

**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE**

**BEFORE  
HON'BLE SHRI JUSTICE VIVEK RUSIA  
&  
HON'BLE SHRI JUSTICE PRANAY VERMA**

**CRIMINAL APPEAL No. 1421 of 2010**

**BETWEEN:-**

**JITENDRA S/O PURSHOTTAM SHARMA, AGED ABOUT 22 YEARS,  
OCCUPATION: LABOUR RAILWAY COLONY MAKSI PS MAKSI DISTT.  
SHAJAPUR (MADHYA PRADESH)**

**.....APPELLANT**

***(BY SHRI ANIL OJHA, ADVOCATE)***

**AND**

**THE STATE OF MADHYA PRADESH GOVT. THROUGH POLICE STATION  
NILGANGA UJJAIN (MADHYA PRADESH)**

**.....RESPONDENTS**

***(BY SHRI KUSHAL GOYAL, DEPUTY ADVOCATE GENERAL)***

**CRIMINAL APPEAL No. 1423 of 2010**

**BETWEEN:-**

**AMJAD S/O SHAHJAD KHAN, AGED ABOUT 19 YEARS, OCCUPATION:  
SERVICE RAILWAY COLONY,JAORA,DISTT.RATLAM (MADHYA  
PRADESH)**

**.....APPELLANT**

***(BY MS. SHARMILA SHARMA, ADVOCATE)***

**AND**

**THE STATE OF MADHYA PRADESH GOVT. THROUGH POLICE STATION  
NEELGANGA,UJJAIN (MADHYA PRADESH)**

.....RESPONDENTS

*(BY SHRI KUSHAL GOYAL, DEPUTY ADVOCATE GENERAL)*

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**Reserved on** : **23<sup>th</sup> February, 2024**

**Pronounced on** : **06<sup>th</sup> March, 2024**

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*These appeals having been heard and reserved for judgment coming on for pronouncement this day, JUSTICE VIVEK RUSIA pronounced the following:*

### J U D G M E N T

Since these appellants are convicted by a common judgment of conviction and sentence, therefore, these criminal appeals are finally heard and being decided by this common judgment.

The appellants have filed these Criminal Appeals under Section 374 of the Code of Criminal Procedure, 1973 against the common judgment of conviction and sentence dated 25.11.2010 passed by the IX Additional Sessions Judge, Ujjain in Sessions Trial No.581/2009, whereby the appellants have been convicted and sentenced as under:-

CONVICTION			SENTENCE	
Section	Act	Imprisonment	Fine if deposited details	Imprisonment instead of a fine
364/34	IPC	Life Imprisonment	Rs.5,000/-	03 months' R.I.
302/34	IPC	Life Imprisonment	Rs.10,000/-	03 months' R.I.
397/34	IPC	10 years' R.I.	Rs.2,000/-	01 month's R.I.
201/34	IPC	03 years' R.I.	Rs.2,000/-	01 month's R.I.

02. As per the prosecution story, the complainant – Nirmal Kumar lodged a missing person report on 17.09.2009 that his son namely Manish (deceased) had been missing since the evening of 16.09.2009. At the same time, Suresh S/o Kanhaiyalal gave information to the police station that between the agricultural field of

Mohan Kumawat and the road, one dead body was lying in bushes. The aforesaid information was recorded under Section 174 of the Cr.P.C. The dead body was identified as a missing person Manish by his father / complainant, thereafter, an F.I.R. was registered and the matter was taken into investigation. The spot map was prepared and after calling the Panch Witnesses, *Lash Panchayatnama* was also prepared. The dead body was sent for postmortem. From the spot, a leaf of the tree containing bloodstains, a broken beer bottle, two coins, and one pair of slippers were seized. The bloodstained clothes of the deceased were received from the hospital.

03. Upon suspicion these two appellants were arrested as the deceased was last seen with them in the Railway Colony, Ujjain. After arresting them, memorandum statements were recorded. On the statement of Amjad, a light-colored wallet and the driving license of the deceased were seized and upon disclosure by Jitendra, one mobile of Spice Company of the deceased was recovered from one Mukesh. All the seized articles were verified by the complainant Nirmal Kumar. The police also recovered the bloodstained clothes of Jitendra & Amjad. The seized articles collected from the scene of the crime were sent to Forensic Science Laboratory, Gwalior. The statements of the witnesses were recorded. The investigation was completed and charge-sheet was filed before the Judicial Magistrate First Class.

04. The trial was committed to the Sessions Court, by which charges under Sections 364, 302, 397 & 201/34 of the IPC were framed against these appellants, which they denied and pleaded innocence. Hence, the prosecution was called upon to adduce the evidence. The prosecution examined 22 witnesses and exhibited 28 documents. In defence, the appellants did not examine any witnesses

and exhibited only four documents. After evaluating the evidence that came on record, the learned IX Additional Sessions Judge, Ujjain passed the common judgment of conviction and sentence dated 25.11.2010 in Sessions Trial No.581/2009, hence, these two criminal appeals are before this Court.

05. Learned counsel for both the appellants raised common grounds to assail the findings by submitting that these appellants have been convicted on the basis of circumstantial evidence as the prosecution failed to examine any eye-witness in this matter. They are residents of Village – Maxi and the dead body of the deceased was found near Ujjain. There are a lot of omissions and contradictions in the statements of prosecution witnesses which have been ignored by the learned trial Court. It is further submitted by the learned counsel that in case of circumstantial evidence, the motive plays an important role, but the prosecution failed to prove the motive in this case.

06. Learned counsel further submitted that as per the postmortem report, the deceased died due to strangulation but the police did not recover any rope or any other material which was used for strangulation. No fingerprints were taken from the beer bottle, therefore, there is no connecting material in this matter to implicate these appellants. At the time of the incident, these appellants were aged about 22 & 19 years respectively, therefore, they could not have committed this type of heinous offense without any motive. At last, learned counsel for the appellants urged that even if the entire prosecution story is believed as it is, one important fact is liable to be noted that the deceased himself went along with these two appellants, they consumed the liquor and there was quite possibility that some

dispute might have occurred between them and one of them assaulted the deceased by means of a beer bottle, therefore, the offense will not travel more than 304 Part – II of IPC, for which these appellants have already undergone more than 10 years of a jail sentence. It is further submitted by the learned counsel that the conviction under sections 397 and 364 I.P.C. is also not sustainable in the given facts and circumstances. Hence, they be released by altering the sentence from life imprisonment to the period already undergone by them. One chance is liable to be given to them as they are not habitual criminals and at the time of offence they were of tender age, hence, the reformatory approach should be adopted in this case.

07. Learned Deputy Advocate General for the respondents / State opposed the appellants by submitting that there was a previous enmity between the deceased and these two appellants, therefore, the father of the deceased got himself transferred from Maxi to Ujjain, These appellants came to Ujjain, took the deceased with him, thereafter, looted, assaulted him and murdered by strangulation from bare hand. Therefore, there is the motive and last-seen evidence against them and they have rightly been convicted. They came all along from Maxi to Ujjain and took the deceased to the forest area, therefore, they had the intention to kill him. Hence, the conviction is not liable to be converted into Section 304 Part – I or II of the IPC, and the criminal appeals be dismissed. A young son of the parents lost his life at the age of 20 years, hence, no leniency is liable to be seen towards these appellants

08. We have heard learned counsel for the parties at length and perused the record.

09. In order to prove the charges against the accused by way of

circumstantial evidence, the prosecution examined several witnesses to complete the chain of events. According to Arvind Sen (PW-11), shop owner of Narmada Pan Bhandar, two persons came to his shop and were making inquiries about the deceased Manish, as per their description, he informed that Manish resides in Railway Colony and gave his address. Thereafter, they went towards the colony. After some time, they came back to the shop and after one hour, they met Manish. Thereafter, all three went towards Sindhi Colony Road and at that time it was 7:00 – 8:00 pm. On the second day, he came to know from the father of Manish that they were Jitendra & Amjad.

10. Thereafter, the prosecution examined Animesh Tiwari (PW-3) a student aged about 20 years. According to him on 16<sup>th</sup> September, he went to meet his friend Manish Rawal i.e. deceased, thereafter, both of them went to the house of Bharat Pushkar at Ashok Nagar. After staying there for half an hour while returning home, they met with the accused persons. They shook their hands and offered tea to him but he went to his house. When Manish did not return home, her mother telephoned him in the morning of the next day, then he informed her that Manish had gone along with Jitendra & Amjad. Therefore, he went along with the father of Manish to Police Station – Nilganga and lodged a missing person report. PW-3 duly identified these two appellants in the Court, hence, there is no reason to doubt his testimony. The presence of P.W.-3 is also mentioned in the missing person report recorded in the police station, which makes him more credible. At the very first instance, he informed the father of the deceased as well as the police that the deceased went along with these two appellants.

11. In the case of *Sunny Kapoor v/s State (UT of Chandigarh)*

*reported in (2006) 10 SCC 182*, the Apex court explained how the conviction under section 302 can be based on last-seen evidence:-

“21. The appellants have been convicted on the basis of circumstantial evidence. It is now well settled by a catena of decisions of this Court that for proving the guilt of commission of an offence under Section 302 IPC, the prosecution must lead evidence to connect all links in a chain to point the guilt of the accused alone and nobody else. Recently in *Ramreddy Rajesh Khanna Reddy v. State of A.P.* [(2006) 10 SCC 172 : (2006) 3 Scale 452] this Court has held as under: (SCC p. 181, paras 26-27)

“26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.

27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration.”

12. From the evidence of Arvind Sen (PW-11) and Animesh Tiwari (PW-3), the prosecution has successfully proved that the deceased was last seen with these appellants and thereafter, his dead body was found in the jungle.

13. In order to prove the previous connection between the deceased and the appellants the prosecution examined Nirmal Rawat (PW-5) who is the father of the deceased. He has confirmed that on 16.09.2009, Animesh came to his house, thereafter, Animesh and his son went to the house of Bharat. Thereafter, Manish did not return at

that night, he waited till 9:30 – 10:00 pm, he contacted Manish on the telephone and he said that he would return to the house by 9:30 – 9:45 pm. After 10:30 when the deceased did not return, he again tried to contact him but the mobile was found switched off. He searched till 1:00 am the night, in morning they searched the number of Animesh and informed him. When Animesh disclosed the names of these two appellants, he recalled that when he was posted at Maxi, they had enmity with his son. Thereafter, he immediately went to the police station and lodged a missing person report (Ex-P/3). Thereafter, at 3:30 pm, Police Station – Nilganga received an information about a dead body lying near Badnagar Road. He was called, to identify the dead body of his son Manish. The deceased had injuries on his head and signs of strangulation on his neck. In paragraph – 13, he disclosed that he was in the Railway Department. Fathers of Jitendra & Amjad were also in the Railway Department. Manish was a cricket player but Jitendra and his father used to prevent Manish from playing cricket and they fought as well, for which he made a report to the police station. According to him, because of this day-to-day nuisance, he got himself transferred to Ujjain in the year 2008. It is found established that due to this previous enmity, the appellants came to Ujjain searched the deceased and thereafter murdered him. Therefore, the motive has also been found established based on the statement of the father of the deceased. However, in cross-examination, he admitted there was no dispute between his son and Amjad and he did not lodge any report to the police against him. After his transfer, his son never met Amjad. He also admitted that when he last time talked to his son between 9:30 and 9:45 pm, he did not disclose that he was with the appellants



and even he did not ask.

14. The appellants have also not come with a plea of alibi. They are the residents of Maxi and they could have taken a plea that at the time of the incident, they were not in Ujjain, but no such defence has been taken by them which goes adversely against them. For the rest of the findings i.e. date of incident, cause of death and recoveries of belongings of the deceased, the appellants are not assailing these findings in these appeals.

15. As per the postmortem report, lacerated wounds, multiple contusions, bleeding from the mouth and nose, and ligature marks around the neck were found. The cause of death is auspicious due to strangulation we accordingly upheld the same.

16. In view of the discussion, now we shall examine the conviction of the appellants under section 364 of I.P.C. According to the deposition of Arvind Sen (PW-11) and Animesh Tiwari (PW-3), the deceased himself went along with these appellants and now a suggestion was given to them that the appellants kidnapped the deceased. The animosity was very old between them and that too between the deceased and Jitendra not with Amjad, therefore, the conviction under Section 364 is unsustainable.

17. In the case of *The State of W.B. V/s Mir Mohammad Omar reported in (2000) 8 SCC 382*, the Supreme Court of India held as under:- (Section 364 of the IPC)

13. Section 364 IPC says, whoever abducts any person “so that such person may be murdered or may be so disposed of as to be put in danger of being murdered” commits the offence punishable under the section. So the important task of the prosecution was to demonstrate that abduction of Mahesh was for murdering him. Even if the murder did not take place, the offence would be complete if the abduction was completed with the said objective. Conversely, if there

was no such objective when the abduction was perpetrated, but later the abductors murdered the victim, Section 364 IPC would not be attracted, though in such a case the court may have to consider whether the offence of culpable homicide (amounting to or not amounting to murder) was committed.

The ingredient of kidnapping is missing in the evidence, hence, these appellants are liable to be acquitted for this offence.

18. So far as the conviction of the appellants under Section 397 of the IPC is concerned, it is clear from the statement of prosecution witnesses that the appellants did not kidnap and murder the deceased for the purpose of robbery or dacoity. They did not come from Maxi to Ujjain for the purpose of kidnap and robbery. They were not carrying any weapons with them. The appellants have been acquitted under Section 364 as no abduction with intention to murder was found hence, the appellants are liable to be acquitted of the offense under Section 397 IPC also.

19. Learned counsel for the appellants argued that even if the entire prosecution story is believed and findings are upheld, the offence will not travel more than 304 Part – II of the IPC because the appellants did not use any lethal weapon to murder the deceased. The appellants and the deceased were sitting and consuming liquor as friends as beer bottle was found on the spot. It appears that all of a sudden, a dispute occurred between them, they blew the bottle on the head and thereafter, the appellants strangled the deceased, due to which the he died. Hence, looking at their age and as they have no criminal record, it cannot be gathered that they went there with the intention to commit murder of the deceased. Hence, at the most, they are liable to be convicted under Section 304 Part – II of the IPC.

20. It is correct that the deceased himself went along with the present appellants, hence, they did not kidnap him with an intention

to commit murder. The deceased was there with them for quite some time and when his father telephoned him, he did not complain that he was unsafe with them. As per the statement of Animesh Tiwari (PW-3), the deceased went along with these appellants after 6:30 pm and as per the statement of Arvind Sen (PW-11), the second time when these appellants came to his shop, it was 7:30 pm. The father had the last call with the deceased between 9:30 – 9:40 pm. In between they consumed the beer, thereafter, something happened that led to the unfortunate incident. It is correct that before strangulation, the deceased was assaulted by the beer bottle as broken beer bottle was found on the spot and thereafter, these appellants strangled him till death. Therefore, they developed the intention to kill him by strangulation on the spot itself.

21. In a decision in the case of *Munna Chanda v/s State of Assam reported in (2006) 3 SCC 752*, the Supreme Court of India observed as:-

“10. The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common objects can be formed on the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.

It is not a case that they gave a single blow on the head without the intention to kill and thereafter, death took place. In case of death by strangulation, the accused continues to apply pressure till the deceased takes a last breath. There was throttling of the neck of Manish by appellants till he died. Hence, it was murder, not culpable homicide. Therefore, the appellants have rightly been convicted under Section 302 of the IPC ..

22. In view of the above, the conviction of the appellants under Sections 364/34 & 397/34 of the IPC is hereby set aside. So far as conviction under Sections 201/34 & 302/34 of the IPC is concerned, the same is hereby upheld.

23. With the aforesaid, Criminal Appeal stands allowed in part.

Let a copy of this judgment be kept in the connected criminal appeal also.

(VIVEK RUSIA)  
J U D G E

(PRANAY VERMA)  
J U D G E