NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 321 of 2013

Duleshwar Verma, S/o. Bharat Verma, Aged About 25 Years, R/o. Village Dilippur, P.S. & Tahsil Khairagarh, Distt. Rajnandgaon, Chhattisgarh

---Appellant

Versus

State Of Chhattisgarh, Through Aarakshi Kendra Dongargaon, Distt. Rajnandgoan Chhattisgarh

---Respondent

For Appellant	:-	Mr. Goutam Khetrapal, Advocate
For State-Respondent	:-	Mr. Avinash Singh, Panel Lawyer

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

Judgment on Board
03.01.2023

Sanjay K. Agrawal, J.

1. This criminal appeal under Section 374(2) of Cr.P.C. is directed against the impugned judgment dated 12.03.2013 passed by learned Special Judge, Rajnandgaon under the S.C. & S.T. (Prevention of Atrocities) Act, in Special Case No.06/2012, by which the appellant herein has been convicted for the offence under Section 302 of Indian Penal Code and sentenced to imprisonment for life with fine amount of Rs.5000/- and in default of payment of fine, 1 year additional R.I.

2. Case of the prosecution, in short, is that on 14.11.2011 at 6:00 p.m. at village Gotatola, the appellant and one co-accused (now acquitted) strangulated deceased Ravindra knowing fully well that he is member of Scheduled Caste and thereby committed the offences under

Section 302/ 34 of I.P.C. and under Section 3 (2) (v) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.

3. Further case of the prosecution is that on 13.11.2011, deceased Ravindra went out of his house for chewing Gutka in the motorcycle, but he did not return to his house and he lastly contacted her wife Taruna Meshram (PW-2) at 3:35 p.m. and thereafter his mobile was found switched off. It was further revealed in the investigation that the appellant had intimacy with the wife of deceased namely Karuna Meshram (PW-2) and he had visiting terms with the deceased and his wife and out of such visiting terms, the deceased had taken loan of Rs.40,000/- from the appellant herein and he did not return the same. Since the amount was not returned, the appellant alongwith the co-accused (now acquitted) planned to murder the deceased and accordingly on 13.11.2011, they called him at Basantpur chowk to which the deceased reached and thereafter the deceased was taken to Gotatola Pahad and administered liquor. Thereafter, when the loan amount was demanded, dispute occurred in between them and they strangulated the deceased by towel (Gamchha) and threw his mobile and sim and they absconded therefrom. Thereafter, on 14.11.2011 at 6:00 p.m. at village Gotatola Pahad, a dead body of unidentified person was found hanging on the tree, which was informed by Ashok Kumar (PW-1) to Police Station Dongargaon pursuant to which merg intimation (Ex.P-1) was registered and dead body was identified by brother of the deceased Subhash (PW-3) and thereafter panchnama was conducted vide Ex.P-2. Thereafter, the dead body was subjected to post-mortem by Dr. Kiran Chandrakar (PW-12) and according to the post-mortem report Ex.P-20, cause of death was asphyxia due to

antemortem hanging. Pursuant to the memorandum statement of the appellant Exs.P-11 & P-12, Mobile, SIM and other articles were seized. Similarly, from the spot, the liquor bottle, cigarettes etc were also seized and thereafter the FIR was registered vide Ex.P-25. The FSL report of the articles is brought on record by Ex.P-33. After full-fledged enquiry, the appellants were charge sheeted before the Special Court for trial in accordance with law, in which the appellant abjured his guilt and stated that he has not committed the offence.

4. In order to bring home the offence, prosecution examined as many as 17 witnesses and exhibited 33 documents and the appellant-accused in support of his defence has neither examined any witness nor exhibited any document.

5. The trial Court, after appreciation of oral and documentary evidence on record, acquitted the co-accused namely Suresh Kumar Verma from the charges and convicted the appellant herein for the offence under Section 302 of I.P.C. and sentenced as above, against which the present appeal has been preferred.

6. Mr. Goutam Khetrapal, learned counsel for the appellant would submit that present is a case of no evidence and the accused/ appellant has been convicted only on the basis of his call details and the call details of the deceased as well as his wife. He submits that as the wife of the deceased was superior officer to the appellant, the appellant was having friendly relation with the family of the deceased. He further submits that merely on the basis of telephonic conversation between the accused, the deceased and his wife as also on the basis of seizure of SIM and cellphone belonging to the accused/ appellant, he cannot be convicted.

7. Mr. Avinash Singh, learned State counsel submits that the prosecution has been able to bring home the offence beyond reasonable doubt, therefore, the conviction of the appellant for the offence under Section 302 of I.P.C. is well merited and the appeal deserves to be dismissed.

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

9. The first question for consideration would be whether the death of deceased Ravindra Meshram was homicidal in nature, which the trial Court has answered in affirmative by holding that the deceased died on account of strangulation. Considering the finding recorded by the trial Court and taking into account the evidence of Dr. Kiran Chandrakar (PW-12) who has proved the post mortem report Ex.P-20, we are of the considered opinion that the trial Court is absolutely justified in holding that the death of the deceased is homicidal in nature, as the same is correct finding of fact based on evidence available on record. Accordingly, we hereby affirm the said finding.

10. Now, the question would be, whether the appellant is the perpetrator of the crime in question, to which the trial Court has clearly recorded a finding that though the appellant had repeatedly on the date of offence called several times to the wife of deceased Taruna Meshram (PW-2) and appellant and Taruna Meshram (PW-2) had close relation, but the role of the appellant and wife of the deceased was suspicious and unnatural and has not been enquired by the police. As such, the motive for the offence has not been found to be

established by the trial Court. Similarly, the trial Court has also recorded a finding that the deceased has taken loan from the appellant and the dispute on that account has also not been found proved by the trial Court. However, the trial Court has recorded a finding in para 26 of the judgment on the basis of analysis that the appellant on the date of offence had contacted several times to the deceased and his wife (PW-2) which has been proved by B.P. Sharma, I.O. (PW-15) and that incriminating circumstance has been brought on record on behalf of the prosecution by way of call details of the appellant herein vide Ex.P-23-A. It would be appropriate to quote the finding recorded by the trial Court in para 26 of its judgment :-

> *"26 निर्णय की कंडिका 17 से 22 में उल्लेखित परिस्थितियां आरोपी दुलेश्वर वर्मा के विरुद्ध संदेह से परे प्रमाणित है। आरोपी दुलेश्वर द्वारा मृतक रवीन्द्र मेश्राम एवं उसकी पत्नी तरुणा मेश्राम से घटना दिनांक को अस्वाभाविक रुप से अनकों बार संपर्क करने के संबंध में कोई स्पष्टीकरण नहीं दिया गया है। **वासा चंद्रशेखर राव विरुद्ध पन्ना सत्यनारायण ए.आई.आर. 2000 सुप्रीम कोर्ट 2138** के मामले में यह मत व्यक्त किया गया है कि परिस्थितियों का संचयी प्रभाव ऐसा होना चाहिए जो आरोपी की निर्दोषिता को अर्थहीन बनाती हों तथा संदेह से परे अपराध सिद्ध करती हों। यदि आरोपी इन परिस्थितियों का कोई स्पष्टीकरण नहीं देता अथवा मिथ्या स्पष्टीकरण देता है तो दोषी पाने के लिये यह एक अतिरिक्त परिस्थितियों की कड़ी होगी। अभियोजन द्वारा प्रस्तुत काल डिटेल के आधार पर घटना के समय घटना स्थल पर मृतक रवीन्द्र मेश्राम के साथ आरोपी दुलेश्वर वर्मा का रहना संदेह से परे प्रमाणित है, परन्तु आरोपी सुरेश वर्मा का उपस्थित रहना संदेह से परे प्रमाणित नहीं है।"*

11. In order to assail the above-stated finding holding it to be a piece of incriminating circumstance, it has been contended on behalf of the appellant that it is not supported by certificate under Section 65B(4)

of the Indian Evidence Act, 1872, therefore, it is inadmissible in evidence and as such, no reliance can be placed upon it, as the trial Court went wrong in accepting it as a piece of incriminating evidence and reliance has been placed upon the judgment of the Supreme Court in the matter of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**[1] in which their Lordships resolving the dispute and the conflict raised in the matters of **Shafhi Mohammad v. State of Himachal Pradesh**[2] and **Anvar P.V. v. P.K. Basheer**[3] have clearly held that production of certificate under Section 65B of the Evidence Act is mandatory only in case of secondary evidence where primary evidence is not laid or original is not produced. Their Lordships further held that the certificate required under Section 65B(4) of the Evidence Act is a condition precedent to the admissibility of secondary evidence by way of electronic evidence as laid down in **Anvar P.V.** (supra) and incorrectly clarified in **Shafhi Mohammad** (supra). It was held as under: -

> "61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor v. Taylor*[4], which has been followed in a number of the judgments of this

1 (2021) 7 SCC 1
2 (2018) 2 SCC 801
3 (2014) 10 SCC 473
4 (1875) LR 1 Ch D 426

> Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose."

Their Lordships also held that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced and this can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and / or operated by him. The reference was answered in paragraphs 73.1., 73.2. and 73.3. as under: -

> "73.1. Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno[5], being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad (supra) and the judgment dated 3-4-2018 reported as Shafhi Mohd. v. State of H.P.[6], do not lay down the law correctly and are therefore overruled.
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> 73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original

5 (2015) 7 SCC 178: (2015) 3 SCC (Cri) 54
6 (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704

information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in Anvar P.V. (supra) which reads as *"… if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act …" is thus clarified;* it is to be read without the words *"under Section 62 of the Evidence Act, …".* With this clarification, the law stated in para 24 of Anvar P.V. (supra) does not need to be revisited.

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers."

12. In the matter of **Ravinder Singh @ Kaku v. State of Punjab**[7], their Lordships of the Supreme Court while following the decision of **Arjun Panditrao Khotkar** (supra) have held that oral evidence in the place of certificate cannot be possibly suffice as Section 65B(4) is a

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mandatory requirement of law. Their Lordships held that Section 65B(4) is a mandatory requirement of law and observed as under:-

> "21. In light of the above, the electronic evidence produced before the High Court should have been in accordance with the statute and should have complied with the certification requirement, for it to be admissible in the court of law. As rightly stated above, oral evidence in the place of such certificate, as is the case in the present matter, cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law."

13. Reverting to the facts of this case in light of the aforesaid pronouncement of the Supreme Court in **Arjun Panditrao Khotkar** (supra) and **Ravinder Singh @ Kaku** (supra), though call details of the accused/ appellant and wife of the deceased Taruna Meshram were brought on record as Ex.P-23-A and proved by Constable-Hemant Kumar (PW-13) but in view of the fact that Section 65B(4) of the Evidence Act is a mandatory requirement of law and in absence of certificate under the aforesaid provision, merely on the basis of the statement of Hemant Kumar (PW-13), call details cannot be said to be proved in absence of required certificate, though the mobile set of the appellant has been seized. Thus, the prosecution has failed to bring on record the mandatory certificate under Section 65B(4) of the Evidence Act and therefore reliance placed by the trial Court on the call details of the appellant and deceased and his wife is of no use to the prosecution.

14. Since call details (Ex.P-23-A) is inadmissible in evidence, therefore, in absence of certificate under Section 65B(4) of the Evidence Act

and non-explanation of the calls made by the appellant and received by wife of the deceased, the appellant cannot be convicted for the offence under Section 302 of I.P.C. as no incriminating circumstance has been brought out and proved by the trial Court. In that view of the matter, we are of the opinion that the appellant is also entitled for benefit of doubt. Accordingly, the conviction and sentence imposed upon the appellant under Section 302 of I.P.C. is set aside and he is acquitted of the said charge. Consequently, this criminal appeal is allowed. The appellant is on bail, his bail bond shall remain in force for a period of six months in view of the provision contained in Section 437-A of Cr.P.C.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rakesh Mohan Pandey)
Judge

Aks