

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Criminal Appeal No. 1128 of 2021**

[Arising out of judgment dated 27.11.2010 passed in Sessions Trial No.09 of 2010 (State of Chhattisgarh vs. Birbal Singh and another) by the Court of Additional Sessions Judge (F.T.C.), Pendra Road, District Bilaspur (C.G.)]

Birbal Singh, Son of Shuru Singh, aged about 35 years, Resident of Village Majhgawan, Police Station Pendra, District Bilaspur (now Gourela Pendra Marwahi) (Chhattisgarh)

---- **Appellant**
(In Jail)

Versus

State of Chhattisgarh, through: Station House Officer, Police Station Pendra, District Bilaspur (now Gourela Pendra Marwahi) (Chhattisgarh)

---- **Respondent**

For Appellant : Ms. Savita Tiwari, Advocate
For Respondent-State : Mr. Ashish Tiwari, Government Advocate

DB: Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Rakesh Mohan Pandey

Judgment on Board
(09.11.2022)

Sanjay K. Agrawal, J

This criminal appeal filed by the appellant-accused under Section 374(2) of Cr.P.C. is directed against the impugned judgment of conviction and order of sentence dated 27.11.2010, passed by the Court of learned Additional Sessions Judge (F.T.C.), Pendra Road, District Bilaspur (C.G.) in S.T. No.09/2010, whereby the appellant-accused has been convicted for offences: under Section 449 of IPC and sentenced to undergo life imprisonment with fine of Rs.100/- and, in default of fine, additional rigorous imprisonment for 01 month; under Section 376 of IPC and sentenced to undergo life imprisonment with fine of Rs.100/- and, in default of fine,



additional rigorous imprisonment for 01 month; under Section 201 of IPC and sentenced to undergo rigorous imprisonment for 07 years with fine of Rs.100/- and, in default of fine, additional rigorous imprisonment for 01 month and under Section 302 of IPC (for committing murder of Shyamvati and her son- Neel Singh) and sentenced to undergo life imprisonment with fine of Rs.100/- (on 02 counts) and, in default of fine, additional rigorous imprisonment of 01 month (02 counts).

(2) The case of the prosecution, in brief, is that: the appellant on 03.12.2009, at Village Majhgawan, within the ambit of Police Station Pendra, District Bilaspur (CG) has committed rape with his sister-in-law, namely, Shyamvati Bai by entering into her house and, thereafter, on 04.12.2009, in order to avoid any discourse of said incident/offence by Shyamvati Bai, the appellant again trespassed the house of Shyamvati Bai and with the intention to kill Shyamvati Bai and her son, namely, Neel Singh, committed their murder by strangulation and further in order to escape and erase evidence of the said offence of murder, the appellant alongwith co-accused, namely, Madan Singh (who stands acquitted by learned trial Court), threw the dead-bodies of Shyamvati and Neel Singh in the water of Bagdi Dam and, thereby, committed the offence under Sections 449, 376, 302 & 201 of IPC.

(3) In the instant case, it is admitted position on record that: deceased- Shyamvati Bai is sister-in-law of accused-appellant Birbal; deceased- Shyamvati was wife of Durbal Singh and Neel Singh was son of Durbal Singh; Durbal and accused-appellant Birbal both are brothers; Premvati (PW-03) is wife of Arjun, who is brother of both Durbal and Birbal; at the time of incident, accused-appellant Birbal was not staying in his Village- Majhgawan, but used to visit there some time.



(4) The further case of the prosecution, in nutshell, is that: on 03.12.2009 deceased- Shyamvati's husband, namely Durbal had gone to his in law's house at Pithampura for participating in 'Dashgatre' Ceremony; his wife Shyamvati and son- Neel Singh both were in his house at Majhgawan; on 05.12.2009, Durbal's nephew, namely, Timman (son of Arjun) came at Pithampura and informed Durbal that his wife and son are not in his house and his house is open and in messed condition and household articles are scattered, on which, Durbal alongwith Timman came to his house at Majhgawan and started search of his wife and son at nearby places, but to no avail; on 07.12.2009 Padmesh Maravi (PW-01) saw dead-body of Neel Singh floating in Bagdi Dam and, thereafter, Durbal Singh was called who, in turn, identified the dead-body of his son, but as the reason of death was not known to him, on 07.12.2009 itself at 09 AM in the morning, Durbal Singh lodged marg intimation (Ex.P/18) at Police Station Pendra with regard to his son- Neel Singh, on which, the police of Police Station Pendra has prepared 'Nagri Naksha' of Bagdi Dam and at that time Premvati (PW-03) informed to police that: on 04.12.2009 in the evening Shyamvati met her and told her that she is not feeling well and she will die, but upon further inquiry, deceased- Shyamvati had not informed her anything else, deceased- Shyamvati was sleeping in her house, thereafter, on 05.12.2009 in the morning when she visited the house of Shyamvati, nobody was there and Shyamvati alongwith his son- Neel were missing; thereafter, postmortem of dead-body of deceased- Neel Singh was conducted by Dr. Smt. J.S. Lakda (PW-11) and in the postmortem examination report (Ex.P/20) it has been opined that cause of death is asphyxia due to pressure on trachea (air passage) and mode of death is homicidal; thereafter, on 09.12.2009, in the morning, dead-body of



Shyamvati was also found floating in said Bagdi Dam, the private parts of dead-body of deceased- Shyamvati were found naked; thereafter 'Naksha Panchnama' of dead-body of Shyamvati was prepared and the dead-body of Shyamvati was sent for postmortem examination; in the postmortem examination, Dr. Smt. J.S. Lakda (PW-11) opined that cause of death of deceased- Shyamvati is asphyxia due to pressure on trachea (strangulation) and mode of death is homicidal vide postmortem report (Ex.P/21). Thereafter, on 14.12.2009, the police of Police Station Pendra registered FIR (Ex.P/14) and the accused-appellant was arrested vide Ex.P/15; further the accused-appellant was subjected to interrogation, in which he informed vide memorandum statement (Ex.P/04) that he committed rape with Shyamvati on 03.12.2009 and, thereafter, on 04.12.2009 he committed murder of Shyamvati and her son- Neel by strangulation and further in order to escape from the offence, he alongwith co-accused Madan Singh, had taken the dead-bodies of deceased Shyamvati and her son-Neel to Bagdi Dam by means of a cycle and tightening it via 'sari' and threw it in the dam. Pursuant to memorandum statement of accused-appellant (Ex.P/04), a sari wore by deceased- Shyamvati was recovered vide Ex.P/05. Thereafter, statement of witnesses were recorded and, after due investigation, the police filed charge-sheet in the Court of Judicial Magistrate First Class, Pendra Road, District Bilaspur (CG) and, thereafter, the case was committed to the Court of Sessions. The appellant/accused abjured his guilt and entered into defence.

(5) The prosecution in order to prove its case examined as many as 11 witnesses and exhibited 21 documents, whereas the appellant-accused in support of his defence has neither examined any witness nor exhibited any document.



(6) The learned trial Court after appreciating the oral and documentary evidence available on record proceeded to convict the appellant for offence under Sections 449, 376, 201 & 302 of IPC and sentenced him as mentioned herein-above, against which this appeal has been preferred by the appellant-accused questioning the impugned judgment of conviction and order of sentence.

(7) Ms. Savita Tiwari, learned counsel appearing for the appellant submits that the learned trial Court is absolutely unjustified in convicting the appellant for the aforementioned offences, as the prosecution has failed to prove the offence beyond reasonable doubt. Moreover, no chain of circumstances have been established against the accused-appellant, except the so called statement of Premvati (PW-03), who is related and interested witness. She further submits that though pursuant to memorandum statement of appellant-accused (Ex.P/04), a 'sari' of deceased- Shyamvati has been recovered vide Ex.P/05, but the said 'sari' has not been identified by any of the prosecution witnesses, specially by Durbal Singh, who is husband of the deceased- Shyamvati, to be the 'sari' of the deceased- Shyamvati, therefore, it could not be considered as a piece of evidence to connect the appellant-accused with the offence in question and further there is no other evidence available on record to connect the appellant-accused with the offence in question, as such, its a case where five golden principles to constitute the panchsheel of the proof of a case based on circumstantial evidence, as laid by their Lordships of Supreme Court in the matter of **Sharad Birdhichand Sarda vs. State of Maharashtra**¹, have not been established. Hence, the present appeal deserves to be allowed and the accused-appellant is liable to be

¹ (1984) 4 SCC 116

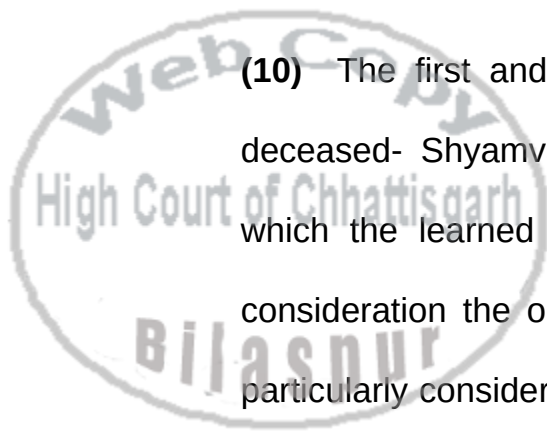


acquitted.

(8) *Per-contra*, Mr. Ashish Tiwari, learned State counsel supported the impugned judgment of conviction and order of sentence and submits that the prosecution has proved the offence beyond reasonable doubt by leading evidence of clinching nature. The learned trial Court has rightly convicted the appellant for aforementioned offence, thus, the present appeal deserves to be dismissed.

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

(10) The first and foremost question is as to whether the death of the deceased- Shyamvati and her son- Neel Singh was homicidal in nature, which the learned trial Court has recorded in affirmative by taking into consideration the oral and documentary evidence available on record and particularly considering the postmortem reports (Ex.P/20 & 21) conducted by Dr. Smt. J.S. Lakda (PW-11), wherein it has been opined that the cause of death of deceased- Shyamvati and her son- Neel Singh is asphyxia due to pressure on trachea (air passage) i.e. strangulation and mode of death is homicidal. Accordingly, taking into consideration the postmortem reports (Ex.P/20 & 21) and the statement of Dr. Smt. J.S. Lakda (PW-11), we are of the considered opinion that the learned trial Court is absolutely justified in holding that the death of deceased- Shyamvati and her son- Neel Singh is homicidal in nature, as the same is correct finding of fact based on evidence and same is neither perverse nor contrary to the record. Accordingly, we hereby affirmed the said finding.





(11) Now the next question would be whether the accused-appellant herein is the author of the crime in question or not, which the learned trial Court has held that it is only the present accused-appellant who has committed the offence.

(12) Before advertng to the arguments advanced by the learned counsel for the parties and answering the aforesaid question, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused in question with the offence and the prosecution rests in case solely on circumstantial evidence. The Supreme Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

“(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. [See: Gambhir v. State of Maharashtra²].”

(13) The Supreme Court in the matter of Sharad Birdhichand Sarda (supra), while dealing with circumstantial evidence held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of their Lordships of Supreme Court, before

² (1982) 2 SCC 351



conviction could be based on circumstantial evidence, must be fully established. They are as under:

“(i) 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;

(ii) 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;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) 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.”

(14) In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature (See: **C. Chenga Reddy vs. State of A.P.**³).

(15) Bearing the above principles of law enunciated by the Supreme Court, we shall scrutinize the evidence scrupulously and examine carefully the circumstances appearing in this case against the appellant.

(16) In the instant case, admittedly and indisputably, deceased- Shyamvati is wife of appellant's brother- Durbal and Neel Singh is appellant's nephew. The prosecution has attributed the motive which has found proved by the learned trial Court that firstly on 03.12.2009, the appellant committed rape with Shyamvati in absence of his husband and, on the next day, in order to

³ (1996) 10 SCC 193



avoid any disclosure of the said incident/offence by Shyamvati, he committed murder of deceased- Shyamvati and her son-Neel Singh by strangulation and further threw their dead-bodies in Bagdi Dam, which were recovered on 09.12.2009 & 07.12.2009 respectively. Admittedly, Premvati, W/o Arjun (PW-03), who used to reside next to the house of the deceased- Shyamvati, has stated before the Court in Para-7 of her cross-examination that she was informed by the deceased- Shyamvati that in the night of 03.12.2009 the appellant had troubled her and he has committed wrong deed (galat kaam) with her, but she herself had had not seen the appellant there and she has not disclosed said incident to anybody under fear and shame. Next day, the appellant is said to have committed murder of Shyamvati and her son- Neel Singh and threw the dead-bodies in Bagdi Dam, on which the the learned trial Court has found the motive to the proved. It is well settled law that motive may be an important circumstance in a case based on circumstantial evidence, but it cannot take place of conclusive proof. (See: **Sampath Kumar vs. Inspector of Police, Krishnagiri**⁴). In a recent decision rendered in the matter of **Mahendra Singh vs. State of M.P.**⁵ their Lordships of Supreme Court reiterated the law on the point stating that merely because motive is established, solely on that basis accused cannot be convicted under Section 302 of IPC. Therefore, though Premvati (PW-03) has stated that deceased has informed her about commission of 'galat kaam' by the appellant with her and troubling her, but that is only with regard to the statement made by the deceased herself to Premvati (PW-03) and only on that basis the appellant cannot be convicted for offence under Sections 376 & 302 of IPC.

⁴ (2012) 4 SCC 124

⁵ (2022) 7 SCC 157



(17) The next circumstance that has been pointed out by the prosecution and found proved by the learned trial Court is recovery of 'sari' vide Ex.P/05 pursuant to memorandum statement of the appellant-accused vide Ex.P/04. The said seizure has been proved by Chhatrapal Singh (PW-02), Ex-Sarpanch of the village, who in Para-05 of his cross-examination has clearly stated that identification of the 'sari' of the deceased- Shyamvati was conducted by the police, in which Durbal Singh (husband of deceased- Shyamvati) could not identify the 'sari' to be of deceased- Shyamvati. However, the learned trial Court in Para-22 of the impugned judgment has held as under:

“22 – आरोपी का यह भी बचाव है कि दुर्बल ने उसकी पत्नी की साड़ी को नहीं पहचाना था, किंतु श्यामवती की लाश नग्न हालत में मिली थी और आरोपी ने बांधा के पानी के अंदर से पत्थर में बंधी साड़ी को जप्त कराया है और वह उस साड़ी को जप्त कराने के संबंध में कोई संतोषजनक कारण नहीं बताया है। अतः मैं, पाता हूँ कि उक्त साड़ी श्यामवती की ही थी यह तथ्य विश्वास किये जाने योग्य है। ”

The learned trial Court though recorded a finding that Durbal Singh, husband of the deceased- Shyamvati, has not identified the 'sari' of his wife, but relied on the fact that the aforesaid 'sari' belongs to deceased- Shyamvati, as same has been recovered pursuant to memorandum statement of accused-appellant (Ex.P/04), which is clearly a perverse finding in light of Para-05 of the statement given by Chhatrapal Singh (PW-02), Ex-Sarpanch of the village, who is one of the seizure witness. Thus, Durbal Singh, who is husband of deceased- Shyamvati failed to identify the 'sari' belonging to his wife- Shyamvati and, therefore, it cannot be held that the 'sari' seized at the instance of the appellant belongs to deceased- Shyamvati only and, therefore, it will not help in connecting the appellant with the



offence in question.

(18) In that view of the matter and having given our careful consideration to the submissions made by the learned counsel for the parties and in the light of the evidence discussed hereinabove and in the background of the principles highlighted above, we are the view that the prosecution has failed to prove that it was the appellant and none else who caused death of deceased- Shyamvati and her son- Neel Singh. The evaluation of the findings recorded by the trial Court suffers from manifest error and improper and misappropriation of the evidence on record. Hence, we hold that the appellant- Birbal is entitled to the benefit of doubt.

(19) Accordingly, conviction of the appellant for offence punishable under Sections 449, 376, 201 & 302 of IPC as well as the sentence of life imprisonment awarded to him by the learned trial Court is hereby set aside. The appellant be released from jail forthwith if not required in any other matter.

(20) This criminal appeal is **allowed** to the extent indicated herein-above.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rakesh Mohan Pandey)
Judge