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HIGH COURT OF CHHATTISGARH AT BILASPUR
(Division Bench)

Coram : Hon'ble Shri T.P. Sharma &
Hon'ble Shri Rangnath Chandrakar, JJ,

Criminal Appeal No. 478 of 2003

Appellants

Dhaniram Sona s/o. Futakna Sona
(Ganda), aged about 35 years and three
others.

Vs.

Respondent

State of Chhattisgarh through Police
Station Tikrapara, Raipur (CG).

JUDGMENT FOR CONSIDERATION

Hon'ble Shri T.P. Sharma, J.

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Sd/-
R.N. Chandrakar
Judge

Sd/-
T.P. Sharma
Judge

POST FOR JUDGMENT ON 30-11-2012

Sd/-
T.P. Sharma
Judge



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Coram: **Hon'ble Shri T.P. Sharma &**
 Hon'ble Shri R.N. Chandrakar, JJ.

Criminal Appeal No. 478 of 2003

Appellants
(in jail)

1. Dhaniram Sona s/o. Futakana Sona (Ganda), aged about 35 years.
2. Smt. Gaouri Bai w/o. Baldeo alias Chunnu Ganda, aged about 25 years.
3. Smt. Naita Bai w/o. Dhaniram Sona, aged about 30 years.
4. Ku.Sumitra Bai, d/o. late Futakana, aged about 25 years, Caste Ganda.

All r/o. village Meriguda, P.S. Bango Munda, District Balangi (Orissa).

At present residents of Veer Bhandra Nagar, P.S. Tikrapara, Raipur, Distt. Raipur, CG.

Vs

Respondents

State of Chhattisgarh through Police Station Tikrapara, Raipur, CG.

(Criminal Appeal under Section 374 (2) of the Cr.P.C.)

Present:

Smt. Usha Chandrakar, counsel for the appellants.

Shri Sandeep Yadav, Dy. Govt. Advocate for the State.

JUDGMENT

(Delivered on 30 -11-2012)



Per Rangnath Chandrakar, J.

1. By this appeal the appellants challenged legality and propriety of the judgment of conviction and order of sentence dated 27-1-2003 passed by 1st Additional Sessions Judge, Raipur, in Sessions Trial No.306/2002 whereby and whereunder learned Additional Sessions Judge after holding the appellants guilty for commission of culpable homicide amounting to murder of Baldeo in sharing common intention and concealing the evidence of criminal case, convicted the appellants under Sections 302/34 and 201/34 of the IPC and sentenced them to undergo imprisonment for life and fine of Rs.2000/-, each in default of payment of fine to undergo additional RI for 6-6 months and RI for two years and fine of Rs.500/-, each in default of payment of fine to undergo further RI for 3 -3 months, respectively.
2. Conviction of the appellants is impugned on the ground that without any iota of evidence, the court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.
3. As per case of prosecution, on fateful day of 10-2-2002 at about 7 p.m., present appellants were present in their house and Baldeo (since deceased) came to the house of accused and quarreled with his wife appellant Gouri Bai who is sister of appellant Dhaniram on which appellant Dhaniram got annoyed and assaulted Baldeo with hands, fists and stick, thereafter gagged his neck as a result of which Baldeo died. Thereafter, accused/appellant Dhaniram along with co-accused/appellants Gouri, Naita Bai and Sumitra Bai,

dragged the dead body of the deceased and buried the dead body in his house.

4. Accused/appellant Dhaniram went to Police Station, Tikrapara and intimated about the incident on the basis of which merge was recorded vide Ex.P/28 and first information report was lodged vide Ex.P/29. PW/13 H.P. Gupta, Investigating Officer proceeded for conducting enquiry. Initially he intimated about the incident to SDM vide Ex.P/26 and after getting permission (Ex.P/27) in presence of Tahsildar M.L. Gupta, he got exhumed the dead body of deceased Baldeo in the house of appellant Dhaniram. After summoning the witness vide Ex.P/4, inquest over the dead body of Baldeo was prepared vide Ex.P/5, bloodstained soil and plain soil were seized vide Ex.P/8 & 9, lock and key of the house of the appellant were seized vide Ex. 6 & 7, dead body was sent for autopsy to Pt.Jawaharlal Nehru Medical College, Raipur, vide Ex.P/1, where Dr. Ullash Gonnada (PW/1) conducted autopsy and found the following injuries vide Ex.(Ex.P/1).

- i) Both legs folded at knee, foots were in touch with waist region and tied with rope. One part of the rope was tied around waist. Upper external part of the deceased was straight. Mud was present on the clothes of the deceased.
- ii) Abrasion over upper part of scapula 4" x 1".
- iii) Abrasion present over lateral part or right size of chest at lower part of size 4" x 2".
- iv) Abrasion over lower part of chest at middle on right side of size 4" x 3".
- v) Abrasion over external part of right thigh at lower region of 3" x 1".

vi) Multiple impact abrasion present over external part of right leg at central portion of the knee towards back of size 5 x 1 cm.

vii) Bones of left wrist of the deceased were dislocated.

Doctor opined that death was due to asphyxia as a result of neck injury and death was homicidal in nature.

5. Accused/appellants were arrested immediately vide Ex.P/32 to P/35. Bloodstained clothes of deceased were seized vide Ex.P/13, nylon rope was seized vide Ex.P/15, gaiter and stick were seized vide Ex.P/16, blood, blood stained clothes of accused were seized vide Ex.P/17, nails of accused were seized vide Ex.P/18. Accused/appellant Dhaniram also received injuries and was examined by Dr. A.A. Saify (PW/12) vide Ex.P/24 and found infected wound over left thumb aspect distal part whitish along with skin present 2cm x 1 cm which was caused by hard and blunt object. Seized articles were sent for chemical examination to FSL Raipur vide Ex.P/30 and presence of blood over seized clothes of deceased and nylon rope was confirmed.
6. Statements of witnesses were recorded under Section 161 of the Cr.P.C. After completion of investigation, charge sheet was filed against the appellant in the Judicial Magistrate First Class, Raipur who in turn committed the case to the Court of Sessions Judge, Raipur. Learned Additional Sessions Judge received the case on transfer for trial.
7. In order to prove the guilt of the appellants, prosecution examined as many as 14 witnesses. Accused/appellants were examined under Section 313 of the Code of Criminal Procedure, where they



denied the circumstances appearing against them and innocence and false implication in crime in question is claimed. Appellants have examined two defence witnesses Koeli Khura (DW/1) and Ugre Baghel (DW/2) who have deposed that at the time of commission of offence, appellants Gouri Bai, Naita Bai and Sumitra Bai went to Gidmal to attend the marriage function where they stayed for three days.

8. After affording opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellant as aforementioned.

9. We have heard learned counsel for the parties, perused the judgment impugned and record of the trial court.

10. Smt. Usha Chandrakar, learned counsel appearing for the appellants vehemently argued that there was no eye-witness to the incident and as per case of the prosecution, the accused Dhaniram lodged report, but except the confessional part relating to discovery of facts, incriminating part is not admissible in evidence. The prosecution has not adduced any other evidence to show that the accused have committed the offence and committed the murder of Baldeo, therefore, only on the ground that Baldeo was murdered in the house of the appellants, liability could not be fastened upon the appellants. Learned counsel further submits that in the case of FIR lodged by the accused, non-confessional, part of FIR is admissible against the accused as admission under Section 21 of the Evidence Act and is relevant, but confessional part of the report made to the Police cannot be used against him in view of Section 25 of the Evidence Act. Learned counsel further submits that extra

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judicial confession after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility if he passes the test, the evidence of extra judicial confession can be accepted and can be the basis of conviction. The trial Court while convicting and sentencing the appellants has not considered the relevant aspects of the matter and thereby committed illegality.

11. *Per contra*, Shri Sandeep Yadav, learned Dy. Govt. Advocate on behalf of the State opposed the appeal and submitted that the evidence adduced on behalf of the prosecution is sufficient for conviction of the appellants. The appellant Dhaniram himself has lodged the report and his non-confessional part of the FIR is admissible in evidence.

12. In order to appreciate the arguments advanced by learned counsel for the parties, we have examined the evidence adduced on behalf of the prosecution.

13. In the present case, homicidal death as a result of multiple injuries found over the dead body of deceased Dhaniram has not been substantially disputed on behalf of the appellants on the other hand also it is established by the evidence of Dr. Ullash Gonnada (PW/1) and autopsy report vide Ex.(Ex.P/1) that the death of deceased was homicidal in nature.

14. As regard complicity of the appellants in the crime in question, in the present case, it is not disputed that dead body of Baldeo with fatal injuries was found in the house of the appellants. Stick and nylon rope were also found in the house of the appellants. The appellant Dhaniram himself lodged a merged statement on the basis of which first information was lodged. FIR(Ex.P/29) includes a confessional and

non-confessional part. Confessional part relating to assault made by the accused to deceased Baldeo with hands, fists and stick and causing his death is not admissible in evidence and is hit by Section 25 of the Evidence Act. As held by this Court in the matter of *Khilawan Kumar vs. State of CG*, reported in 2009(3) CGLJ 14 (DB) confessional part of FIR is not admissible in evidence, but non-confessional part of FIR is admissible against the accused as admission under Section 21 of the Evidence Act, in the light of decision of Hon'ble the Supreme Court in the matter of **Aghnoo Nagesia vs. State of Bihar**, reported in AIR 1966 SC 119 wherein it has been held in para 10 which reads as under:

... "10. Section 154 of the Code of Criminal Procedure provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under Section 157 of the Evidence Act or to contradict him under Section 145 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under Section 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under Section 21 of the Evidence Act and is relevant, see *Faddi v. State of Madhya Pradesh*¹ explaining *Nisar Ali v. State of U.P.*² and *Dal Singh v. King-Emperor*³. But a confessional first information report to a police officer cannot be used against the accused in view of Section 25 of the Evidence Act."

15. If we closely examine Ex.P/29, first information report, it is in two parts. First part relates to the fact that deceased Baldeo was the husband of appellant Gowri, who is the sister of appellant Dhaniram, on the date of the incident when the deceased Baldeo came to the house of appellant Dhaniram, at that time all the appellants were present in his house and he quarreled with them.

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16. Second part relates to assault and killing of Baldeo. Definitely second part of the FIR relating to killing of Baldeo with hands, fists and stick by the appellant Dhaniram is not admissible in evidence, but the fact that deceased was present in the house of the appellant Dhaniram and at the time of commission of offence, the appellants were also present there and the quarrel took place when deceased Baldeo abused the appellants, is not confessional statement as held by the Supreme Court in the matter of Aghnoo (supra), this part is admissible in evidence as admission under Section 21 of the Evidence Act.

17. The appellants have examined DW/1 and DW/2 who have deposed that at the time of commission of offence appellants Gouri, Naita and Sumitra went to the Gilmad to attend the marriage function where they stayed for three days. In the light of confessional part of FIR (Ex.P/3) lodged by the appellant Dhaniram, the evidence of DW/1 and DW/2 does not inspire confidence and trustworthy.

18. As per evidence of PW/2 Samaru Naik and PW/3 Vishnu Naik, dead body of deceased Baldeo was found in the house of the appellant Dhaniram. As per evidence of PW/5 Saraswati, she was residing in the house of appellant Dhaniram on rent. On the date of incident at about 6 – 7 O' clock, at night deceased Baldeo, brother-in-law of appellant Dhaniram came to his house and directed his wife Gowri to come along with him and abused Dhaniram and Gowri. During the course of quarrel, Dhaniram went inside the house and brought Danda and assaulted Baldeo by stick. On seeing the incident she was frightened and went inside her house.

This is not rebutted by the accused persons. As per evidence of H.O. Gupta, Investigating Officer, dead body of Baldeo was exhumed from the house of the appellant Dhaniram where stick and nylon rope were found. This shows that nothing has been recovered on the basis of disclosure statement made by the accused. Therefore, as held by this court in the matter of Khilawan (supra), any discovery relating to stick and nylon rope is not admissible in evidence.

19. Substantially, non-confessional part of FIR remains for consideration which reveals that at the time of commission of incident deceased Baldeo was present in the house of the appellants where appellants were also present, deceased Baldeo quarreled with them thereafter the incident took place and Baldeo died. The appellants have not offered any explanation as to who has committed the murder of Baldeo and how he died. Definitely this is an offence committed in secrecy and as per admission of the appellants, the appellants were present at the time of commission of offence, they have not offered any explanation that how Baldeo died and who caused fatal injuries to him. The appellants were under obligation to offer explanation to prove the offence committed in secrecy in terms of Section 106 of the evidence Act and non-offering of explanation is adverse circumstances against the appellants.

20. While dealing with the case of offence committed in secrecy the Supreme Court in the matter of Trimukh Maroti Kirkan vs. State of Maharashtra, reported in (2006) 10 SCC 681 has held that if the offence was committed in the dwelling house where the husband

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also resided and if the accused husband did not offer any explanation as to the injuries received by his wife or if the explanation is false, then there is strong circumstance which indicates that he committed the crime. Paragraphs 14 and 15 of the said judgment are relevant which read as follows:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions*— quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Sing.*) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him."

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation".

21. This is a special circumstance and it must be within the knowledge of the accused Dhaniram, therefore, in accordance with Section 106 of the Evidence Act, the appellant Dhaniram was under obligation to prove the fact that how deceased Baldeo received injuries and he died.
22. In the present case, the appellant has not offered any explanation, virtually the appellant admitted the guilt, but in the light of Sections 25, 26 and 27 of the Evidence Act, confession made before the Police officer is not admissible in evidence. Therefore, the explanation/confession of the appellant is not admissible in evidence. However, in the light of his admission relating to non-confessional part and non-offering of explanation in terms of Section 106 of the Evidence Act, the only hypothesis that only the appellant Dhaniram has committed the murder of Baldeo and that except the appellant Dhaniram nobody has committed his murder, would be possible.
23. As regards the act attributed to appellants Gouri, Naita and Sumitra, there is no direct evidence against them. Mere presence of Gouri, Naita and Sumitra being sister, wife and mother of the appellant Dhaniram does not make reliable for commission of offence. Thus, evidence adduced on behalf of the prosecution against the appellants Gouri, Naita and Sumitra is not sufficient for drawing inference that in sharing common intention, appellant Dhaniram committed the aforesaid offence.
24. In the present case, fatal injuries have been found over the dead body of deceased. At the time of incident, deceased was not having any weapon, he quarreled with Gouri Bai, sister of the appellant Dhaniram, being annoyed appellant Dhaniram has caused injuries and caused homicidal death of deceased and buried the dead body which was found in his house, therefore,

only inference would be possible that the appellant has caused homicidal death of deceased Dhaniram with intent to cause his death.

25. After appreciating the evidence available on record, the court below has convicted and sentenced the appellant Dhaniram as aforementioned and we do not find any illegality or infirmity in the judgment.

26. For the foregoing reasons, the appeal is partly allowed. Conviction and sentence of the appellants Gouri, Naita and Sumitra under Sections 302/34 and 201/34 of the IPC is not sustainable under the law but conviction and sentence of the appellant Dhaniram is sustainable under the law. Conviction and sentence of the appellants Gouri, Naita and Sumitra under Sections 302/34 and 201/34 of the IPC are hereby set aside. They be set at liberty at once and be released forthwith, if not required in any other case. They are on bail and their bail bonds shall stand discharged. Conviction and sentence of the appellant Dhaniram under Section 302 and 201 of the IPC are hereby affirmed.

Sd/-
T.P. Sharma
Judge

Sd/-
R.N. Chandrakar
Judge

Raju