

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 891 of 2008

1. Gangwa @ Shivnandan, aged about 23 years, S/o Tukaram Sahu.
2. Chira Guddu @ Pyarelal, aged about 25 years, S/o Dhansingh Nepali Rajput
Both are R/o Bhawani Nagar, Police Station - Gudhiyari, Raipur, District Raipur (C.G.)
3. Babla @ Pawan Kumar, aged about 34 years, S/o Sukhlal Sahu, R/o Laxman Nagar, Khalhepara, Police Station - Gudhiyari, Raipur, District - Raipur (C.G.)

---- Appellants

Versus

- State of Chhattisgarh Through : District Magistrate, Raipur, District Raipur (C.G.)

---- Respondent

For Appellants.	:	Smt. Indira Tripathi, Advocate.
For Respondent/State	:	Smt. Smita Ghai, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

Judgment On Board

By Pritinker Diwaker, J

19/09/2017

This appeal arises out of the judgment of conviction and order of sentence dated 29.08.2009 passed by 7th Additional Sessions Judge, Raipur, in S.T. No.54/2008 convicting the accused/appellants under Sections 302/34 and 201/34 IPC & sentencing them to undergo imprisonment for life with fine of Rs.300/-, R.I. for three years with fine of Rs.200/- each, plus default stipulations.

02. In the present case, name of the deceased is Anil. It is said that on 27.11.2007 in between 9-10.00 am, the accused/appellants along

with deceased Anil had consumed liquor and thereafter a quarrel took place between them. It is further alleged that on the next day i.e. on 28.11.2007 at about 10.00 am, body of deceased was found lying on railway track in two pieces . On the same day at 10.30 am, mereg intimation (Ex.P/1) was recorded at the instance of Shiv Kumar Manikpuri (PW/1), brother of the deceased. Inquest on the body of deceased was conducted vide Ex.P/3 and body was sent for postmortem examination to Dr. Ambedkar Hospital, Raipur vide Ex.P/17 where Dr. Shivnarayan Manjhi (PW/11) conducted postmortem on the body of deceased and gave his report Ex.P/15 opining the cause of death of deceased to be hemorrhage and shock due to crushing injuries to the body. After mereg inquiry, FIR Ex.P/19 was registered on 05.12.2007 under Sections 302/34 IPC against the accused/appellants. On the next day of registration of F.I.R. i.e. on 06.12.2007, memorandum of accused/appellants Gangwa @ Shivnandan (A-1), Chira Guddu @ Pyarelal (A-2) and Babla @ Pawan Kumar (A-3) were recorded vide Ex.P/7, P/8 and P/9 respectively, based on which, their clothes have been seized vide Ex.P/10, P/11 and P/12 respectively. Seized articles were sent for chemical examination to FSL, Raipur vide Ex.P/25 but unfortunately FSL and serological report could not be obtained to confirm presence of blood and its origin. During investigation, diary statements of Jamuna Bai (PW/4) and Johny Gond (PW/5) were recorded on 06.12.2007 wherein they have stated that on 27.11.2007 they had seen the accused/appellants and the deceased together. In-fact, the entire case of the prosecution is based on statement of last seen made by these two witnesses.

03. On completion of investigation, charge sheet for the offence punishable under Sections 302/34, 201/34 IPC was filed against the appellants and accordingly charges were framed against them by the trial Court.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 11 witnesses. Statements of the accused/appellants were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. That apart, Sanju @ Sanjay Sharma (DW/1) has also been examined by the defence to substantiate its case.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced all the appellants as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellants submits:

- That the appellants have been convicted solely on the basis of circumstantial evidence, but the nature of circumstantial evidence is not as such which can be made basis for their conviction. It has been argued that the main piece of evidence which has been relied upon by the trial Court against the accused/appellants is so called statement of last seen by Jamuna Bai (PW/4) and Johny Gond (PW/5), but in absence of any other positive evidence, merely on the basis of evidence of last seen, the accused/appellants could not have been convicted.

- That Johny Gond (PW/5) has stated that for the first time he saw the accused persons in the Court, whereas in his diary statement he has named the accused persons. It has been argued that in absence of test identification parade, the court statement of PW/5 loses its significance.

07. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellants based on evidence of last seen by PW/4 and PW/5 is in accordance with law and there is no infirmity in the same.

08. We have heard learned counsel for the parties and perused the material available on record.

09. Jamuna Bai (PW/4) is wife of the deceased. She has stated that on the date of incident at about 10.00 pm, her husband came to the house and demanded Rs.50/- for liquor saying that he would get the same through one Ganesh. She has further stated that her husband demanded three glasses and water and when she came out of her house along with it, she saw accused/appellant Chira Guddu and another boy, who was having beard. In the Court she pointed out her finger towards appellant No.3-Babla @ Pawan Kumar saying that he is the same person who was having beard at the time of incident, thereafter, she came back to her house and slept. She has also stated that when she woke up at 2.00 am, her husband was not in house, thereafter, she went to see him near temple platform as quite often her husband, after consuming liquor, used to sleep near temple platform but her husband was not there. Next day, one Sukhlal came to her and informed that her husband has died in rail accident and his body is

lying on the rail track. In cross-examination, she has admitted the fact that her husband was habitual drunkard and used to consume liquor with many persons. She has denied the fact that any test identification parade was conducted. She has further stated that the person who was standing outside her house, had covered himself with blanket and was having beard.

10. Johny Gond (PW/5) is another witness to last seen. He has stated that on the date of incident at about 11.30 pm, when he returned to his house, he saw deceased Anil standing near his house shouting and demanding glass and water. He has further stated that he scolded deceased Anil saying as to how he was demanding glass and water in the late night and thereafter the deceased sat opposite to his house. He has also stated that he gave glass and water to the deceased and at that time all the accused persons were along with him, thereafter, he came back to his house. However, after taking meal, he again came out of his house and saw the accused/appellants quarreling with the deceased. This witness has further stated that wife of one Gopal (PW/6) came there and took PW/6 along with her, thereafter, the accused/appellants and the deceased again started quarreling. This witness, in para 7, has stated that when he first saw the deceased at night, he was drunk and that he had no acquaintance with the accused/appellants prior to the incident. He has further stated that after the said incident, for the first time, he was seeing the accused persons in the Court. He has also stated that he had not seen the accused/appellants beating the deceased and all of them including Gopal (PW/6) had advised the deceased to go back to his house.

11. Shivkumar Manikapuri (PW/1) is brother of the deceased at whose instance merger intimation (Ex.P/1) was recorded. He is also witness to seizure memo (Ex.P/4) and inquest (Ex.P/3) and turned hostile.

12. Jabir Khan (PW/2) and Bharat Sahu (PW/3), witnesses to memorandum Ex.P/7, P/8, P/9, and P/10 of the accused/appellants & seizure of clothes made under Ex.P/11, P/12, P/13 and P/14, have turned hostile.

13. Gopal Ram (PW/6) turned hostile. Jeevanlal Sharma (PW/7)- constable assisted in the investigation. Smt. Malti Bai (PW/8) - wife of PW/5 has turned hostile. She states that after the incident her husband informed about the quarrel took place between the appellants and the deceased. Tomanlal Sahu (PW/9) - Head Constable assisted in the investigation. Mukesh Khare (PW/10) - Investigating Officer has duly supported the prosecution case. Dr. Shivnarayan Manjhi (PW/11) has conducted the postmortem on the body of deceased vide Ex.P/15 and found following injuries:-

- (i) The body was in two segments. Crushing contused lacerated wound present on abdomen at the level of T-12 and L4 vertebra level, all around red colour ecchymosis present (kidney, some parts of small intestine, liver lower parts were missing). Abdominal muscles were crushed. Vertebra were crushed, ribs were fractured.
- (ii) Multiple impacted abrasion in the size of 0.5 cm was present on chest. Fracture of sternum 2nd level.
- (iii) Contusion present on left thigh mid part with contused lacerated wound of 5 x 3 cm transversely fractured of femur mid part.

The Doctor has opined that the cause of death of deceased was

shock as a result of crushing injuries to the deceased.

14. Sanju @ Sanjay Sharma (DW/1) has stated that one Anjora Bai was keep of the deceased and that on the date of incident he saw both of them quarreling.

15. Close scrutiny of the evidence makes it clear that but for evidence of last seen by PW/4 and PW/5 there is no other evidence available against the accused/appellants showing their complicity in the commission of offence. In the present case, deceased was allegedly seen in the company of the accused/appellant on 27.11.2007 at about 10.00 pm, whereas his dead body was found after about 12 hours on railway track in two pieces. Evidence on record further makes it crystal clear that the deceased was habitual drunkard, he used to consume liquor with many persons and on the date of incident also he was highly intoxicated. Evidence also reveals that the railway track was very near to village and possibility of deceased meeting with the rail accident in drunken condition cannot be ruled out as the body of deceased was found in two pieces. The doctor conducting autopsy on the body has also found multiple crushed abrasions and opined that the deceased died due to hemorrhage and shock as a result of crushing injuries to the body. Be that as it may, there is no reliable and clinching evidence on record showing the involvement of the accused/appellants in commission of murder. There must be clinching evidence that the time-gap between the point of time when the deceased and the accused were seen last together alive and the death of deceased must be so close and proximate that an inference regarding the guilt of accused can be drawn and there is no possibility

of coming any third person in between the last seen together and death of the deceased. There must be unerringly clinching legal evidence that should point towards the involvement of the accused in commission of murder. Further it is unsafe to convict a person based on the last seen theory unless the last seen coupled with other circumstances is indicator of the fact that the accused is the author of the crime. Even otherwise it is settled preposition of law that the evidence of last seen alone is not sufficient to convict a person unless some other corroborative evidence is there. The Supreme Court in the matters of **State of Goa V. Sanjay Thakran**¹, **Yusuf V. State of West Bengal**², **Anjan Kumar Sharma V. State of Assam**³, **Nijam V. State of Rajasthan**⁴, **Kanhaiyalal V. State of Rajasthan**⁵ and this Court in the matter of **Smt. Jiteshwari Bai V. State of CG**⁶ has held that while basing the conviction on the last seen theory, it is safer to look for corroboration from other circumstance and evidence adduced by the prosecution. The statements of Jamuna Bai (PW/4) and Johny Gond (PW/5), witnesses to last seen, do not inspire confidence of this Court and do not indicate the same to be conclusive in nature against the accused/appellants. Thus, in the absence of definite evidence, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of the deceased. The trial Court while convicting and sentencing the accused/appellants has not considered the evidence of these witnesses in its proper perspective and thereby committed an illegality.

1 2007 (3) SCC 755

2 AIR 2011 SC 2283

3 2017 SCC 622

4 AIR 2015 SC 3430

5 2014 (4) SCC 715

6 2015 (S) SCC 393

16. Another piece of evidence against the accused/appellants is their memorandum statements Ex.P/7, P/8, P/9 and seizure under Ex.P/10, P/11 and P/12 by which clothes of the accused/appellants have been seized but neither there is FSL nor serological report on record to confirm presence of blood and its origin. The prosecution has not been able to prove complete chain of circumstances to connect the accused/appellants in commission of crime. Taking the cumulative effect of the evidence adduced by the prosecution, we are of the view that the trial Court has erred in law in convicting the accused/appellants under Sections 302/34 and 201/34 IPC.

17. Thus considering the evidence collected by the prosecution, this Court is of the opinion that conviction of the accused/appellants under Sections 302/34 and 201/34 IPC is not based on due appreciation of the evidence available on record and that being so they are entitled for benefit of doubt. Consequently, the judgment impugned convicting the accused/appellants under Sections 302/34 and 201/34 IPC is set aside and they are hereby acquitted of the charge levelled against them. The appellants are on bail, their bail bonds stand discharged.

18. Appeal is thus allowed.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Ram Prasanna Sharma)
JUDGE