

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 477 of 2011**

- Aabkari Paikra, S/o Baithul, aged 25 years, R/o Village Keshav Nagar, P. S. Bishrampur, Distt. Surguja (C.G.)

---- Petitioner**Versus**

- State Of Chhattisgarh, through Station House Officer, Bishrampur, Distt. Surguja (C.G.)

---- Respondent

For Appellant
For Respondent-State

Shri H. P. Agrawal, Advocate
Shri Bhaskar Payashi, PL

Hon'ble Shri Justice Prashant Kumar Mishra

Hon'ble Smt. Justice Vimla Singh Kapoor

Order On Board by

Prashant Kumar Mishra J.

28/06/2018

1. The appellant would call in question the legality, validity and correctness of the impugned judgment of conviction, whereunder he has been convicted for committing offence under Sections 302 and 201 of IPC and has been sentenced to undergo life imprisonment and RI for 7 years, respectively, and fine of Rs.100/- for each of the offence, in default to undergo additional RI for 10 days for each of the offence.
2. The prosecution case, as projected in the charge sheet, is that the appellant and PW-4 Samundri Bai were married about 3 years prior to

01.06.2010. The appellant was native of Village Jamgala, Police Station Lakhanpur, District Surguja, whereas Samundri Bai was native of Village Latori, Police Station Lakhanpur, District Surguja. They got married after an affair and were residing at Village Keshav Nagar, Police Station Vishrampur, District Surajpur. On 01.06.2010, Samundri Bai gave birth to a baby boy. It is alleged that during the midnight of 2nd and 3rd of June, 2010, the appellant wrapped the baby boy under a piece of cloth and took him away from their residence and never came back. On 02.07.2010, the FIR (Ex-P-9) was lodged by Samundri Bai alleging that during the intervening night of 2nd and 3rd of June, 2010, the appellant had taken away the baby boy and did not return till 5 am, thereafter she tried to locate the appellant but could not find him. Later on, she enquired from the native village of the appellant where he was available, but the child was not available. Samundri Bai carried an impression that the appellant had taken away the child out of anguish and must have left the child in the house of any relative, however, during further search, there was no trace of the child, therefore, it is a case of abduction.

3. On the basis of the above FIR, the appellant was taken into custody and his memorandum statement was recorded on 03.07.2010 vide Ex-P-1, wherein the appellant disclosed that he has committed murder of the baby boy and has buried the dead body at a depth of about 1-2 feet under the Red River and similarly the piece of clothe, in which the baby boy was wrapped, has also been concealed at a distance of about 1 metre. The search inquest/talasi panchnama was conducted at the indicated place vide Ex-P-3, however, neither the dead body nor the clothe was recovered. It is mentioned in the inquest (Ex-P-3) that

because of rains, there is water in the river but yet the sand was removed for searching the dead body, however, the same could not be located. Thus, the *corpus delicti* has not been recovered in the instant case. After recording the statement of witnesses under Section 161 of CrPC, the charge sheet was filed and eventually the trial Court has convicted the appellant on the basis of the documentary as well as oral evidence of the witnesses namely, PW-1 Jagdish, PW-2 Narendra Kumar, PW-3 Satyendra Ravi, PW-4 Samundri Bai, PW-5 Dharampal, PW-6 Lodhudass, PW-7 Surendra, PW-8 Rajeev Kumar Shrivastava and PW-9 M. J. Firdausi.

4. Shri H. P. Agrawal, learned counsel for the appellant, would vehemently submit that in the absence of *corpus delicti* having been recovered, the appellant cannot be convicted for the offence under Section 302 of IPC, because there is no proof that death was homicidal. According to him, there is no admissible evidence against the appellant to connect him with murder, therefore, the impugned judgment deserves to be set aside.

5. Per contra, Shri Bhaskar Payashi, learned State counsel, would submit that from the evidence of PW-4 Samundri Bai and PW-6 Lodhudass duly supported by other witnesses and the contents of FIR, it has been firmly established that the appellant alone has abducted and thereafter committed murder of the deceased.

6. The pivotal question to be considered is whether there is enough evidence on record to rest appellant's conviction for offence under Sections 302 and 201 of IPC.

7. For convicting an accused under Section 302 of IPC, it is ordinarily required that the *corpus delicti* is traced, however, in appropriate cases, conviction can be sustained even if *corpus delicti* has not been found, if clinching evidence is available to hold that the accused was last seen together in the company of the deceased and thereafter he is missing from the world and there is no explanation by the accused as to what happened to the deceased when he was in his company; in such cases conviction is ordinarily based on extra judicial confession or the evidence to the effect that the accused has caused disappearance of the evidence of the crime. (See : **Ram Chandra and another vs State of Uttar Pradesh**¹, **Rama Nand and others vs State of Himachal Pradesh**², **Lakshmi and others vs State of U.P.**³, **State of Karnataka vs M. V. Mahesh**⁴ and **Rishipal vs State of Uttarakhand**⁵)

8. PW-4 Samundri Bai, being the mother of the baby boy, is the most important witness for the prosecution. She has lodged the FIR after one month of the incident. She has supported the prosecution by making statement that the appellant took away the baby boy by wrapping him with a piece of clothe and that when she woke up at about 5 am in the morning, she did not find the baby boy. In the FIR, she has stated that she tried to locate the appellant, on which she came to know that the appellant is available in his native Village Jamgala but the child is not available and that she was under impression that the appellant has left the child in the house of any of

1 AIR 1957 SC 381

2 (1981) 1 SCC 511

3 (2002) 7 SCC 198

4 (2003) 3 SCC 353

5 (2013) 12 SCC 551

the relative but later on when the child was not traceable, she lodged the FIR, however, this effort of her to locate the appellant or the child is not elaborately stated in her examination-in-chief. In her entire statement, this witness has not stated as to whether she tried to meet her husband or the child when she came to know that the appellant is available at his native Village Jamgala. It is extremely unnatural and unusual for a mother of 2 days old child to not to meet her husband who has allegedly taken away the child, despite coming to know that her husband is available at a nearby village but the child is not there. There is no evidence on record about the distance between Jamgala, Latori and Keshav Nagar, however, Jamgala and Latori are within the jurisdiction of same police station i.e. Police Station Lakhanpur, whereas Keshav Nagar is within the jurisdiction of Police Station Vishrampur. We have taken out the distance between Jamgala and Latori from Google Map wherefrom it appears, being located within the same police station, the distance between Jamgala and Latori is less than 10 kms. Latori is the place where Samundri Bai's parents reside. At the time of deposition, PW-4 Samundri Bai and her father PW-6 Lodhudas have mentioned their address as Village Latori, Police Station Lakhanpur. However, there is no evidence to the effect as to what effort Samundri Bai or her parents initiated after coming to know that the appellant is available at Village Jamgala. The distance between Keshav Nagar within Police Station Vishrampur and Jamgala within Police Station Lakhanpur is 31 kms. This distance is also not too far so that it may be construed that Samundri Bai was not in a position to locate her child at Village Jamgala even if she was residing at Keshav Nagar and not at Latori after the incident.

9. Coming to the other evidence, PW-1 Jagdish is the landlord in whose premises the appellant and Samundri Bai were living as tenant. Jagdish has not supported the prosecution. He has admitted his signature on the memorandum statement but has stated that the Police has taken his signature over the document but the memorandum statement or the panchnama was not prepared on the spot. PW-2 Narendra Kumar has also been declared hostile. In his cross examination, he states that on the very next day of the birth of the baby boy, Samundri Bai and her parents had gone to Village Latori. Similar is the statement of PW-3 Satyendra Ravi in his cross examination, after being declared hostile.

10. PW-5 Dharampal has supported the memorandum statement (Ex-P-1). PW-6 Lochudas is the father of PW-4 Samundri Bai. According to this witness, he received information through the mobile phone of one Shiv Vyas that the appellant has abducted the baby boy, on which he went to Keshav Nagar and met Samundri Bai and other villagers on his way when they were going to the police station for lodging the FIR. This would mean that he met Samundri Bai on 2nd of July, 2010 itself and not on any date prior to this. From this evidence also, it can be appreciated that Samundri Bai had never informed her parents about the appellant's act of taking away the child. Thus, Samundri Bai did not disclose this important event concerning her baby boy to her parents. If the conduct of PW-4 Samundri Bai is analyzed, it appears to be very strange and unusual, therefore, her statement cannot form the basis for conviction when otherwise the *corpus delicti* has not been recovered making the memorandum statement insignificant. It is also surprising that when at about 2 am in

the midnight, the appellant went away with the child, Samundri Bai did not react to this behavior of the appellant nor resisted or stopped him from taking away the child.

11. In a case where the prosecution case is based on circumstantial evidence and the dead body has not been recovered at the instance of the accused, the evidenciary value of other circumstances becomes so weak that a conviction cannot be based on such evidence. For this, we may draw support from the observation made by the Supreme Court in the matter of **Kala alias Chandrakala vs State through Inspector of Police**, reported in (2016) 9 SCC 337, on which Shri H. P. Agrawal has rightly placed reliance. Para 15 of the judgment is reproduced herein below:-

“15. In the instant case, which is based on the circumstantial evidence, particularly when the body has not been recovered at the instance of the accused, the recoveries of moped and piece of nylon saree which were made are not proved to be related to commission of offence, they are not proved to be incriminating materials. The extra-judicial confession made by the appellant to Susheela, P.W.4 is prima facie unusual and doubtful and is not corroborated by other evidence on record. Merely, the fact that the deceased had left the house on 16.5.2005, as per version of appellant, cannot be used as a circumstance against her so as to fasten guilt. The deceased used to drink alcohol and used to spend money recklessly. Due to his bad habits, there may be so many enemies of him. How the deceased spent the amount of Rs.1,30,000/- which he received on execution of agreement is not on record. The prosecution has not been able to complete the chain of circumstances so as to fasten the guilt and to prove the commission of offence by the appellant beyond periphery of doubt. The father of appellant has also been extended benefit of doubt. As such, the appellant is entitled for benefit of doubt in view of the evidence which has been adduced by the prosecution.”

12. On the basis of the above discussion, in our considered opinion, there is strong doubt in the case of the prosecution as to whether the appellant has committed the offence, therefore, he deserves benefit of

doubt. The appeal deserves to be and is hereby allowed. The impugned judgment and sentence is set aside. The appellant is in jail. He be set free immediately if he is not required to be detained in any other case.

Sd/-
Judge
Prashant Kumar Mishra

Sd/-
Judge
Vimla Singh Kapoor

Nirala

