

①

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

CRIMINAL APPEAL NO. 244/2003

APPELLANT
IN JAIL

Ramkumar Nishad aged about 22 years s/o *Shital*
R/O village Mohalai distt durg (C.G)

Vs

RESPONDENT

State of Chhattisgarh through p/s Pulgaon distt
Durg (C.G)

CRIMINAL APPEAL UNDER SECTION 374 (2) CRIMINAL PROCEDURE CODE
1973



NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 244 of 2003

- Ram Kumar Nishad

---- Petitioner

Versus

- State Of Chhattisgarh

---- Respondent

For Appellant	Ms. Nirupama Bajpayee, Advocate
For Respondent /State	Mr. R. Tripathi, Panel Lawyer

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Anil Kumar Shukla

Order On Board By

Prashant Kumar Mishra, J.

21/11/2016

1. Heard,
2. The appellant has called in question his conviction under Section 302/34 of IPC and sentence of life imprisonment and fine of Rs.1000/- for committing murder of deceased -Manharan during the intervening night of 30.11.2000 – 01.12.2000.
3. The prosecution case, in nutshell, is that at about 7:00 p.m. in the evening of 30.11.2000, the present appellant, convicted co-accused Sheikh Firoz Ahmed (since deceased) along with four other persons brought the deceased to his house for recovery of the loan amount of Rs.500/-. The deceased demanded



assistance from his brother Rajkumar (PW-2), who lodged the FIR, however, Rajkumar refused to help him by saying that he is not possessed of any money. The accused persons thereafter took the deceased with them and went to the house of Sarpanch Nirmala Mishra (PW-6). Thereafter, all the accused persons took the deceased with them by saying that he is taken to the Police. At about 11:00 a.m. on 01.12.2000, one Ramkumar Tailor informed PW-2 Rajkumar that one dead body is lying under the bridge, on which, Rajkumar went to the place and found that his brother Manharan is lying dead having injuries over his chin, forehead and ribs. The appellant was named in the FIR as the suspect who has murdered the deceased. The FIR -Ex.P/2 was lodged by Rajkumar at about 13:50 hours on 01.12.2000. In the course of investigation, memorandum statement of co-accused Sheikh Firoz Ahmed was recorded vide Ex.P/12, pursuant to which, the towel used for tying the stone to assault the deceased was recovered vide Ex.P/6. There is no memorandum statement or any recovery from the present appellant. Although only the present appellant was named in the FIR, but later on, 05 other persons were sent for trial, however, the prosecution did not conduct any Test Identification parade to ascertain complicity of other accused persons.

4. The charge sheet was filed against the accused persons mainly on the evidence of last seen together and memorandum statement of co-accused Sheikh Firoj Ahmed. In the course of trial, the prosecution examined PW-1 Dr. A.P. Sawant, PW-2 Rajkumar, PW-3 Sunder Lal, PW-4 Bhole Das, PW-5 Dilip Kumar,



PW-6 Smt. Nirmala Mishra, PW-7 Birjha Bai, PW-8 Shyam Bai, PW-9 Ramnarayan, PW-10 Lokeshwar Nath Khobragade, PW-11 Pahlu Ram, PW-12 Chandrika Prasad Nishad and PW-13 Jagdish Uikey. While accused No.2 Narottam Gond, accused No.4 Ramanand Yadav, accused No.5 Naresh Kumar and accused No.6 Poonam Nishad have been acquitted, only two accused persons namely Sheikh Firoz Ahmed and the present appellant have been convicted by the trial Court. The other convict Sheikh Firoz Ahmed died during pendency of the appeal, therefore, Criminal Appeal No.882 of 2002 preferred by Sheikh Firoz Ahemd has been dismissed, as abated, leaving the present appeal for its consideration on merits.

5. It is argued by learned counsel for the appellant that there is absolute lack of cogent and reliable evidence to convict the appellant, therefore, the impugned conviction deserves to be set-aside.
6. Learned counsel for the State would support the impugned conviction on submission that the evidence of PW-2 Rajkumar , PW-6 Smt. Nirmala Mishra and PW-8 Shyam Bai is sufficient for sustaining the conviction.
7. Before proceeding to scrutinize the evidence, it is required to bear in mind the principles, on which, a case based on circumstantial evidence needs to be considered.
8. In the matter of **Sharad Birdhichand Sarda, AIR 1984 SC 1622**, the Supreme Court has underlined the conditions, which must be fulfilled for convicting an accused on the basis of



46

circumstantial evidence and held in para-152 as under:

"152. 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 Sahebrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

'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."

9. In the case in hand, there is no ocular evidence to the crime, therefore, the entire case of the prosecution is based on only circumstantial evidence of last seen together.



10. PW-2 Rajkumar is the brother of the deceased, whereas, PW-8

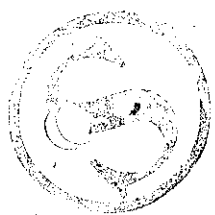
Shyam Bai is the mother of the deceased. These witnesses have deposed that in the evening of 30.11.2000, 5-6 persons including the present appellant have brought the deceased to their house and were asking for repayment of the loan advanced to deceased Manharan. While FIR speaks about theft of bicycle by the deceased, the Court statements of these two witnesses have not made any allegations about commission of theft by the deceased. The accused persons have not assaulted the deceased at his residence nor any threat was extended to him as admitted by PW-2 Rajkumar in para 6 of his statement.

11. PW-3 Sunder Lal, who is a villager, speaks about some quarrel or

assault made to Manharan by some persons, however, he has not seen as to who were assaulting the deceased. After being declared hostile, this witness has identified co-accused Sheikh Firoz Ahmed as the person, who slapped the deceased. However, he has not made any incriminating statement against the present appellant. In cross-examination, he has even denied to have seen any assault made to the deceased.

12. PW-4 Bhole Das is also a villager, who has been declared hostile.

He would state in his cross-examination that few persons who were assaulting the deceased had taken the deceased to the house of Sarpanch and one Patel. PW-5 Dilip Kumar is another brother of deceased Manharan. He also speaks about the appellant and few other persons coming to their house to seek refund of the loan advanced to the deceased. However, in para 6 of his cross-examination, he had denied that the deceased was



assaulted or threatened by the accused persons.

13. The Village Sarpanch Nirmala Mishra (PW-6) has also been declared hostile. She has refused to identify the present appellant. PW-9 Ramnarayan and PW-12 Chandrika Prasad Nishad are the witnesses to the memorandum statement Ex.P/12, however, they have not supported the prosecution. Thus, the memorandum statement and consequent seizure from co-accused Sheikh Firoz Ahmed has not been proved.

14. In **Kanhaiya Lal vs State of Rajasthan, (2014) 4 SCC 715**, the Supreme Court has held that the evidence of last seen together is a weak kind of evidence, therefore, unless necessary corroboration is available, it will not be safe to convict an accused only on the basis of evidence of last seen together.

15. In the case in hand, although there is evidence of last seen together against the appellant, however, the said piece of evidence was against six accused persons, out of them, four accused persons have been acquitted by the trial Court. There is no lead in the prosecution case as to what happened to the deceased after they left the house of Sarpanch Nirmala Mishra (PW-6).

16. It is not a case where the present appellant alone had taken the deceased to his house and both of them left the house and thereafter, the deceased was not seen by anybody and was found dead. On the contrary, as per the prosecution case itself, at least six accused persons were seen with the deceased when they left the house of the Sarpanch, therefore, the prosecution



should have come forward with specific allegations against the present appellant that it is he who alone could have been responsible for committing murder of deceased Manharan.

17. In the matter of **Sujeet Biswas Vs. State of Assam, AIR 2013**

SC 3817, it has been held by the Supreme Court that mere suspicion howsoever strong would not be sufficient to convict a person.

18. The evidence available in the present case does not inspire confidence of the Court to conclude that it is the appellant alone who was last seen together in the company of the deceased. Once the trial Court has acquitted four other accused persons for lack of evidence against them, so as to establish their identity, the appellant alone cannot be convicted on the basis of same set of evidence of last seen together. Moreover, the Investigating Officer Jagdish Uikey (PW-13) has admitted in para 7 of his statement that at the place on the other side of the river, where the dead body was found, huts of several labourers were available and they were inquired about the case, however, nothing important could be elicited from them. It also appears from para 8 of his statement that the place where the dead body was found is hardly 1 ½ km away from the village, therefore, it appears highly improbable that no other person in the village would have seen the accused persons taking the deceased with them to the place of occurrence and more so when the witnesses speak about some quarrel between the accused persons and deceased, where the accused persons were seen assaulting him.



19. For the foregoing, it will not be safe to convict the appellant only on the basis of circumstantial evidence of last seen together.

20. Accordingly, the appeal is allowed and the conviction and sentence imposed on **appellant Ramkumar Nishad** under Section 302/34 of the IPC is hereby set aside and he is acquitted of the said charge. The appellant is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.

Sd/-
Prashant Kumar Mishra
Judge

Sd/-
Anil Kumar Shukla
Judge

Shyna