

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**CRA No. 866 of 2009**

- Ubhey Ram @ Guddu Dewangan S/o Rampyare Dewangan, aged about 25 years, R/o Shyam Nagar Lingiyadih Kali Mandir Ke Pass Sarkanda, PS Sarkanda, Distt. Bilaspur (CG)

**---- Appellant**

**Versus**

- The State Of Chhattisgarh through S.H.O. P.S. Sarkanda, Bilaspur, Distt. Bilaspur (CG)

**---- Respondent**

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| For Appellant        | : | Shri Shravan Chandel, Advocate. |
| For Respondent/State | : | Smt. Madhunisha Singh, P.L.     |

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**Hon'ble Shri Justice Pritinker Diwaker**  
**Hon'ble Shri Justice Arvind Singh Chandel**

**Judgment On Board By Justice Pritinker Diwaker**

**20/11/2017**

This appeal arises out of the judgment of conviction and order of sentence dated 10.9.2009 passed by the Additional Sessions Judge, Bilaspur in S.T. No.138/2009 convicting the appellant under Sections 302 & 201 of IPC and sentencing him to undergo imprisonment for life, pay a fine of Rs.100/- and RI for three years, fine of Rs.100/- with default stipulations respectively.

02. As per the prosecution case, on 17.4.2009 some time in the evening deceased Purru Ahirwar had gone to Baba Musa Khan Darbar in the rickshaw of the accused/appellant and thereafter left the said place after some time. It is said that while returning Purru Ahirwar was killed by the appellant after looting some amount from him. On

18.4.2009 dead body of Purru was found near the culvert of Amariya Chowk and as soon as the said information was received by PW-3 Butel Ahirwar, brother of the deceased, he lodged merger intimation Ex.P/3 at 6.30 am. Inquest on the dead body was conducted on 18.4.2009 vide Ex.P/2 and thereafter the body was sent for postmortem which was conducted on the same day vide Ex.P/11 by PW-13 Dr. RK Upadhyay. The autopsy surgeon noticed ligature mark on both sides of the neck and in his opinion the cause of death was asphyxia due to hanging. After merger enquiry and receipt of postmortem report, FIR was registered under Sections 302 & 201 of IPC against unknown person on 22.4.2009 vide Ex.P/13. On 23.4.2009 memorandum of the appellant was recorded vide Ex.P/7 which led to recovery of one rickshaw and rope kept beneath the seat vide Ex.P/8. During investigation, the prosecution has recorded statements of PW-1 Gangotribai, PW-2 Babulal Sahu & PW-10 Kaleshwar Prasad Sahu who are witnesses of last seen. After filing of charge sheet, the trial Court framed charges under Sections 302 & 201 of IPC.

03. So as to hold the accused/appellant guilty, the prosecution examined 14 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned above.

05. Counsel for the appellant submits as under:

(i) that there is no eyewitness account to the occurrence and conviction of the appellant is based on circumstantial evidence but none of the circumstances from which inference of guilt can be drawn has been proved beyond reasonable doubt and therefore, there can be no inference that it was the appellant who committed murder.

(ii) that the evidence of last seen in the present case is very weak in nature and unless the said evidence gets corroboration from some other piece of evidence, the appellant cannot be convicted.

(iii) even motive has not been proved by the prosecution for commission of the offence.

06. On the other hand, State counsel supporting the impugned judgment has submitted that conviction of the appellant is strictly in accordance with law and there is no illegality or infirmity in the impugned judgment warranting interference by this Court.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Gangotribai, wife of the deceased, has stated that her husband used to go to Darbar in the rickshaw of the appellant. She states that on the date of incident also the deceased had gone with the appellant, however, in cross-examination she admits that she had not seen the deceased going in the rickshaw of the appellant and that she was informed about the same by the people at Darbar. She has further stated that she is not aware as to who killed her husband.

09. PW-2 Babulal Sahu is the other witness who is said to have seen the deceased on the date of incident going with the appellant. He states that in the previous night of the incident at around 8-8.30 pm he saw the deceased going in the rickshaw of the appellant and later on he came to know about death of the deceased. PW-10 Kaleshwar Prasad Sahu is another witness of last seen. He has stated that on 17.4.2009 at about 8-8.30 pm he saw the deceased coming in a rickshaw. However, he has nowhere stated that the rickshaw was of the appellant. Even he has not stated that he knew the appellant.

10. PW-3 Butel Ahirwar is a witness to inquest Ex.P/2. PW-4 Santosh Kumar Sahu & PW-6 Ramlal have turned hostile. PW-5 Ajay Shrivastava is a witness to memorandum (Ex.P/7) and seizure (Ex.P/8). PW-7 Shivshankar Koushik, Police Constable, assisted in the investigation. PW-8 Rajkumar Sori, ASI, did part of investigation. PW-9 Vivek Mourya is a witness to memorandum and seizure. PW-12 KS Kunwar, investigating officer, has supported the prosecution case. PW-13 Dr. RK Upadhyay conducted postmortem on the body of the deceased on 18.4.2009 vide Ex.P/11 and noticed no injury on the person of the deceased except ligature mark on both sides of the neck. In his opinion, the cause of death was asphyxia due to hanging. PW-14 Sanjay Kumar Yadav has stated that on the date of incident he heard the sound of overturning of rickshaw, however, he is not aware as to who was the said rickshaw puller.

11. Close scrutiny of the evidence makes it clear that there is no direct evidence against the appellant connecting him with the crime in question and his conviction rests upon circumstantial evidence i.e. the

evidence of last seen by PW-1, PW-2 & PW-10 and recovery of rickshaw and plastic rope at the instance of the appellant allegedly used in commission of the offence.

12. In the matter of ***Rambraksh alias Jalim*** reported in ***AIR 2016 SC 2381*** it has been held as under:

10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

11. In a similar fact situation this Court in the case of *Krishnan v. State of Tamil Nadu* [(2014) 12 SCC 279, held as follows:

“21. The conviction cannot be based only on circumstance of last seen together with the deceased. In *Arjun Marik v. State of Bihar* (1994) Supp (2) SCC 372)

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

22. This Court in *Bodhraj v. State of J&K* (2002) 8 SCC 45) held that:

“31. 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 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.

23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during

Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.

24. In *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438), this Court held that in the absence of any other links in the chain of circumstantial evidence, the appellant cannot be convicted solely on the basis of “last seen together” even if version of the prosecution witness in this regard is believed.

12. In the present case as noticed above the Sessions Court as well as the High Court convicted the appellant/accused No.2 on the basis of last seen evidence, the correctness of which is also doubtful. The High Court had failed to appreciate the aforesaid fact and erred in affirming the judgment of conviction passed by the Sessions Court. We are satisfied that the conviction of the appellant cannot be sustained in law and liable to be set aside.

13. Likewise, in the case of *Kanhaiya Lal* reported in **2014 AIR SCW 1828** it has been held as under:

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the

accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

14. The theory of last seen – the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh vs. State of Rajasthan* (2010) 15 SCC 588.”

14. In the present case, three witnesses (PWs-1, 2 & 10) have been examined on the point of last seen. PW-1 Gangotribai, wife of the deceased, has admitted the suggestion in cross-examination that on the date of incident she had not seen the deceased going with the appellant in his rickshaw and that she was informed about the same by the people at Darbar and as such, she cannot be said to be a witness of last seen, rather she appears to be a hearsay witness. Likewise, PW-10 Kaleshwar Prasad Sahu has nowhere stated that the rickshaw in which the deceased was seen by him was of the appellant or that he saw both the appellant and the deceased together at that point of time.

He has even not stated about his acquaintance with the appellant. Though PW-2 Babulal Sahu has stated that on the date of incident he had seen the deceased alive in the company of the appellant at around 8-8.15 pm and later on he came to know about death of the deceased, but merely on the basis of his evidence regarding last seen, it would be hazardous to infer guilt of the appellant, as has been observed in the aforesaid judgments, and we are to further see whether this evidence of last seen is consistent with other evidence adduced by the prosecution.

15. The other evidence adduced against the appellant is the recovery of rickshaw and plastic rope at his instance. However, the prosecution has not been able to prove that the rickshaw so seized was the same rickshaw in which the deceased was last seen sitting with the appellant. The prosecution was required to prove that it was the same rickshaw which was used in commission of the offence as alleged by PW-2. It ought to have made this person witness to memorandum and seizure but it has not been done. However, the prosecution has examined PW-5 Ajay Shrivastava and PW-9 Vivek Mourya in this regard who have though supported the memorandum and seizure but have nowhere stated that the rickshaw so seized was of the appellant. PW-5 has stated that on being called by police constable he went to police station where he found one rickshaw standing there and he is not aware as to who had brought that rickshaw to police station and likewise PW-9 has also stated that on being called by police when he went to police station he found one rickshaw standing there which was brought by one constable from outside whereas at

that time the appellant was already in the police station. In these circumstances, involvement of the rickshaw so seized in the crime in question appears to be doubtful. It is well settled that in a case resting upon circumstantial evidence the prosecution is required to prove each circumstance to the hilt leaving no room for any doubt.

16. As regards seizure of plastic rope, though as per postmortem report ligature mark was noticed on the neck of the deceased. However, the autopsy surgeon has not stated anywhere that death was homicidal in nature. According to him, the cause of death was asphyxia due to hanging. He has though clarified in response to the query raised by the police that if any person drags another person by tying a rope around his neck such ligature mark could be there but in the present case, as per postmortem report, there was no injury on the person of the deceased except ligature mark on both sides of the neck, meaning thereby that the deceased was not dragged while being strangled by means of rope. True it is that in the inquest as also the application for postmortem it is mentioned that there are certain abrasions on right knee, above right ankle and on the chest of the deceased whereas no such injury was noticed by the doctor while conducting postmortem and in the Court also he has reiterated that except ligature mark on the neck, there was no other injury on the body of the deceased.

17. Thus considering the overall facts and circumstances of the case in light of above legal position, the nature and quality of evidence adduced, we are of the opinion that the prosecution has not been successful in proving the guilt of the appellant on the basis of evidence adduced by it beyond reasonable doubt. Though the circumstances

raise suspicion against the appellant but mere suspicion can not be the basis of conviction, howsoever strong it may be. Being so, the trial Court has committed an illegality in convicting the appellant under Sections 302 & 201 of IPC on the basis of such evidence. The appellant deserves to be acquitted of the said charges by giving him benefit of doubt.

18. In the result, the appeal is allowed. The impugned judgment is hereby set aside and the appellant is acquitted of charges under Sections 302 & 201 of IPC by extending him benefit of doubt. The appellant is reported to be on bail, therefore, his bail bonds stand discharged and he need not surrender.

Sd/

**(Pritinker Diwaker)**  
**Judge**

Sd/

**(Arvind Singh Chandel)**  
**Judge**