

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 93 of 2013

- Ambuj Kumar Bhadro S/o Late Motilal Bhadro Aged About 60 Years
R/o Chinam Nagar, Post Latikata, P.S. Latikata , Distt. Sundergarh
(Orissa)

---- Appellant

Versus

- State of Chhattisgarh, Through - P.S. City Kotwali, Distt. Raigarh,
Chhattisgarh

---- Respondent

And

CRA No. 853 of 2013

- Dilip Kumar Agrawal, S/o Shri Ramji Lal Agarwal, Aged About 48
Years, Occupation – Cloth & Crasher business, R/o Chandrika
Textile, Gopalpur, PS Himgiri, Distt. Sundargarh (Orissa)

---- Appellant

Vs

- State of Chhattisgarh, Through – The Station House Officer, City
Kotwali, Distt. Raigarh, Chhattisgarh.

---- Respondent

For Appellant in CRA No. 93 of 2013 :	Mr. Sunil Otwani, Advocate.
For Appellant in CRA No.853 of 2013 :	Mr. Surendra Singh, Senior Advocate assisted by Mr. Neeraj Mehta, Advocate
For Respondent/State :	Mr. U.K.S. Chandel, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

CAV JUDGMENT

Delivered on : 18/11/2015

Per, I.S. Uboweja, J.

1. Since these two appeals arise out of common judgment of conviction and order of sentence dated 30.11.2012 passed by the IInd Additional Sessions Judge, Raigarh in Sessions Trial No. 38 of 2010, they are heard together and are being disposed of by this common judgment.

2. Challenge in these appeals is to the judgment of conviction and order of sentence dated 30.11.2012 passed by the IInd Additional Sessions Judge, Raigarh in Sessions Trial No.38/2010, whereby the trial Court has convicted the appellants under Sections 365, 302 and 201 of the IPC and sentenced them to undergo R.I. for 4 years & to pay fine of Rs.2,000/-, in default of payment of fine to undergo further RI for 4 months, to undergo life imprisonment & to pay fine of Rs.10,000/-, in default of payment of fine to undergo R.I for one year and to undergo R.I. for 1 year & to pay fine of Rs.1,000/-, in default of payment of fine to undergo further RI for 2 months respectively with a direction to run all the sentences concurrently.
3. Conviction is impugned on the ground that without there being an iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed an illegality.
4. As per case of prosecution, on 29.11.2009, accused Dilip and Ambuj Kumar Bhadro, after reaching Raigarh from Jhiglipali (Jhillital) Kandagarh at about 7.00 p.m., called deceased Anand Agrawal through mobile, who was sitting along with his friend Vinod Agrawal near Gopi Talkies in Ajay Restaurant and took him in their Alto Car to Chakradhar Nagar Seed (Manure) Shop. Deceased Anand Agrawal was having the key of motorcycle of Vinod Agrawal, to return the same they came back. After returning the key, they all went towards railway station and

thereafter, when deceased Anand Agrawal did not return back to his home, his father Vishnu Prasad Agrawal lodged missing report in police station vide 61/2009 on 30.11.2009. During investigation, on 04.12.2009, after receiving an information that an unknown dead body was found from Binjkot, P.S. Chakradhar Nagar, merg No. 68/2009 was registered and during panchnama unknown dead body was identified as dead body of deceased Anand Agrawal by his brother Arun and Arvind Agrawal. On 03.12.2009, a written report was received at P.S. Kotwali from Smt. Rajshree Agrawal, wife of deceased Anand Agrawal. During the course of investigation, murder of Anand Agrawal was alleged to have been committed by accused Dilip Agrawal and Ambuj Kumar Bhadro after abduction, on the ground of transactions of amount, by pre-planning and premeditation. Thereafter, FIR was registered against the accused persons under Sections 365, 201, 302, 120B/34 of the IPC vide Ex.P-19.

5. Investigating Officer left for scene of occurrence and after summoning the witnesses vide Ex.P-11, inquest over the dead body of the deceased was prepared vide Ex.P-12. Spot map was prepared vide Ex.P-5. Plain soil and bloodstained soil, a pair of shoes, three piece of chocolate, one piece *kamla pasand* pouch, one Nokia mobile, two coins denomination of Re.1, one purse containing voter-ID of deceased Anand Agrawal, pieces of coconut rope and one bottle of liquor were recovered from the

spot vide Ex.P-16. Dead body of the deceased was sent for autopsy to the District Hospital, Raigarh vide Ex.P-20, where Dr. S. Lakra (PW-14) conducted autopsy on the dead body of the deceased vide Ex.P-20A and found the following injuries and symptoms :-

- (i) Post-mortem rigor mortis present all over the body;
- (ii) Lacerated wound of 2½" x 1" upto bone deep over left occipital parietal bone;
- (iii) Depression over left eyebrow about 1½" x 1" x ¼" with crackling sensation left facial bone & mandible with black discolouration line about 2½" x 1" x 1/6";
- (iv) Contused abrasion over left shoulder & arm;
- (v) Left leg blackish upper aspect.
- (vi) Contusion over costo - sternal junction about 1¾" x 1" x Block.

Cause of death is head injury and hypo volumetric transmatic shock caused by blunt and hard band object and the nature of death was homicidal in nature.

6. During the course of investigation, accused/appellants were taken into custody, they made disclosure statements of jack-rod and Alto Car vide Exs.P-1 & P-2, same were recovered at their instance vide Exs.P-3 & P-4 respectively. Sealed clothes of deceased were seized vide Ex.P-9. Patwari prepared spot map vide Ex.P-14. Seized items were sent for chemical examination to Forensic Science Laboratory, Raipur vide Exs.P-29 & P-30.

7. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'the Code'). After completion of investigation, charge sheet was filed before the Court of Chief Judicial Magistrate, Raigarh, who in turn committed the case to the Court of Sessions, Raigarh, from where learned IInd Additional Sessions Judge received the case on transfer for trial.
8. In order to bring home the charges of the accused/appellants, the prosecution examined as many as 21 witnesses. Accused persons were examined under Section 313 of the Code, in which they denied the circumstances appearing against them and pleaded innocence and false implication in crime in question.
9. After providing opportunity of hearing to the parties, learned Additional Sessions Judge has convicted and sentenced the appellants as aforementioned.
10. We have heard learned counsel for both the parties and perused the judgment impugned including the record of court below.
11. Learned counsel for the appellants vehemently argued that this is the case of no evidence. The prosecution has utterly failed to complete the chain of circumstances sufficient for drawing irresistible inference that only the appellants are the author of crime and none else. The prosecution has further failed to prove motive, evidence of Vinod Agrawal (PW-1), who has seen the appellants with deceased in Raigarh city by itself is not sufficient

to connect the appellants in crime in question, unless his evidence is corroborated from other attending circumstances. Even his evidence does not inspire confidence and is not trustworthy. He further submits that evidence adduced on behalf of the prosecution is also not natural and reliable, trial Court has committed an error of law by drawing adverse inference against the appellants on the basis of conjunctures and surmises.

12. Learned counsel for the appellants has placed reliance on the decision of Apex Court in the matter of **Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh** reported in **AIR 2006 SC 1656** in which Apex Court in para 27 has held as under :-

“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 Courts should look for some corroboration.”

13. Further reliance has been placed on the decision of Apex Court in the matter of **Krishnan alias Ramasamy & others v. State of Tamil Nadu** reported in **AIR 2014 SC 2548** in which Apex Court in para 22 has held as under :-

“22. This Court in *Bhodhraj vs. State of Jammu and Kashmir*, (2002) 8 SCC 45 : (*AIR 2002 sc 3164*), held that the last seen theory comes into

play where time-gap between the point of time when the accused and the deceased were seen last 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. It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together.”

14. Further reliance has been placed on the decision of Apex Court in the matter of **Nizam & another v. State of Rajasthan** reported in **2015 AIR SCW 5118** in which Apex Court in para 18 & 19 has held as under :-

“18. In view of the time gap between Manoj left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the “last seen theory”; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.

19. In case of circumstantial evidence, court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. In the case at hand, neither the weapon of murder nor the money allegedly looted by the appellants or any other material was recovered from the possession of the appellants. There are many apparent lapses in the investigation and missing links:—(i) Non-recovery of stolen money; (ii) The weapon from which abrasions were caused; (iii) False case lodged by PW-2 alleging that he was being robbed by some other miscreants; (iv) Non-identification of the dead body and (v) Non-explanation as to how the deceased reached Maniya village and injuries on his internal organ (penis). Thus we find many loopholes in the case of the prosecution. For establishing the guilt on the basis of the circumstantial evidence, the circumstances must be firmly established and the chain of circumstances must be completed from the facts. The chain of circumstantial evidence cannot be said to be concluded in any manner sought to be urged by the prosecution.”

15. Further reliance has been placed on the decision of Apex Court in the matter of **Sahadevan & Anr. v. State of Tamil Nadu** reported in **AIR 2012 SC 2435** in which Apex Court has held that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a

finding of guilt. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

16. Further reliance has been placed on the decision of Apex Court in the matter of **Kartarey and others v. State of U.P.** reported in **AIR 1976 SC 76** in which Apex Court has held that where injuries found are forensically of the same species, e.g. stab wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon, it is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with the weapon. Failure to do so may, sometimes, cause aberration in course of justice.
17. Further reliance has been placed on the decision of Apex Court in the matter of **Sattatiya alias Satish Rajanna Kartalla v. State of Maharashtra** reported in **(2008) 2 SCC 210** in which Apex Court has held that Criminal Trial – Circumstantial evidence – Bloodmarks / trail and Bloodstains – Need for establishing link

with blood of deceased – Bloodstains on the alleged clothes and weapon used, found to be of human blood – However, said stains could not be linked with blood of deceased – Effect – Held, the same was a serious lacuna in the prosecution story and High Court and trial court erred in convicting accused despite the same.

18. Further reliance has been placed on the decision of Apex Court in the matter of **Bharat v. State of M.P.** reported in **(2003) 3 SCC 106** in which Apex Court has held that the prosecution failed to establish that death of the deceased took place on 8-1-1981, as claimed by it; as per medical evidence, the earliest it could be was on 10-1-1981. There is nothing to show as to what transpired between these dates. Mere non-explanation cannot lead to the proof of guilt against the appellant. The prosecution has to prove its case against the appellant beyond reasonable doubt. The chain of circumstances is not complete so as to sustain the conviction of the appellant. There is thus no substance in the contention urged on behalf of the State that the Supreme Court may not interfere in the concurrent findings of the fact of the courts below. There has been a complete miscarriage of justice to the appellant. Thus it is not possible to sustain the conviction.
19. On the other hand, learned State counsel has opposed the appeal and supported the judgment of conviction and order of sentence passed by the trial Court.

20. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.
21. Prosecution witness Vinod Agrawal (PW-1) is well known person for accused and deceased. He deposed that at about 3.30 pm to 4.00 pm., he was sitting with deceased and one Suresh Agrawal in the office of Suresh Agrawal and there deceased received one phone call of accused Dilip Agrawal. Deceased stated that he had received phone call of Dilip Agrawal and he requested him for lift nearby Gopi Talkies, he dropped the deceased by his motorcycle near Gopi Talkies where he met Dilip Agrawal. Dilip Agrawal was driving Maruti Alto car and accused Bhadro and one 25-26 years old person were sitting in his car. After sometime, deceased talked to him that Dilip had some work in Chakradhar Nagar, after completion of his work he will return back. Deceased went along with Dilip Agrawal and other accused. After half an hour again, both accused and deceased came back there and deceased returned his motorcycle key and stated that Dilip has some work in Railway station, thereafter, he will come back. All accused and deceased went in car towards Ramniwas talkies. He has been cross-examined at length, but nothing material has been elicited to discredit his testimony. His evidence only shows that he is a person who has lastly seen the deceased in the evening of 29th November, 2009 with accused, thereafter, dead

body of deceased was found in the morning of 4th December, 2009 near Binjkot road.

22. Arun Agrawal (PW-2) is a younger brother of the deceased. He stated that deceased was a partner in crusher machine with accused Dilip Agrawal and Jagdish Agrawal. His brother had to take Rs.2,10,000/- from Dilip Agrawal and Jagdish Agrawal. On 29.11.2009 his brother came to his shoe shop, at there Vinod Agrawal (PW-1) came and told his brother that "today Samir has invited for Eid, lets go there and take food". His brother went with Vinod Agrawal (PW-1). On 30.11.2009 at about 7.30 a.m., his sister-in-law (bhabhi) informed him that deceased did not come in the night and his phone was switched off. He enquired Vinod Agrawal, who stated that after coming from Samir's house, while they were sitting in the office of Suresh Agrawal, accused came there and deceased went with accused persons in their Alto car. He has been cross-examined at length. He admitted that he was not having a single document for proving the partnership of deceased with accused Dilip Agrawal and one another Jagdish Agrawal.
23. Bishnu Agrawal (PW-4), who is father of the deceased has stated that deceased was partner with accused Dilip Agrawal and one Jagdish Agrawal. Prior to his death/murder, he left the partnership and he had to take an amount of Rs.2,10,000/- from Dilip and Jagdish. He was regularly demanding them, but they

were avoiding to give him the money. On 29.11.2009, deceased was telephoned by Dilip Agrawal and deceased went with him, other accused was accompanying Dilip, they went to Chakradhar Nagar. He also stated in his examination-in-chief that his son Arvind had enquired from Dilip by phone that where was deceased, then Dilip replied that they left the deceased with Vinod alias Beda, thereafter, they enquired from Beda, he cleared that they have not left the deceased with him, then Vinod talked with Dilip and enquired about the deceased, on which he told that he left deceased at Railway Station. In his cross-examination he has cleared that police has never taken his statement, he is stating all things today firstly before the Court, but he has not given reason why he has not given his statement to police, therefore, his statement firstly given in the Court is not so much reliable.

24. Rajshree Agrawal (PW-9), who is wife of the deceased has stated that her husband was partner in a stone crusher work with accused Dilip and one another person Jaggu alias Jagdish Agrawal. She further stated that prior to death of her husband, he has departed the partnership from them and he had to take Rs.2,10,000/- from another partner Dilip and Jagdish Agrawal. On 29.11.2009 at about 4.00 p.m., when her husband came to house at that time her daughter Sakshi was not feeling well, he went outside for taking medicine, but did not come till 6.30 a.m., then she called on his mobile, he replied that he is busy, he will

call after sometime, but he did not call or come. Next day morning, she phoned to her father-in-law and informed him about not coming of her husband, they searched her husband and they came to know that on 29.11.2009 at about 7 to 7.30 pm, her husband was seated in Alto car with accused Dilip, Ambuja and one another person who worn yellow shirt. After searching she lodged a written report (Ex.P-18) on 31.12.2009 at City Kotwali, Raigarh. In her cross-examination, she admitted that she was not having a single document for proving the fact that her husband was a partner in crusher stone work. She also admitted that Vinod alias Beda told Arun that he saw the deceased with accused Dilip, Ambuj and one another person.

25. Deepak Agrawal (PW-8) is a near relative of deceased. He has stated that on 29.11.2009 at about 5.30 to 6 pm, deceased Anand Agrawal came to his shop and after five minutes accused Dilip Agrawal also came there and after five minutes they left his shop. He is the witness of memorandum and seizure of jack rods. He has not been declared hostile, therefore, his testimony cannot be discarded.
26. Jagdish Agrawal (PW-15), who is a close associate with the deceased, accused Dilip and Bhadro, has stated that on 29.11.2009 at night when he was sleeping in crusher, accused Dilip also slept near his side. On next morning at about 7.30 am, he along with accused Dilip, Bhadro and one Khalasi seated in

car and ran away for recovery towards Jharsugda. At about 9.00-9.30 am, he received call of Rajshree, wife of deceased, that whether her husband was accompanied with him or not, he replied that he was not with him.

27. Ashok Kumar Mittal (PW-17) is an employee at Crusher. He has also supported the statement of Jagdish Agrawal (PW-15) that on 29.11.2009 at about 5.00 to 5.30 pm, accused Dilip, dada and Khalasi had gone for Raigarh by a car and on next day accused Dilip, dada and Khalasi had gone for recovery towards Jharsugada. This witness has not been declared hostile on above evidence. Therefore, his testimony cannot be discarded.
28. Pradeed Rajput (PW-18) who is well associated with accused Dilip, Bhadro and deceased has stated that deceased was manager in crusher. He further stated that on 30.11.2009 accused Dilip and Jagdish Agrawal had gone from crusher and not came back. This prosecution witness has not also been declared hostile, therefore, his testimony cannot be discarded.
29. J. R. Dahire (PW-21), investigating officer has stated that on 08.01.2010 accused Ambuj Bhadro was taken into custody, he made a disclosure statement (Ex.P-1) and on the same day accused Dilip Agrawal was also taken into custody, he also made a disclosure statement (Ex.P-2) and at their instance two jack rods were recovered and seizure memo (Ex.P-3) was prepared. Independent witnesses Deepak Agrawal (PW-8) and Beda alias

Vinod Agrawal (PW-1) have fully supported the statement of J. R. Dahire (PW-21) and proved the memorandum.

30. As held by the Supreme Court in **Bhodhraj vs. State of Jammu and Kashmir**¹, **S.K. Yusuf vs. State of West Bengal**² and **Mohd. Azad alias Samin vs. State of West Bengal**³ that in the case of last seen theory, time gap between last seen and recovery of dead body has vital role for the possibility of third person between the accused and the deceased.
31. On close scrutiny of the evidence available on record, it is clear that on 29.11.2009 at about 5 to 6 pm, deceased was in the company of accused, but he was not in their control and clutches. Prosecution witness Jagdish Agrawal (PW-15) proved that accused had gone to Jharsuguda on next day morning i.e. on 30.11.2009 at about 8-9 am, thereafter, they did not return to Raigarh. On 4.12.2009 at about 8.00 am dead body of deceased was recovered from Binjot. Autopsy surgeon, Dr. S. Lakra (PW-14) has clearly stated that he conducted autopsy on 04.12.2009 at about 3.05 p.m. According to him dead body was found in good condition and there is no symptoms of decomposition and death was approximate within 24 to 48 hours prior to autopsy. Medical evidence shows that death of deceased took place between 3.00 pm of 02.12.2009 to 3.00 pm of 03.12.2009. Prosecution witnesses clearly stated that accused persons have left Raigarh

¹ AIR 2002 SC 3164

² AIR 2011 SC 2283

³ (2008) 15 SCC 449

on 30.11.2009 at about 8-9 am and they were not seen after that in Raigarh and they have not come back to Raigarh. FSL Report (Ex.P-31) only shows that bloodstained was found on seized article i.e. Jack rod, but there is no serological report to ascertain that the blood found on the said article was of the human blood and was related to deceased blood group, therefore, seized article is of no help to the prosecution.

32. There is no dispute that dead body of the deceased was found on 04.12.2009 at about 8.00 am, therefore, even if we take that the deceased was lastly seen alive in the company of accused/appellants, his dead body was found after about 4 to 4½ days. Thus, as there was a long time gap like above, possibility of any third person coming in between cannot be fully ruled out and in the above situation, it would be hazardous to conclude that the appellants and the deceased were last seen together. According to the above possibility the said circumstance loses its character of being conclusive in nature and of not capable of being explained.
33. Learned Sessions Judge has not at all taken into account the above factor of long time gap between the two events and also not considered medical opinion properly, and has simply recorded the finding that since the deceased was lastly seen in the company of the accused/appellants, they were liable for his homicidal death. Learned Sessions Judge has also wrongly held

that accused/appellants have made conspiracy and abduction of the deceased and thereafter, they committed murder of deceased and concealed the evidence of murder.

34. In the instant case, as we already held, none of the circumstance was fully established. The circumstances set-forth by the prosecution were not of conclusive nature and tendency and almost all the circumstances were capable of being explained and the chain of circumstantial evidence was also not complete.
35. For the forgoing reasons, we are unable to sustain the conviction of the appellants on the basis of set of circumstantial evidence and the same deserves to be set aside.
36. Accordingly, the appeals are allowed. Conviction and sentences awarded to the appellants under Sections 365, 302 and 201 of the IPC are set aside. The appellants are acquitted of the charges framed against them.
37. It is stated that the appellants are in jail. They be released forthwith if not required in any other case.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(I.S. Uboweja)
JUDGE