

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2876 of 1999

1. Jageshwar Chouhan @ Jagsai @ Shaili Tailor S/o Prem Sai Chouhan, aged 24 years, Occupation Tailoring, R/o village Palidih, Thana Pathalgaon, at present R/o village Banderchuwa, Thana Kansabel, District Jashpur Nagar (MP) (Now Chhattisgarh)
2. Madan Ram S/o Bhukhan Ram Bardhaniya, aged 22 years, Occupation Tailoring R/o village Patrapali, Thana Kansabel at present r/o village Banderchuwa, Thana Kansabel, District Jashpur Nagar (M.P.) (Now Chhattisgarh)

--- Appellants

versus

The State of Madhya Pradesh (Now Chhattisgarh) Through the District Magistrate Jashpur Nagar (Madhya Pradesh) (Now Chhattisgarh)

---- Respondent

For Appellants	:	Shri Awadh Tripathi, Advocate
For Respondent/State	:	Ms. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Navin Sinha, Chief Justice

15/1/2016

1. The Appellants stand convicted under Section 302/34 IPC and sentenced to life imprisonment with fine of Rs. 10,000/- each as ordered on 30.6.1999 by the Additional Sessions Judge, Jashpurnagar in Sessions Trial No. 209 of 1998.
2. The body of deceased Bhajendra @ Piti Prasad Sai was found lying near the bushes at 5:00 pm on 16.10.1998. The police station stated to have been 17 Kms. away, FIR (Exhibit P-5) was lodged by his brother PW-2, Jagdish Prasad Sai on 17.10.1998 in the morning against unknown. The postmortem of the deceased (Exhibit P-1) was conducted by PW-1, Dr. Yashwant Kumar Toppo. Ten incised wounds and one lacerated wound were found on the body of the deceased. The cause of death was opined due to shock and cerebral haemorrhage resulting from incised injuries and

consequent bleeding. Death was opined homicidal in nature and the time elapsed since death was between 36-45 hours.

3. Learned Counsel for the Appellants submitted that there is no eye witness to the occurrence. The case of the prosecution is based on circumstantial evidence including the last seen theory. It was therefore incumbent upon the prosecution to establish all the links in the chain of circumstances ruling out the possibility of the deceased having parted company with the Appellants leaving the only inescapable conclusion that the Appellants were the assailants. If there was any break in the link of chain of circumstances compatible with the innocence of the accused or if there was any doubt that the deceased was last seen in the company of the Appellants and there existed on basis of the prosecution evidence alone, a possibility of the occurrence having taken place in a different manner by some others, the benefit of doubt has to be given to the Appellants. The Trial Judge has convicted on the basis of suspicion only relying on the last seen theory which has not been explained coupled with alleged recovery of Chappals of the Appellants from the place of occurrence which has also not been proved. The Trial Judge has himself opined that the recovery of the blood stained clothes of the Appellants which they were wearing till the third day of the occurrence and were carrying weapon of the assault in their trousers was highly improbable and that there was no forensic report available despite the clothes having been sent to the FSL, regarding blood stains on it and yet relied upon it as an incriminating material to convict. PW-11, Nirmala Bai, wife of the deceased deposed that the Appellants came to the house of the deceased at 9:00 am, having left returned at 11:00 am and then the deceased left home with them at 3:00 pm. But she has simultaneously stated that she left for the village pond to have a bath around 2 to 2:30 pm. If she left the house before the Appellants departed alongwith the deceased, it cannot be conclusively held that the Appellants were all

along together with the deceased in proximity of time before the body was recovered at 5:00 pm. The possibility cannot be completely excluded that the deceased and the Appellants left the house separately in different directions and destinations. The deceased was in an illicit relationship with one Ludhri Bai, wife of Girdhari who was in military service and would remain away from home on duty. The deceased would spend nights at her place and she was persuading the deceased to abandon his family and run away with her and for that reason she had left home with cash and jewellery which she allegedly kept it with the Appellants who worked as tailors in the house of Rajesh. On the date of occurrence, the husband of Ludhri Bai was also in the village. Her father-in-law was very annoyed and had told the father of the deceased to tell his son to desist from such activities. PW-11, Nirmala Bai had deposed that her husband was made an accused in a criminal case earlier and that he had many enemies in the village. She had also stated that the Appellants and the deceased were friends, and thus there did not exist any motive to kill also. PW-3, Charkuram Korwa who claimed that he saw the Appellants and the deceased near the bushes about 2:00 pm and where the body was subsequently found, cannot be relied upon in view of the evidence of PW-11, Nirmala Bai, that the Appellants were home with the deceased till 3:00 pm. The allegations are of assault causing incised injuries and the prosecution alleges recovery of a knife. But PW-3 stated that he did not see the Appellants having any weapon with them. The defence evidence of DW-1, Nevali Bai that she was with the Appellants at their tailoring shop from 1:00 to 5:00 pm on the fateful day has not been considered properly and erroneously rejected holding that the witness being illiterate could not be relied upon to remember dates and events. Conviction was therefore not justified and the Appellants are entitled to acquittal.

4. Learned Counsel for the State opposing the appeal submitted that PW-11, Nirmala Bai has deposed that the Appellants came to the house of the deceased at 9:00 am, left to return at 11:00 am and then finally the deceased went out with them at 3:00 pm and the body was found at 5:00 pm. No evidence has been led by the Appellants to the contrary or that they parted company with the deceased in these two hours. PW-11, Nirmala Bai also deposed the colour of the Chappals which the Appellants were wearing when they had come to her house which was similar to that found at the place of occurrence. The clothes of the Appellants were seized with blood stains on it pursuant to their confession and the seizures marked Exhibits P-13 and P-15. PW-3 was an independent witness who saw the Appellants with the deceased at 2:00 pm near the bushes where the body was found at 5:00 pm. Ludhri Bai, with whom the deceased had an illicit relationship had left home with jewellery and cash and had given it to Appellant-Madan for safe keeping which they were refusing to return and for which she had filed a case against the Appellants. The deceased wanted the Appellants to return the same. Motive therefore clearly existed for the murder.

5. We have considered the submissions and perused the evidence on record.

6. There is no eyewitness to the occurrence. PW-8, Prabhat Kumar Khalkho, who was alleged to be an eyewitness denied having seen anything and was not even declared hostile or confronted by the prosecution with his police statement. The entire case of the prosecution therefore rests on circumstantial evidence which consists of the fact that Ludhri Bai with whom the deceased had illicit relationship had given her jewellery and cash for safe keeping to Appellant-Madan. The other circumstance against the Appellants is that they were last seen with the deceased in proximity to death, and their Chappals being found at the place of occurrence as also

blood stains on their clothes.

7. In a case of circumstantial evidence, and the last seen theory is but a part of the same, the onus first rests on the prosecution to establish a *prima facie* case that all the chain of circumstances inextricably linked to each other were present leading to the only hypothesis for the guilt of the accused leaving out any possibility of innocence to sustain conviction. Likewise, if the last seen theory is invoked, it has to be conclusively established that the deceased was with the accused alone in close proximity to death and the possibility of their not having been together or existence of any other circumstances intervening or that they could have parted ways before the occurrence must be clearly ruled out. If there is the slightest of doubt or the possibility exists that they may have parted company or death may have taken place in some other manner and that the accused may be different, the benefit of doubt has to be given to the accused.

8. The deceased was in an illicit amorous relationship with Ludhri Bai wife of Girdhari and would spend nights with her. Her husband remained out of home being in military service. The latter's father-in-law had complained to the father of the deceased also. A Panchayat had been proposed. Ludhri Bai in her infatuation had left her matrimonial home with cash and jewellery in the effort to persuade the deceased to abandon his own family and run away with her. As a part of the plan, she is alleged to have kept the jewellery and cash with the Appellants who were tailors. The Trial Judge has erred in not appreciating properly and the relevance of the fact that on the date of occurrence, the husband of Ludhri Bai was also in the village. If the amorous relationship was so open as also confirmed by PW-11, Nirmala Bai, wife of the deceased, naturally, Girdhari must have been fully aware of the facts. That in our opinion opens myriad possibilities. If the Appellants as alleged had intentions not to return the cash and jewellery of Ludhri Bai, it is

difficult to understand how that purpose would be served by killing the deceased who had an illicit relationship with Ludhri Bai. Surprisingly, Ludhri Bai, the most important witness in support of this accusation for implicating the Appellants has not been examined as a witness for reasons not explained by the prosecution.

9. The circumstances against the Appellants are that they came to the house of the deceased at 9:00 am, went away and came back at 11:00 am and then left home with him at 3:00 pm. But, PW-11, Nirmala Bai, who proved these circumstances has herself deposed that she left home to bathe at the pond at around 2 to 2:30 pm. If she left home before the deceased left the house with the Appellants, it is difficult to accept her statement that the three left home together. The possibility cannot be ruled out that they may have left in different directions for different destinations. If that were not enough, PW-3, Charkuram Korwa claimed that he saw the Appellants alongwith the deceased at around 2:00 pm near the bushes where the body was found. This evidence is directly in conflict with that of PW-11, Nirmala Bai to safely conclude that PW-3, Charkuram Korwa was a totally unreliable witness and was cooking up stories. This is a conclusion we reach from the additional fact that even though the body was found the next morning and the entire village must be aware of it in such a sensational matter, he did not inform anyone in the village, not even the family of the deceased till the police recorded his statement approximately one month later. We consider this conduct of the witness highly abnormal and his evidence severely doubtful which in any event is of no help to the prosecution.

10. The fact that the Chappals of a particular colour allegedly worn by the Appellants may have been found at the place of occurrence does not automatically lead to any conclusion that it belonged to them alone in

absence of any identification parade or forensic examination of the same. The colour of a Chappal cannot be considered a specific identification to distinguish. This evidence is therefore considered irrelevant. The Trial Judge has himself doubted that the Appellants would have been wearing blood stained clothes for three-four days before it was recovered from them after the occurrence. He has also noticed absence of any forensic report with regard to the clothes but yet considers it incriminating material against the Appellants by relying on the last seen theory and the recovery of Chappals.

11. The Trial Judge has completely erred in his appreciation of evidence by cursorily rejecting the plea of alibi taken by the Appellants in holding that the evidence of DW-1, Nevali Bai that she was with the Appellants on the date of occurrence at their tailoring shop from 1:00 pm to 5:00 pm did not merit any consideration because she was an illiterate lady and could not remember dates and events. This conclusion is against normal human behaviour and not supported by any logic or reason, clearly unsustainable in law.

12. PW-11, Nirmala Bai, wife of the deceased has herself acknowledged that the Appellants were friends of the deceased. The deceased had many enemies in the village and which would include, in our understanding, Girdhari, husband of Ludhri Bai with whom the deceased had a strong illicit relationship. The deceased had also been made accused in a criminal case earlier which is reflective of his antecedents. All these facts open up myriad possibilities with regard to how the death may have taken place.

13. In the aforesaid discussion, the conclusion of the Trial Judge appears inherently contradictory when he holds that the police had nothing to do with the dispensation of justice and it was the duty and prerogative of the Court and investigation was only a formality. This conclusion, to say the least, runs

completely contrary to the concept of criminal jurisprudence and are therefore unacceptable. The Trial Judge has then reversed the entire principle of criminal jurisprudence by holding that even though the prosecution has not placed concrete and satisfactory evidence but because there was suspicion against the Appellants and they had not led proper evidence in support of their defence, they must be presumed to be guilty. This principle is clearly unsustainable in law.

14. We are therefore unable to sustain the conviction of the Appellants. It is set aside and the appeal is allowed subject to the conditions incorporated in Section 437A Cr.P.C. insofar as the Appellants are concerned.

Sd/-
(**Navin Sinha**)
CHIEF JUSTICE

Sd/-
(**P. Sam Koshy**)
JUDGE