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**(2012) 02 CHH CK 0080**

**Chhattisgarh High Court**

**Case No:** Criminal Appeal No. 828 of 2008

Shatruhan Sahu

APPELLANT

Vs

State of Chhattisgarh

RESPONDENT

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**Date of Decision:** Feb. 28, 2012

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) â€” Section 161, 313#Evidence Act, 1872 â€” Section 114#Penal Code, 1860 (IPC) â€” Section 302, 397, 459

**Citation:** (2012) 02 CHH CK 0080

**Hon'ble Judges:** T.P. Sharma, J; Rangnath Chandrakar, J

**Bench:** Full Bench

**Advocate:** P.K.C. Tiwari and Shashi Bhushan, for the Appellant; Madhunisha Singh, Panel Lawyer, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

T.P. Sharma, J.

Challenge in this appeal is to the judgment of conviction and order of sentence dated 7-8-2008 passed by the Sessions

Judge, Kabirdham (Kawardha), in Sessions Trial No. 01/08, whereby and where under the Sessions Judge after holding appellant Shatruhan guilty

for commission of lurking house trespass at night and causing grievous hurt after committing robbery by using deadly weapon and murder of

Milabai while acquitting co-accused Sushilabai, convicted him under sections 302, 459 and 397 of the I.P.C. and sentenced to undergo

imprisonment for life, R.I. for five years and R.I. for seven years. Conviction is impugned on the ground that without any iota of evidence, the trial

Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

2. As per case of the prosecution, in the month of June, 2007, husband of deceased Milabai, namely Ghasiram (PW-2) sold his agricultural land

on consideration of Rs. 3,20,750/-, he purchased ornaments of Rs. 40,000/- for his wife i.e. kardhan of 5 chain, ornaments for leg and aithy,

currency notes of 100, 20, 50 total Rs. 1,22,000/- were kept in dibba and hidden under the rice. On 15-10-2007 Ghasiram (PW-2) went to

village Pipariya with his wife Milabai, Milabai came back alone to her village Gopalbhawna, Ghasiram stayed in his in-laws house. On second day

he was informed by telephone that his wife Milabai died, he came to his house where he saw dead body of his wife, some persons have committed

theft of currency notes kept in rice, they have also removed laccha, kardhan, aithy and silver and golden ornaments from the body of the deceased

and committed her murder. He lodged dehati nalishi vide Ex. P/2. Dehati merg was recorded vide Ex. P/3. Police Officer left for scene of

occurrence and after summoning the witnesses vide Ex. P/18 inquest over dead body of Milabai was prepared vide Ex. P/19. Spot map was

prepared by Investigating Officer vide Ex. P/4. Extra key of lock of room of the deceased was seized vide Ex. P/6. Part of necklace was seized

from the husband of the deceased vide Ex. P/11. Dead body of the deceased was sent for autopsy to District Hospital, Kabirdham. Dr. Santosh

Luniya (PW-4) conducted autopsy of Milabai vide Ex. P/14 and found following injuries:--

(i) Marks found over neck of 12 c.m. in size.

(ii) Blood found inside trachea.

Cause of death was asphyxia as a result of throttling. Death was homicidal in nature. During the course of investigation, photographs were taken,

numberi merg was recorded vide Ex. P/17 and F.I.R. was lodged vide Ex. P/30. Appellant Shatruhan was taken into custody on 18-10-07, he

made disclosure statement of article i.e. aithy, laccha, kardhan, silver ring, golden necklace, golden topps and currency notes of Rs. 90,000/- vide

Ex. P/7, same were recovered at the instance of appellant Shatruhan from manure ditch in buried position vide Ex. P/9. Co-accused Sushila also

made disclosure statement of aforesaid articles and one lock vide Ex. P/8, one lock along with key were seized at the instance of co-accused

Sushila vide Ex. P/10. On 18-10-2007 articles seized at the instance of appellant Shatruhan was weight by Manoj Soni (PW-12) vide Ex. P/12.

Appellant Shatruhan was also examined. Seized articles were placed for identification and Naib-Tahsildar S.R. Diwan (PW-13) conducted test

identification vide Ex. P/1, same were identified by Ghasiram (PW-2), husband of the deceased.

3. Statements of the witnesses were recorded u/s 161 of the Code of Criminal Procedure (for short "the Code") and after completion of

investigation charge-sheet was filed in the Court of Chief Judicial Magistrate, Kabirdham (Kawardha), who in turn committed the case to the Court

of Sessions, Kabirdham (Kawardha).

4. In order to prove the guilt of the accused, the prosecution has examined as many as thirteen witnesses. Accused were examined u/s 313 of the

Code, in which they denied the circumstances appearing against them and claimed innocence and false implication in the crime in question.

5. After providing opportunity of hearing to the parties, the Sessions Judge, Kabirdham while acquitting accused Sushila convicted and sentenced

the appellant as aforementioned.

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

7. Learned counsel for the appellant vehemently argued that in the present case conviction is substantially based on conjecture, surmises and

without legal evidence. The prosecution has utterly failed to prove the motive for commission of offence and without any iota of evidence, the trial

Court has held guilt of the appellant for commission of aforesaid offence. Ghasiram (PW-2), husband of the deceased, has not uttered single word

about the alleged articles seized at the instance of the appellant that the articles seized from the appellant were his wife's articles. Investigation

Officer has identified the articles in Court who was not aware with the articles. There is no whisper of evidence to show that how the police came

to know that the appellant has committed the aforesaid offence. Even as per evidence of the prosecution witnesses, the articles were lying in open

place in manure ditch used by the villagers, which was not in exclusive possession of the appellant. Even otherwise, the aforesaid articles have not

been recovered at the instance of the appellant, inter alia as per evidences of panch witnesses Kumar Chandrawanshi (PW-3) and Bishouha (PW-

8) whom the prosecution has declared hostile they were called by the police, the police was in possession of the aforesaid articles and it was

informed by the police that the appellant has removed the same from manure ditch. Evidence of police officer alone is not sufficient to prove

disclosure statement and recovery of articles. Learned counsel further argued that test identification is not substantive piece of evidence and

evidence before the Court is only substantive piece of evidence. The only purpose for test identification is to ensure that investigation is going on

right side. The persons who have identified the appellant were unknown to the appellant, they were not having sufficient opportunity to see him,

therefore, test identification was necessary, but in the present case, test identification has been conducted in presence of the police and witnesses

have seen the appellant in police custody which completely vitiates the test identification.

8. On the other hand, learned Panel Lawyer for the respondent/State opposed the appeal and argued that the appellant, resident of same village,

was found in possession of Rs. 90,000/- currency notes and ornaments of the deceased which she was wearing at the time of her death and

articles have been identified by Ghasiram (PW-2), husband of the deceased.

Identification of the articles has not been rebutted or questioned by

the appellant. Robbery by itself is a motive for commission of offence. Robbed articles were found in possession of the appellant after commission

of robbery, which is sufficient for drawing inference that the appellant has committed lurking house trespass and has committed murder after commission of robbery.

9. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the prosecution.

10. In the present case, homicidal death of Milabai as a result of throttling has not been substantially disputed on behalf of the appellant, even

otherwise, it is also established by the evidence of Dr. Santosh Luniya (PW-4) and autopsy report Ex. P/14 that death of Milabai was homicidal in nature.

11. As regards the complicity of the appellant in the crime in question, as per unrebutted evidence adduced on behalf of the prosecution, dead

body of the deceased was found in her house, lock of room was broken and ornaments including currency notes of Rs. 90,000/- were stolen.

Conviction is substantially based on factum of recovery of ornaments and currency notes at the instance of the appellant on the basis of his

disclosure statement and identification of the articles as articles of the deceased which she was wearing at the time of death.

12. As per evidence of Ghasiram (PW-2), husband of the deceased, he along with the deceased had gone to village Pipariya, the deceased came

back to her house situate at Gopalbhawna and he went to village Rabeli, on second day he was telephoned and informed that deceased Milabai

died, he came back to his house situate at Gopalbhawna where he saw dead body of his wife lying on cot in his house and ornaments i.e., laccha,

kardhan, aithy, silver ring, ornaments of ear and necklace were not found over body of the deceased, he lodged dehati nalishi vide Ex. P/2 and

merg vide Ex. P/3. Second key of the lock was seized from him vide Ex. P/6. As per his evidence, identification parade was conducted by Naib-

Tahsildar and he has identified the ornaments i.e. laccha, kardhan, aithy, silver ring, ornaments of ear and necklace as ornaments of his wife vide

Ex. P/1.

13. As per evidence of Inspector Sanjay Pundhir (PW-9), after taking the appellant in custody he interrogated him, the appellant made disclosure

statement of ornaments i.e., aithy, laccha, kardhan, silver ring, golden leaves, golden topps and Rs. 90,000/- and informed that same has been

hidden in kitchen garden in ditch manure which he recorded vide Ex. P/7. He has further deposed that he went along with the appellant in kitchen

garden of the appellant from where the appellant produced ornaments from manure ditch hidden in ditch which he seized vide Ex. P/9. He has

mentioned the weight of ornaments. Manoj Soni (PW-12) has deposed that he was called by the police at village Gopalbhawna where he weighed

the ornaments vide Ex. P/12.

14. The prosecution has examined panch witnesses Kumar Chandrawanshi (PW-3) and Bishouha (PW-8) who have deposed that ornaments and

currency notes were seized near manure ditch situate beside the house of the appellant. They have specifically deposed that when they were called

by the police, ornaments were already in the hands of the police, they were informed that the present appellant has taken out the ornaments from

manure ditch. The prosecution has declared them hostile. They have signed over disclosure statement Ex. P/7 and seizure Ex. P/10 which shows

that the appellant has made disclosure statement of ornaments and currency notes and same have been recovered from manure ditch hiding in

ditch. They have not supported Exs. P/7 and P/10, but they have not explained that why they have signed over Exs. P/7 and P/10 when the

appellant has not made such statement. They have also not deposed or explained any circumstance in which they were compelled to sign over such

documents. In these circumstances, the only inference would be possible that they are suppressing the truth, but the fact remain that they were

called near manure ditch situate beside the house of the appellant.

15. Seizure of ornaments and currency notes were prepared by the police. In these circumstances, only evidence of Investigating Officer Sanjay

Pundhir (PW-9) is remain for consideration. Sanjay Pundhir (PW-9) is police officer, but only on the ground that he is police officer and interested

in outcome of the case, his entire evidence cannot be discarded.

16. While dealing with the question of evidentiary value of evidence of police officers, the Supreme Court in the matter of Anil alias Andya

Sadashiv Nandoskar Vs. State of Maharashtra, has held that testimony of police officials are not liable to be discarded merely because they are

police officials. However, their evidence should be carefully scrutinized and independently appreciated. The Supreme Court further held that

witnesses being police officers do not by itself create a doubt about their creditworthiness if non-examination of Panch witnesses is explained

satisfactorily. Para 5 of the said judgment reads as under:--

Indeed all the 5 prosecution witnesses who have been examined in support of search and seizure were members of the raiding party. They are all

police officials. There is, however, no rule of law that the evidence of police officials has to be discarded or that it suffers from some inherent

infirmary. Prudence, however, requires that the evidence of the police officials, who are interested in the outcome of the result of the case, needs to

be carefully scrutinised and independently appreciated. The police officials do not suffer from any disability to give evidence and the mere fact that

they are police officials does not by itself give rise to any doubt about their creditworthiness. We have carefully and critically analysed the evidence

of all the 5 police officials. There is nothing on the record to show that any one of them was hostile to be appellant and despite lengthy cross-

examination their evidence has remained unshaken throughout. These witnesses have deposed in clear terms the details of the trap that was laid to

apprehend the appellant and the manner in which he was apprehended. Their evidence regarding search and seizure of the weapons from the

appellant is straightforward, consistent and specific. It inspires confidence and learned counsel for the appellant has not been able to point out any

serious, let alone fatal, infirmity in their evidence. In our opinion, the factum of search and seizure of the country-made revolver from the conscious

possession of the appellant has been established by the prosecution beyond any reasonable doubt. The explanation given by the prosecution, for

the non-examination of the two panch witnesses, which is supported by the report Ext. 24 filed by PW 4 PI Gaikwad is satisfactory. The evidence

on the record shows that the raiding party made sincere efforts to join with them two independent panchas at the time of search and seizure and

they were so joined. They were also cited as prosecution witnesses and summoned to give evidence. However, despite diligent efforts made by the

prosecuting agency to serve them, they could not be located or traced and therefore they could not be examined at the trial. In the face of the facts

stated in report Ext. 24, the correctness of which has remained virtually unchallenged during the cross-examination of PW 4, the non-examination

of the two panchas cannot be said to be on account of any oblique reason. Their non-production at the trial thus has not created any dent in the

prosecution case. The prosecution cannot be accused of withholding these witnesses since it made every effort to trace and produce them at the

trial but failed on account of the fact that they had left the addresses furnished by them at the time of search and their whereabouts could not be

traced despite diligent efforts made in that behalf. We, therefore, do not find any reason to doubt the correctness of the prosecution version relating

to the apprehension of the appellant, the search and seizure by the raiding party and the recovery from the appellant of the country-made revolver

and cartridges for which he could produce no licence or authority because of the non-examination of the panch witnesses. We find that the

evidence of PW 1 to PW 5 is reliable, cogent and trustworthy.

17. Further, in the matter of P.P. Beeran Vs. State of Kerala, it has been held by the Supreme Court that reliance can be placed on the

uncorroborated evidence of the Sub Inspector of Police.



18. As per evidence of Sanjay Pundhir (PW-9), he has taken the appellant in custody, the appellant has made disclosure statement of entire

ornaments and currency notes and has specifically stated that same were kept in manure ditch in buried position, thereafter he took the appellant

near ditch from where he has removed the ornaments, same were weight and seized vide Ex. P/9. Ex. P/9 reveals the time of seizure on 18-10-

2007 at 12.30 p.m., however weighed document Ex. P/12 reveals the time of weighing as 12.15 p.m. Manoj Soni (PW-12) has prepared Ex.

P/12 and has deposed that he has weighed the ornaments i.e. laccha, kardhan, aithy, golden topps and leaves. In his cross-examination he has

deposed that he was called by police at 9 a.m., he reached village Gopalbhawna at 11 a.m. As per Ex. P/12 he has weighed the articles at about

12.15 p.m. Disclosure statement Ex. P/7 was recorded at 11 a.m. There is discrepancy relating to time and preparation of documents. Ex. P/9

shows weight of articles which reveals that Ex. P/9 has been prepared after preparation of Ex. P/12. There may be some discrepancy relating to

time, that too one or two hours. Manoj Soni (PW-12) has not deposed exactly that he was called by police at 9 or 10 a.m. He has deposed that

between 9 to 10 a.m. he was called by police and he has finished his work at 11 a.m., therefore, it can safely be inferred that he was called after

recording of memorandum and before seizure of the articles. Even otherwise Manoj Soni (PW-12) has not been confronted with Ex. P/12.

Document prepared by him, in which he has written the time as 12.15 p.m. Prosecution witnesses have deposed that ditch manure is situate near

the house of the appellant, but it was in open place and beside the house of other persons of the village. Ditch manure is situate on open place but

evidence of Sanjay Pundhir (PW-9) specifically reveals that articles were not kept/lying in open place and were kept in buried position in manure

ditch, it was not visible to other persons, even hostile panch witnesses Kumar Chandrawanshi (PW-3) and Bishouha (PW-8) have not deposed

that articles were lying in the place or open manure ditch.

19. Considering the fact that panch witnesses Kumar Chandrawanshi (PW-3) and Bishouha (PW-8) are suppressing the truth, the only evidence

of Sanjay Pundhir (PW-9) is available for consideration. Defence has not suggested anything to this witness that he is interested or departure from

procedure prescribed. His evidence is well corroborated by the documents Exs. P/7 and P/9 inspires confidence and trustworthy and same is safe

to rely that on the basis of disclosure statement of the present appellant, articles were recovered from manure ditch which were in hidden position

and were not visible to public. Recovery of articles by itself is not incriminating circumstance against the appellant if it is explained properly. The

appellant was under obligation to offer explanation that how he came to know about the articles hidden in manure ditch, that too within three days

of the incident, but he has not offered any explanation.

20. As regards the question of identification of articles or the question that whether articles were belonging to the deceased, the prosecution has

examined Ghasiram (PW-2), husband of the deceased, who has specifically deposed that aforesaid articles were missing from body of the

deceased which is sufficient to establish the fact that when the deceased was alive she was wearing the ornaments. He has identified the articles

vide Ex. P/1. Defence has cross-examined this witness, but nothing has been asked relating to question of identification. As per his evidence,

articles were purchased by him in the month of June, 2007, his wife was wearing the ornaments and he was having sufficient opportunity to see the

articles.

21. Naib-Tahsildar S.R. Diwan (PW-13) conducted identification, who has specifically deposed that articles were identified. He has mixed six

identical articles with each other Husband of the deceased, who has purchased the ornaments, was in a position to identify the articles without any

specific marks of identification and any discrepancy in number of mixing the articles would not affect the credibility of this witness. Evidence of test

identification parade is not a substantive piece of evidence and evidence of identification before the Court is a substantive piece of evidence.

22. In the present case, articles have not been shown to Ghasiram (PW-2) during the course of recording his evidence, inter alia, articles have

been shown to investigating officer Sanjay Pudhir (PW-9), who has identified and marked the articles as articles 1 to 10. He has very specifically

deposed that articles 1 to 7 as the articles which he has seized, although he was not in a position to identify the articles as articles of Milabai, but his

unrebutted evidence of para 21 is sufficient to prove the fact that he has seized the articles 1 to 7 on the basis of disclosure statement Ex. P/7 vide

Ex. P/9 from the appellant which have been produced by the appellant after taking out the same from manure ditch.

23. Evidence of Ghasiram (PW-2) is sufficient to prove the fact that articles seized from the appellant has been identified by him in his test

identification parade. Evidence of both the witnesses i.e. Ghasiram (PW-2) and Sanjay Pudhir (PW-9) are further sufficient to prove the fact that

ornaments seized at the instance of the appellant are the articles 1 to 7 and same have been identified by Ghasiram (PW-2) in test identification

parade. These evidences are sufficient to prove the fact that soon after the commission of lurking house trespass, murder, robbery of ornaments

and currency notes in the intervening night of 15/16-10-2007 on 18-10-2007 after two days of the incident same were found in possession of the

appellant. The appellant has not claimed any right over the property. In case of non-explanation, the Court may presume u/s 114 of the Evidence

Act that the person who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen,

unless he can account for his possession, but illustration (a) of section 114 of the Evidence Act is not confined to the charge of theft, but it may

explain all the charges committed in series including murder and robbery.

24. While dealing with the question of such presumption the Supreme Court in the matter of Tulsiram Kanu Vs. The State, has held that the

presumption permitted to be drawn u/s 114 of the Evidence Act, has to be read along with the important time-factor. If ornaments or things of the

deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months expire in

the interval, the presumption may not be permitted to be drawn having regard to the circumstances of the case. In the aforesaid matter on the

ground of recent and unexplained possession the Supreme Court has held that presumption of murder may be drawn.

25. While dealing with the same question the Supreme Court in the matter of Sunderlal Vs. The State of Madhya Pradesh, as held that in case of

recent possession of stolen article without explanation from the body of the deceased the Court may presume that the accused is also responsible

for murder of the deceased.

26. In the present case, within two days of the incident the appellant found in possession of ornaments which the deceased was wearing along with

currency notes of Rs. 90,000/-. The appellant has failed to account for such recent possession. Lock of room of the deceased was broken and

dead body was found inside the house which is sufficient for drawing inference that some person has committed robbery after lurking house

trespass and also committed murder of deceased Milabai. In absence of explanation of recent possession of ornaments which deceased Milabai

was wearing and currency notes stolen from the house of the deceased, the only inference would be possible that the appellant has committed

robbery of the ornaments and commission of murder of Milabai after lurking house trespass.

27. After appreciating the evidence available on record, the Sessions Judge, Kabirdham (Kawardha) has convicted and sentenced the appellant as

aforementioned.

28. On close scrutiny, we do not find any illegality or infirmity in the judgment of conviction and order of sentence. Consequently, the appeal being

devoid of merit is liable to be dismissed and is hereby dismissed.