

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ACQUITTAL APPEAL NO. 196 OF 2015

Ramvilas Rajwade, S/o Sahoran Rajwade, aged about 42 years, R/o Village Parsa, P.S. Ambikapur, District Sarguja (C.G.)

... Appellant

Versus

1. Mohan Kanwar, S/o Santhu Kanwar, aged about 40 years, R/o Village Parsa, P.S. Ambikapur, District Sarguja (C.G.)

2. Omprakash Rajwar, S/o Laxman Rajwar, aged about 30 years, R/o Village Parsa, P.S. Ambikapur, District Sarguja (C.G.)

3. State of Chhattisgarh, through P.S. Ambikapur, District Sarguja (C.G.)

... Respondents

For Appellant	:	Mr. Bhupendra Singh, Advocate.
For Respondent 1 & 2	:	Mr. Jitendra Shrivastava, Advocate.
For Respondents 3	:	Ms. Smita Ghai, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per NAVIN SINHA, C.J.

03/02/2016

1. The Appellant, father of the deceased, Sanjay, assails acquittal of Respondents 1 & 2 of the charge under Sections 302, 201/34 IPC, dated 24.1.2015 by the First Additional Sessions Judge, Ambikapur, in Sessions Trial No. 476 of 2011.

2. Learned Counsel for the Appellant submits that PW-7, Goura Bai, mother of the deceased, has deposed that Respondents 1 & 2 along with Jitendra and Dhananjay came to her house in the evening around 7 to 8 pm and invited the deceased to accompany them to the village circus. The deceased left home with them and was seen at the circus at night by the Appellant (PW-16) along with Tera *alias* Ankit Gupta. The deceased did not return home. His dead body was fished out of the well on 25.7.2011 at 4:00 pm. The present is a case of circumstantial

evidence. If the deceased left home with Respondents 1 & 2 and his dead body has been found thereafter, the last seen theory applies to Respondents 1 & 2 and the onus was on them under Section 106 of the Evidence Act to demonstrate either how the deceased died or when he parted with their company. The last seen theory cannot be seen in isolation from other surrounding circumstances. The conduct of Respondents 1 & 2 in giving evasive answers, threatening not to make them accused and that the deceased had allegedly misbehaved with the wife of Respondent 2, which may have provided the motive for the assault are all relevant circumstances in a case of circumstantial evidence invoking the last seen theory. PW-7, Goura Bai, has deposed of having seen a dead body in a sack with the feet sticking out lying under the cot in the house of Respondent 1. When she told him she would return with her husband, he locked the house and went away. These were all incriminating factors in support of the last seen theory. Respondents 1 & 2 have not contended at any stage in any manner that there was any ground for the Appellant to falsely implicate them.

3. Learned Counsel for Respondents 1 & 2 submitted that to invoke the last seen theory, all the links in the chain of circumstances must be complete pointing conclusively to the guilt of Respondents 1 & 2 alone. If the link of circumstances was not complete or the time gap between the deceased having last being seen with Respondents 1 & 2 and recovery of the body is too long, suspicion howsoever strong cannot replace proof of guilt for conviction. The Appellant as PW-16 has deposed of a dispute between the deceased and certain others named as Mahendra, Murari, Dhananjay and Bhatesh who had allegedly threatened the deceased barely a month earlier to kill him. In his cross-examination, the Appellant acknowledged having seen the deceased at

the circus in the company of Tera *alias* Ankit Gupta alone deviating from his evidence-in-chief that the Respondents were also present. The Appellant upon recovery of dead body lodged the Merg against unknown on 25.7.2011 as he rightly did not suspect any involvement of Respondents 1 & 2. The alleged motive with regard to misbehaviour by the deceased with the wife of Respondent 2 has not been proved and PW-10, Sumitra, wife of Respondent 2, has denied that any such occurrence had taken place.

4. We have considered the submissions on behalf of the parties and perused the records of the case.

5. The deceased is stated to have left home with Respondents 1 & 2 and two others on 23.7.2011 at about 7 to 8 pm to go to the village circus. He did not return home. His body was found in a well on 25.7.2011 at 4:00 pm. The post-mortem was done on 26.7.2011 at about 12:30 pm. Bleeding injuries were found on the head leading the Doctor to conclude that the deceased had been killed and then thrown into the well as no water was found in his lungs and stomach inter-alia with other materials to suggest that he had died of drowning. The time elapsed since death was estimated as between 24 to 96 hours.

6. There is no eye-witness to the occurrence and the first police report lodged by the Appellant was on 25.7.2011, Exhibit P-20, against unknown persons. This report did not mention that the deceased left home with Respondents 1 & 2 but only that the deceased had gone to the circus and did not return after which the search started the next day when the body was discovered from the well.

7. The case of the prosecution therefore rests on circumstantial evidence invoking the last seen theory because according to PW-7,

Goura Bai, mother of the deceased, he left home with Respondents 1 & 2 in the evening of 23.7.2011 after which the dead body was recovered.

8. To invoke the last seen theory as a part of circumstantial evidence, the prosecution is required to establish links in the chain of circumstances that the deceased was last seen in the company of the accused only. The time gap between the deceased having last being seen with the accused and the recovery of the body must not be too large. Though attending and surrounding circumstances may raise a suspicion against the accused, it cannot amount to proof unless the attending circumstances and event according to ordinary common prudence can lead inevitably to only one conclusion of the accused being the assailant. If, the possibility of the deceased having parted company with the accused or of his having been killed by any other at some other place or in a different manner cannot be ruled out, the benefit has to be given to the accused. Reference may appropriately be made to (2011) 14 SCC 401 (Ajitsingh Harnamsingh Gujral v. State of Maharashtra) observing :-

“27. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible,....”

9. The deceased left home at about 7 to 8 pm on 23.7.2011. The body has been discovered on 25.7.2011 at 4:00 pm. The time gap is approximately 40hrs. The Doctor has opined that time elapsed since death was in a very wide range from 24 to 96 hours. The deceased is alleged to have been threatened by four others Mahendra, Murari, Dhananjay and Bhatesh about a month prior to the occurrence threatening to kill him. They were all relatives of Tera *alias* Ankit Gupta

with whom the deceased was last seen at the circus by the Appellant himself acknowledged in paragraph 14 of his cross-examination. The prosecution has therefore not been able to establish conclusively the link in the chain of circumstances that Respondents 1 & 2 were with the deceased at this time. The possibility therefore that Respondents 1 & 2 parted company and came back home and that the assault may have taken place by Mahendra, Murari, Dhananjay and Bhatesh who had threatened the deceased a month earlier cannot be ruled out. The manner in which and the time at which the deceased may have been assaulted therefore also goes into doubt keeping in mind the very wide range of time elapsed since death as mentioned by the Doctor. The recovery of the body nearly 40hrs later read along with the post-mortem report persuade us to opine that the possibility that the deceased may have been taken away from the circus by the others, killed at a later time and then thrown into the well also cannot be ruled out.

10. The fact that on the confession of Respondents 1 & 2 a wooden stick may have been recovered and that the injury on the head could possibly have been caused by the same, is considered irrelevant in the absence of any forensic report with regard to presence of blood etc., on the wooden bait. The only motive sought to be ascribed to the Respondents has failed from the evidence of PW-10, Sumitra.

11. The evidence of PW-7, Gourba Bai, mother of the deceased, that there was a dead body lying in the house of Respondent 2 in a sack with the feet sticking out is also not considered relevant because the witness acknowledges that there were *chappals* on the feet but did not state that the *chappals* belonged to the deceased or were similar to that worn by the deceased, considering that the deceased was her own son.

12. We therefore find no reason to interfere with the order of acquittal based primarily on the finding that from the evidence of the Appellant in his cross-examination at paragraph 14, the prosecution had not been able to establish that the deceased was last seen in the company of Respondents 1 & 2 and the possibility that they had parted ways could not be ruled out. We find no reason to grant leave to appeal.

13. The acquittal appeal is dismissed.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge