IN THE HIGH COURT OF JHARKHAND AT RANCHI
Cr. Appeal (DB) No.344 of 2022

(Against the judgment of conviction dated 26.11.2018 and the order of sentence dated 29.11.2018 passed by the learned Additional Sessions Judge-XVI, Dhanbad in Sessions Trial No.251 of 2008)

Jumed Khan, son of late Akbar Shekh, resident of Sijua, 10 No., P.O. & P.S. Jogta, District Dhanbad .... **Appellant**

Versus

The State of Jharkhand .... **Respondent**

CORAM: SRI ANANDA SEN, J.
SRI SUBHASH CHAND, J.

For the Appellant : Mr. Rajeev Ranjan Tiwary, Advocate
For the State : Mrs. Nehala Sharmin, APP

Order No.08/ Dated: 19.03.2024

J U D G M E N T

Per: Subhash Chand, J.

1. This Criminal Appeal has been preferred against the judgment of conviction dated 26.11.2018 and the order of sentence dated 29.11.2018 passed by the learned Additional Sessions Judge-XVI, Dhanbad in Sessions Trial No.251 of 2008, whereby the learned trial Court has convicted the appellant under Sections 302/201 of the Indian Penal Code and sentenced him to RI for life along with fine of Rs.20,000/- for the offence under Section 302 of the Indian Penal Code. The appellant was further directed to undergo RI for 7 years along with fine of Rs.5000/- for the offence under Section 201 of the Indian Penal Code. In case of default in payment of fine, the appellant was directed to undergo RI for one year.

2. The brief facts of the prosecution case leading to this Criminal Appeal are that the informant Ali Bux Mian had given the written information with the police station concerned with these allegations that his daughter was

married with Jumed Khan 20-21 years ago. After marriage, both remained happily for some time, thereafter, her husband began to torture her, for this reason, his daughter had instituted a case in the Court of Giridih, due to which, his son-in-law Jumed Khan, his *samdhi* Nabi Hasan and Noor Hasan, all three had assaulted his daughter and committed murder on 31.12.2007 and threw her dead body nearby the bush in order to screen themselves. On this, the FIR was lodged, which was registered as Case Crime No. 01 of 2008 with the Jogta Police Station, District Dhanbad under Sections 302, 201/34 of the Indian Penal Code.

3. The Investigating Officer after having concluded the investigation, exonerated two accused persons, namely, Nabi Hasan and Noor Hasan and filed charge-sheet against the appellant Jumed Khan under Sections 302, 201/34 of the Indian Penal Code. The cognizance was taken by the Magistrate concerned, who committed the case for trial to the Court of learned Sessions Judge, Dhanbad, who subsequently transferred the same to the learned Additional Sessions Judge, FTC-III, Dhanbad.

4. The Court of learned Additional Sessions Judge, FTC-III, Dhanbad framed the charge against the accused-appellant Jumed Khan under Sections 302, 201/34 of the Indian Penal Code and the same was explained to him, he denied the charge and claimed to face the trial.

5. On behalf of the prosecution to prove the charge against the accused in **oral evidence** examined altogether eight witnesses i.e. **P.W.-1, Ishwar Ram; P.W.-2, Dr. Shailendra Kumar; P.W.-3, Ahasan Mian @ Khan; P.W.-4, Sadique Ansari; P.W.-5, Ali Bux Mian and; P.W.-6, Kiran Surin** and **in documentary evidence** the prosecution has adduced **Exhibit-1, Postmortem report of deceased; Exhibit-2, Signature of Ahasan Mian on**

inquest report and; Exhibit-3, Certified copy of complaint petition of C.P. Case No.1270 of 2005.

6. The statement of the accused was recorded under Section **313 of the Code of Criminal Procedure**, in which, he denied the incriminating circumstances in evidence against him and stated himself to be innocent.

7. The learned trial Court after hearing the rival submissions of the learned counsel for the accused and learned counsel for the State, passed the impugned judgment of conviction dated 26.11.2018 and the order of sentence dated 29.11.2018 holding the appellant-accused Jumed Khan guilty for the offence under Sections 302, 201/34 of the Indian Penal Code and sentenced as stated hereinabove.

8. Aggrieved from the impugned judgment of conviction dated 26.11.2018 and the order of sentence dated 29.11.2018, this Criminal Appeal has been preferred on behalf of the appellant.

9. Heard the rival submissions of the learned counsel for the appellant and learned APP for the State and perused the materials available on record.

10. Learned counsel for the appellant has submitted that the prosecution case is based on circumstantial evidence and there is no link in the chain of circumstantial evidence against the appellant. The Investigating Officer has also not been examined in this case; therefore, the conviction of the appellant is based on conjectures and surmises. In view of the above, contended to allow this Criminal Appeal and set aside the impugned judgment of conviction and the order of sentence.

11. The learned APP for the State vehemently opposed the contentions made by the learned counsel for the appellant and contended that the motive of occurrence is also shown in the FIR and the same is also proved with the

cogent evidence adduced by the prosecution and with the strong motive the murder of the daughter of informant was committed and to screen themselves from the punishment of the offence, they have thrown the dead body in the nearby bush. As such, the impugned judgment passed by the learned Trial Court is based on the proper appreciation of the evidence and the same needs no interference.

12. In order to decide the legality and propriety of the impugned judgment of conviction and the order of sentence passed by the learned Trial Court, we would like to re-evaluate the evidence oral as well as documentary adduced on behalf of the parties on record, which are reproduced hereinbelow:

12.1 P.W.-1, Ishwar Ram, in his examination-in-chief, says that he knows nothing in regard to the occurrence. The police did not interrogate him. This witness was declared hostile.

12.2 P.W.-3, Ahasan Mian @ Khan, in his examination-in-chief, says that Samina Khatoon was married with Jumed Khan. He is not aware whether Samina Khatoon had instituted any case against Jumed Khan in Giridih and for the same pressure was created upon her. On 31.12.2007, Samina Khatoon died. She saw her dead body in her matrimonial house. Daroga Ji prepared the papers, he put his signature thereon marked Exhibit-1.

12.3 P.W.-4, Sadique Ansari, in his examination-in-chief, says that Samina Khatoon married with Jumed Khan about 25 years ago. After marriage 5-6 years, she remained well with her husband, thereafter, Jumed Khan began to torture her. Since Samina Khatoon wanted to be nominee in the service book but he was not ready for that, on this issue, he used to do *mar-pit* with her. For the same reason, the case was filed in Giridih Court by Samina Khatoon. To withdraw that case, Jumed Khan was creating pressure

upon Samina Khatoon. On 01.12.2008 after occurrence, he came to Sijua and found the dead body of the deceased thrown in the ditch. The opportunity of cross-examination was given to the defence counsel but no cross-examination was done from this witness.

12.4 P.W.-5, Ali Bux Mian, in his examination-in-chief, says that his daughter Samina Khatoon was married with Jumed Khan about 20-23 years ago. Jumed Khand was doing job in TISCO Company. His daughter wanted to be nominee therein but he was not ready for the same. With this reason, Jumed Khan, Nabi Hasan and Noor Hasan all used to beat her. Consequently, his daughter instituted a case in the year 2005 in Giridih Court against them. The certified copy of the same is Exhibit-3. His daughter was asked to withdraw the case by the accused but, for not doing the same, she was murdered. After receiving the information, he reached Sijua on the next day in the morning. Police also reached there and found the dead body from the bush. There were injury caused by tangi on her head etc. The defence was also given opportunity to cross-examine but no one cross-examined this witness.

12.5 P.W.-6, Kiran Surin, in his examination-in-chief, says that he has filed the charge-sheet. The second Investigating Officer has stated that after being satisfied from the evidence collected by the former Investigating Officer, he has filed charge-sheet, which is in his handwriting and signature. In his cross-examination, this witness says that he did not collect any evidence since all evidence had been collected by the previous Investigating Officer and he filed charge-sheet.

12.6 P.W.-2, Dr. Shailendra Kumar, in his examination-in-chief, says that, on 01.01.2008, he was posted as Assistant Professor in the Department

of F.H.T, P.M.C.H, Dhanbad, on that day, at 01:30 p.m., he conducted the postmortem examination of Samina Khatoon, wife of Jumed Khan and found following antemortem injuries on external examination of dead body:

> *"External Examination-*
> *(I) Abrasion-*
> *(a) multiple abrasion were found all over the forehead, face and left side of neck.*
> *(b) 3'x ½'at the lower portion, front of right side of neck situated obliquely from down upwards.*
> *(c) 3'x ¼' & 3'x ½' two abrasion found on the lower portion of neck and upper portion of chest from side to side.*
> *(d) 10'x 6' multiple abrasion of the back of waist and all over the buttock.*
>
> *(II) Contusion / bruises:-*
> *a. Dark brown in colour 1'x ½'on the under surface of chin*
> *b. 3'x 1'on the upper portion of front of left side of chest*
>
> *(III) Lacerated wound:-*
> *1. 1 ¾'x 1/2' x bone deep on the left parital region of head with fracture of left parital bone of skull.*
>
> *On dissection:-*
> *1. Ecchymosis were found all over the front of neck and upper portion of chest on both sides.*
> *2. Muscles of neck were found berated.*
> *3. Cartilage of tracheal rings were found fractured.*
> *……*
> *……..*
> *Time elapsed since death:-18-24 hours.*
> *Cause of death- death was due to asphyxia, result of strangulation by hard and blunt force pressure on neck. Hard and blunt force injuries of head and brain was also sufficient to cause death."*

13. The prosecution case is based on circumstantial evidence. The motive of the occurrence is shown that the deceased daughter of the informant wanted to be nominee in the service record of her husband Jumed Khan, the appellant herein, who was not ready for the same and with this reason her husband Jumed Khand used to torture her, due to which, she had instituted a case bearing No.1270 of 2005 (Samina Khatoon Vs. Jumed Khan and four others) in the Court of the learned Chief Judicial Magistrate, Giridih. It is further alleged that her husband was creating pressure upon his wife to withdraw that case, but due to not withdrawing the same, her murder was

committed. This motive is shown in the FIR itself and to this effect on behalf of the prosecution has been produced in evidence P.W.-4, Sadique Ansari and P.W.5, Ali Bux Mian, both these witnesses had narrated this motive in their examination-in-chief and both were not cross-examined on behalf of the accused by the defence counsel, therefore, the statement given by both these witnesses in their examination-in-chief being not cross-examined, shall be admissible in evidence.

13.1 The Hon'ble Supreme Court in the case of ***Rajinder Pershad v. Darshana Devi*** reported in ***(2001) 7 SCC 69*** held at paragraph No.4, which reads as under:

> *"**4.** The only point urged albeit strenuously on behalf of the appellant by Mr P.S. Mishra, the learned Senior Counsel is that as there has been no valid service of notice, so all proceedings taken on the assumption of service of notice are illegal and void. He has invited our attention to the judgment of the learned Rent Control Tribunal wherein it is recorded that Exhibit AW 1/6 dated 5-8-1986 was sent by registered post and the same was taken by the postman to the address of the tenant on 6-8-1986, 8-8-1986, 19-8-1986 and 20-8-1986 but on those days the tenant was not available; on 21-8-1986, he met the tenant who refused to receive the notice. This finding remained undisturbed by both the Tribunals as well as the High Court. Learned counsel attacks this finding on the ground that the postman was on leave on those days and submits that the records called for from the post office to prove that fact, were reported as not available. On those facts, submits the learned counsel, it follows that there was no refusal by the tenant and no service of notice. We are afraid we cannot accept these contentions of the learned counsel. In the Court of the Rent Controller, the postman was examined as AW 2. We have gone through his cross-examination. It was not suggested to him that he was not on duty during the period in question and the endorsement "refused" on the envelope was incorrect. **In the absence of cross-examination of the postman on this crucial aspect, his statement in the chief examination has been rightly relied upon**. ……"*

14. The link in the chain of circumstantial evidence is the recovery of dead body of the daughter of the informant from the nearby bush of the house of the appellant-accused-convict. **P.W.-4, Sadique Andari and P.W.5, Ali Bux Mian @ Khan** stated that the dead body was recovered from the nearby bush in injured condition. The dead body, which was recovered in

injured condition is also corroborated with the medical **evidence** of **P.W.-2, Dr. Shailendra Kumar,** who found multiple abrasion, contusion and lacerated wound on the dead body of the deceased Samina Khatoon. The lacerated wound was on the left parital region of the head with fracture of left parital bone of skull. The trachea is also shown fractured and cause of death is shown asphyxia as a result of strangulation and also antemortem injuries caused by hard and blunt force on the head.

15. Though the prosecution has proved the motive of the occurrence and the homicidal death of the deceased daughter of the informant is also proved, which is found from the bush nearby the house of the appellant; **yet there is no evidence to connect that the said murder of the daughter of the informant was committed by the appellant-convict**.

15.1 Except the evidence of motive, there is no other circumstantial evidence against the appellant to complete the chain of circumstantial evidence. None of the prosecution witness had seen the appellant committing murder of the daughter of the informant. During investigation, nothing incriminating circumstance was found by the Investigating Officer and relying upon the evidence collected by the former Investigating Officer, the second Investigating Officer filed the charge-sheet, who has been examined as **P.W.-6, Kiran Surin.** The prosecution case being based on the circumstantial evidence there being no link in the circumstances against the appellant-convict to complete the chain of circumstantial evidence even indicating that the appellant is the perpetrator of the commission of the murder of his wife.

15.2 The Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra*** reported in ***(1984) 4 SCC 116*** laid down

five golden principles, which constitute the panchsheel of proof of case based on circumstantial evidence. Paragraph No. 153 reads as under:

> *"**153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[19] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]*
> *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
> *(2) 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,*
> *(3) the circumstances should be of a conclusive nature and tendency,*
> *(4) they should exclude every possible hypothesis except the one to be proved, and*
> *(5) 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.*"

15.3 The Hon'ble Supreme Court also followed the said five principles as laid down in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra (supra)*** in the case of ***Indrajit Das Vs. The State of Tripura*** reported in ***2023 LiveLaw (SC) 152.*** Paragraph No.10 reads asunder:

> *"10. The present one is a case of circumstantial evidence as no one has seen the commission of crime. The law in the case of circumstantial evidence is well settled. The leading case being **Sharad Birdhichand Sarda vs. State of Maharashtra**. According to it, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; 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 they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence. The said principle set out in the case of Sharad Birdhichand Sarda (supra) has been consistently followed by this Court. In a recent case – Sailendra Rajdev Pasvan and Others vs. State of Gujarat Etc., this Court observed that in a case of circumstantial evidence, law postulates*

> *two-fold requirements. Firstly, that every link in the chain of circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt and secondly, all the circumstances must be consistent pointing out only towards the guilt of the accused. We need not burden this judgment by referring to other judgments as the above principles have been consistently followed and approved by this Court time and again."*

16. In this case, the first Investigating Officer, who investigated the whole of the case, has not been examined only the second Investigating Officer has been examined as P.W.-6, Kiren Surin, who filed the charge-sheet relying upon the evidence collected by the former Investigating Officer. **In case of circumstantial evidence, the examination of the Investigating Officer becomes very important**. More so, the evidence, which has been collected by the former Investigating Officer has not been proved by the 2nd Investigating Officer, as such, the same becomes fatal to the prosecution case.

16.1 The Hon'ble Apex Court in the case is ***Rajesh Yadav & Anr. Vs. State of U.P.*** reported in ***2022 LiveLaw (SC) 137*** held that the evidence of Investigating Officer is not indispensable, it requires contradiction and corroboration of other material witnesses as he is one, who links and presents them before the Court. Paragraph No. 25 reads as under:

> *"25. Section 173(2) of the CrPC calls upon the investigating officer to file his final report before the court. It being a report, is nothing but a piece of evidence. It forms a mere opinion of the investigating officer on the materials collected by him. He takes note of the offence and thereafter, conducts an investigation to identify the offender, the truth of which can only be decided by the court.* ***The aforesaid conclusion would lead to the position that the evidence of the investigating officer is not indispensable. The evidence is required for corroboration and contradiction of the other material witnesses as he is the one who links and presents them before the court****. Even assuming that the investigating officer has not deposed before the court or has not cooperated sufficiently, an accused is not entitled for acquittal solely on that basis, when there are other incriminating evidence available on record. ……"*

17. The conviction of the appellant is based on only suspicion and it is the settled law that the suspicion cannot take the place of proof. The Hon'ble

Apex Court in the case of ***Narendrasinh Keshubhai Zala Vs. State of Gujarat*** reported in ***2023 LiveLaw (SC) 227.*** Paragraph No. 8 reads as under:

> *"8. It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence [Jagga Singh v. State of Punjab, 1994 Supp (3) SCC 463]. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. This Court in the case of Anil Phukan v. State of Assam, (1993) 3 SCC 282 has held that: "3. ... So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect…"*

17.1 The Hon'ble Apex Court has taken same view in the case of ***State through C. B.I. Vs, Mahender Singh Dahiya*** reported in ***AIR 2011 SC 1017*** suspicion no matter how strong cannot and should not be permitted to take the place of proof. Paragraph No. 19 reads as under:

> "*"19.Undoubtedly, this case demonstrates the actions of a depraved soul. The manner in which the crime has been committed in this case, demonstrates the depths to which the human spirit/soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the Courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the Court has to be on its guard and to ensure that the conclusion reached by it are not influenced by emotion, but are based on the evidence produced in the Court. Suspicion no matter how strong cannot, and should not be permitted to, take the place of proof. Therefore, in such cases, the Courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court."*

18. In view of the analysis of the evidence on record, we are of the considered view that the impugned judgment of conviction and the order of sentence passed by the learned Trial Court is based on conjectures and

surmises and the findings recorded by the learned Trial Court being not based on any cogent evidence is found perverse, accordingly, the same needs interference and this Criminal Appeal deserves to be allowed.

19. Accordingly, this Criminal Appeal is **allowed** and the impugned judgment of conviction dated 26.11.2018 and the order of sentence dated 29.11.2018 passed by the learned Additional Sessions Judge-XVI, Dhanbad in Sessions Trial No.251 of 2008 are **set aside**. The appellant is **acquitted** from the charge levelled against him and he is directed to be released, if not wanted in any other case.

20. Let a copy of this judgment be communicated to the learned Trial Court.

(Ananda Sen, J.)

(Subhash Chand, J.)

Madhav/- **A.F.R.**