

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 599 of 2012

1. Baleshwar Rajwar S/o Ramvriksh Rajwar, R/o Village Sirki, P.S. Katghora,
Korba, C.g.

---- Appellant

Versus

1. State Of Chhattisgarh, Through S.H.O, Katghora, Distt. Korba, C.g.

---- Respondent

For Appellant : Mr. Harish Khuntiya, Advocate
For Respondent/State: Mr. Mahesh Mishra, P.L.

Hon'ble Shri Justice T. P. Sharma
Hon'ble Shri Justice Inder Singh Uboweja

Judgment

02/03/2015

Per T.P.Sharma

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 07.06.2011 passed by the Special Sessions Judge under S.C. & S.T. (Prevention of Atrocities) Act, 1989, in Special Case No.51/2009 whereby and whereunder after holding the appellant guilty for causing homicidal death amounting to murder of Bharat Singh Gond and for concealing the evidence, the trial Court convicted the appellant under Section 302 and 201 of the I.P.C. and sentenced him to life imprisonment under Section 302 of the I.P.C. and RI for two years under Section 201 of the I.P.C. with fine of Rs.1000/- and in default to further undergo RI for six months on each count.

2. Conviction of the appellant is impugned on the ground that without there being any iota of evidence, the Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per case of the prosecution, on 15.01.2009 at evening the appellant came to the house of deceased Bharat, he took deceased with him for talking by

mobile phone and thereafter he did not come back. On 16.01.2009, the body of deceased was found near the bridge. P.W.8 Shiv Shankar Gond, father of deceased went to police station, Katghora and lodged merq vide Ex.P.13 and F.I.R. vide Ex.P.16.

4. Investigating Officer left for scene of occurrence and after summoning witnesses vide Ex.P.3, inquest over the dead body was prepared vide Ex.P.4. Bloodstained and plain soils were recovered from the spot vide Ex.P.5. One Reynold pen and chappal were seized from the spot vide Ex.P.6. Spot map was prepared vide Ex.P.8. Dead body was sent for autopsy to Community Health Center, Katghora vide Ex.P.1A. Dr. B.R.Ratre conducted autopsy vide Ex.P. 1 and found following injuries and symptoms:

- I. Dried blood over the face.
- II. Abrasion of 2" x 1" over the forehead.
- III. Abrasion of 1" x 1" over the right side of forehead.
- IV. Nail Abrasion was present below left ear/neck.

The above injuries were ante-mortem. Mode of death was Asphyxia and death was homicidal in nature.

5. During the course of investigation, appellant was taken into custody, he made disclosure statement of Sim and Mobile vide Ex.P.9 and the same were recovered at his instance vide Ex.P.7. Documents relating to caste certificate and residence certificate were recovered vide Ex.P.10. Patwari prepared spot map vide Ex.P. 10.

6. Statements of the witnesses were recorded under Section 161 of the Code of the Code of Criminal Procedure, 1973 (for short 'the Code').

7. After completion of investigation, charge sheet was filed before the Judicial Magistrate First Class, Katghora, who in turn committed the case the Court of Special Judge, Katghora.

8. In order to prove the guilt of the appellant, prosecution examined as many as 9 witnesses. Accused person was examined under Section 313 of the Code, in

which, he denied the circumstances appearing against him and innocence and false implication was claimed.

9. After providing an opportunity of hearing to the parties, learned Special Judge has convicted and sentenced the appellant as aforementioned.

10. We have heard learned counsel for the parties and perused the judgment impugned and record of Court below.

11. Mr. Harish Khuntiya, learned counsel for the appellant, vehemently argued that conviction of the appellant is based on the evidence of P.W.6 Duhan Bai, mother of deceased Bharat Singh and wife of P.W.8 Shiv Shankar Gond. Her evidence does not inspire confidence and trustworthy. Even there was a long gap between last seen theory and recovery of dead body, therefore, the possibility of the appellant being with the deceased cannot be ruled out. He further submits that even otherwise last seen theory is a weak type of evidence and conviction solely on the basis of last seen theory is not safe.

12. Per contra, Mr. Mahesh Mishra, learned counsel for the State, opposed the appeal vehemently and made submission that conviction is not only based on the evidence of last seen theory but is based on the evidence relating to active control of the appellant upon deceased before his death. Therefore, by convicting the appellant for commission of homicidal death amounting to murder of deceased – Bharat, the trial Court has not committed any illegality.

13. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution. In the present case, homicidal death as a result of fatal injuries found over the vital parts of the body of Bharat has not been substantially disputed on behalf of the appellant, but, on the other hand established by the evidence of P.W.2 Khemraj Singh, P.W. 4 Bihan Das, P.W.5 Vijay Kumar Singh Tanwar, P.W.6 Duhan Bai, P.W.8 Shiv Shankar Gond, merg Ex.P.13, F.I.R. Ex.P.16, P.W.1 Dr. B.R. Ratre and autopsy report Ex.P.1.

14. As regards complicity of the appellant in crime in question, conviction of the

appellant is substantially is based on P.W.6 Duhan Bai, mother of the deceased. As per her evidence, on 14.01.2009 at about 6.00 pm, she along with her husband - Shiv Shankar proceeded for treatment of her other child to Baiga. Unfortunately, deceased – Bharat was present in the house, at that time the appellant came to him and asked for Mobile from Bharat and on the pretext of non-availability of Mobile tower, he took deceased with him out of his house. She came after treatment of her child and took her meals. Till that time, the deceased did not come back, then she made search for Bharat but she did not find him anywhere. On the same night, she met with Jay, Samelal, Ramesh and Babulal, who informed about the dead body of her son. This evidence is virtually unchallenged in her cross-examination. This is sufficient to prove the fact that deceased was taken by the appellant on the pretext of non-availability of Mobile tower at 6.00 pm and his dead body was noticed in the same night between 8.00 to 9.00 pm, i.e., he died within the 2 - 3 hours. Simplicitor last seen theory is also kind of evidence and once disputed, the same may be sufficient for conviction unless it is explained properly that when the appellant parted the company of the deceased. Even otherwise, Mobile owned and possessed by deceased have been recovered vide Ex.P.7 at the instance of the appellant vide his disclosure statement Ex.P.9.

15. While dealing with the evidentiary value of last seen theory, the Supreme Court, in the case of ***State of Goa v. Sanjay Thakran and another and another connected appeal***¹ held that in case of last seen together the proof of last seen together would be relevant if the prosecution establishes that in the intervening period there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime. Para 34 of the said judgment reads thus:-

“34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of

1 (2007) 3 SCC 755

any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

16. The Apex Court in the case of ***Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai***² has held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter, then it would be obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. Para 19 of the said judgment reads thus:-

"19. The last circumstance relied on by the courts below pertains to the stand taken by the appellants in the trial as to parting company with Vadivelu. Here we must notice that as discussed hereinabove, the prosecution has established the fact that Vadivelu was seen in the company of the appellants from the morning of 5.3.1985 till at least 5 p.m. on the same day, when he was brought to his house and thereafter his dead body was found in the morning of 6.3.1985. Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Cr.P.C. they have not taken any specific stand whatsoever. In the evidence of PW-25, it is elicited that on 5.3.1985 in the afternoon when Vadivelu was produced before the said witness, he after interrogation allowed Vadivelu to go, but then it is found from his evidence that he instructed A-1 to keep a watch over Vadivelu. In such circumstances, it was incumbent upon A-1 to have explained to the court in what circumstances they parted company. He has not given any explanation in this regard. On the contrary, the prosecution has established the fact that on the very day at about 5 p.m., Vadivelu was brought to the house of PW-1 by the appellants which was seen by PW-5. This part of the evidence of PW-5 has gone unchallenged in the cross-examination and, therefore, we will have to proceed on the basis that, what is stated by PW-5 in this regard is true. If that be so, the prosecution has established the fact that on 5.3.1985 at 5 p.m. Vadivelu was still in the company of these appellants and, therefore, in the absence of any specific explanation from the appellants in this regard, and in view of the other incriminating circumstances against the appellants having been proved by the prosecution, an adverse inference will have to be drawn against these appellants as to their part in the missing of Vadivelu. At this point, it may be relevant to note that though no specific stand has been taken by the appellants as to their parting company with Vadivelu, in their statement under Section 313 Cr.P.C., it is seen from the evidence of PWs.1 and 5 that A-1 told the said witnesses on the night intervening between 5-3-1985 and 6-3-1985 that Vadivelu had

escaped from the Police Station when he was allowed to sleep in the verandah of the Police Station. This explanation given by A-1 to PW-1 which was also heard by PWs.5 and 14, clearly shows that the same is totally false and obviously was an excuse made by the appellants to conceal the true facts and, therefore, this circumstance of A-1 making a false statement to PW-1 can also be taken as a circumstance against the appellants, in establishing the appellants' guilt. This Court in more than one case has held, that if the prosecution, based on reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. See *Joseph v. State of Kerala* [2000 5 SCC 197]. Therefore, we are in agreement with the finding of the courts below that circumstance No.7 also stands established against the appellants."

17. In the present case, the appellant has failed to offer any explanation that when he parted with the company of deceased. Virtually, deceased age was 14 years, who was under active control and custody of the appellant. The heavy burden to explain was upon the appellant that when he set free the deceased but the appellant has failed to explain the aforesaid facts. The aforesaid facts, if taken into consideration, are sufficient to prove the guilt of the appellant that only the appellant was author of the crime and none else. It is also sufficient to exclude the possibility of innocence of the appellant.

18. After appreciating the evidence available on record, learned Special Judge has convicted and sentenced the appellant as aforementioned. On close scrutiny of the evidence available on record, we do not find any illegality and infirmity in the judgment of conviction and order of sentence.

19. Consequently, the appeal, being devoid of merit and substance, is liable to be and is hereby dismissed.

JUDGE

JUDGE