below :

> 16) Undisputedly, the present case rests entirely on circumstantial evidence. A three-Judges Bench of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116, has laid down the golden principles with regard to conviction in a case which rests entirely on circumstantial evidence. We may gainfully refer to the following observations of this Court in the said case:
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> "153. 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 Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] "Certainly, it is a primary principle that the accused



9 2023 SCC OnLine SC 50

> 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 hypothesis of should not be the accused is established should be consistent only with the the guilt of the accused, that is to say, they explainable on any other hypothesis except that 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."



23. Applying the aforesaid principles in the present case, it would be necessary for prosecution to link all the chain of circumstances, which lead to conviction.

24. The Court, time and again, has held that certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict him. It has been laid down that there is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". Further, the law as has been laid down shows that 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. The Court held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved and the chain of evidence should be complete.

25. In view of the foregoing, we are of the view that the guilt of the accused/appellant has not been proved by the prosecution beyond reasonable doubt. Therefore, the trial Court has committed serious illegality while convicting the appellant herein.

26. Accordingly, the conviction and sentence imposed upon the appellant under Sections 342, 302/34 & 302/201 of the IPC are hereby set aside and she is acquitted of the said charges leveled against her. The appellant is in jail. She be released forthwith if not required in any other case, on furnishing a personal bond for a sum of ₹ 10,000/- to the satisfaction of the trial Court. The bond shall remain in operation for a period of six months as required under the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.



27. In the result, the instant appeal is allowed.

Sd/- Sd/-

(Goutam Bhaduri)
Judge

(Radhakishan Agrawal)
Judge

Gowri