

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 750 of 2004

(Arising out of judgment/order dated in Case No. of the
learned.....)

- Saurav Shrivastava @ Sonu, S/o. Shri Narendra Bhushan Shrivastava, aged about 22-23 years, resident of Bahadurguda Para, Jagdalpur, District Bastar

---- Appellant

Versus

- State Of Chhattisgarh, through the District Magistrate Jagdalpur, Bastar (CG)

---- Respondent

And

CRA No. 880 Of 2004

- Omprakash @ Dabla @ Babla, S/o. Mokhu Ram, Aged about 25-26 years, Caste Bhatra, R/o. Panarpara, Jagdalpur, District Bastar (CG)

----Appellant

Vs

- State Of Chhattisgarh, Through District Magistrate Jagdalpur District Bastar (CG)

---- Respondent

For Appellants	: Shri Akash Pandey and Shri Sachin Singh Rajput, Advocates for the appellants.
For Respondent/State	: Shri Bhaskar Pyasi, P.L.

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

Judgement on Board

Per Pritinker Diwaker,J.

21/08/2017

As these two appeals arise out of the judgment and order dated 23.08.2004 passed by the Special Judge, Bastar District Jagdalpur in Sessions Trial No. 40/2004 convicting the accused/appellants in both the Cr. Appeals under Sections 302,364 and 201 IPC and sentencing them to undergo imprisonment for life with fine of Rs. 1,000/- u/Ss. 302 and 364 and RI for seven years with fine of Rs. 500/- under Section 201 IPC with default stipulation, they are being disposed of by this common judgment.

2. In the present case, name of the deceased is Ashiq Ali and as per prosecution case, on account of old enmity between the accused persons and the deceased, in the intervening night of 11-12 October 2003 accused persons committed murder of the deceased by causing him multiple injuries and then threw his body in front of the booking office of Mahendra Travels. On 12.10.03, at about 7.00 a.m., when the employee of Mahendra Travel namely Sanat Singh Thakur (PW-1) had gone to open the booking office, he found body of deceased lying over there. Merg intimation Ex.P-1 was lodged on 12.10.03 at 7.30 a.m. by Sanat Singh Thakur (PW-1). Inquest on the dead body was conducted on 12.10.03 at 7.30 a.m. vide Ex.P-5. Body was sent for postmortem examination which was conducted by Dr. Sanjay Basak (PW-14) vide Ex.P-22 and according to him, cause of death was coma and shock due to acute head injury with extradural hemorrhage. On the same day FIR Ex.P-25 was registered at 5.55 p.m. on the basis of merg enquiry against the present appellants and ten other accused persons under Section 302/34 IPC. On the basis of memorandum of accused Omprakash Ex.P-13, seizure of club vide Ex.P-14 was made however

there is no FSL report in respect of the said club. After filing of charge sheet trial judge has framed the charge against present appellants under Sections 364/120, 320/120-B and 201 IPC. Likewise, the charges were framed against other accused persons.

3. The trial Court proceeded against the present appellants and three other accused persons and recorded statement of 17 witnesses to hold them guilty. Statement of the accused/appellants were also recorded under Section 313 of the Cr.P.C. in which they denied the charges levelled against them and pleaded their innocence and false implication in the case.

4. After hearing the parties, the trial Court by judgment impugned, has acquitted three accused persons namely Subhash Choudhary @ Bunt, Chhotu @ Devendra Pal and Sanjay John @ Sanju but has convicted and sentenced the present appellants as mentioned in paragraph 1 of the judgment. Hence the present appeals.

5. Contention of the counsel for the appellants is as under :

i) that the prosecution has failed to prove its case on the basis of statement of eyewitnesses however all the eyewitnesses have turned hostile.

ii) the appellants have been convicted solely on the basis of statement of last seen by Shujawat Ali (PW-8), Vijay Yadav (PW-9), Karan Yadav (PW-12) and Surendra Jain (PW-15) however out of these witnesses only Shujawat Ali (PW-8) has supported the prosecution case and rest of the witnesses cannot be termed as witness of last seen.

iii) it has been argued that the evidence of last seen is a weak type of evidence and unless it is corroborative by other piece of evidence, the accused persons cannot be convicted for murder of the accused.

6. On the other hand, supporting the impugned judgment, it has been argued by the State counsel that the conviction of the appellants is in accordance with law and there is no infirmity in the same.

7. Heard counsel for the parties and perused the material available on record.

9. Sanat Singh Thakur (PW-1) is a witness who first saw the body of the deceased lying in front of his booking office and it is he who lodged the merger intimation. Gajadhar Sahu (PW-2), Kaneez Fatima Sahu (PW-4), Shaheen Parveen (PW-5), Sudarshan Kashyap (PW-6), Inayat Ali (PW-7), Smt, Kaniz Fatima Sheikh (PW-10), Narendra Jain (PW-15), Mukesh Tiwari (PW-16) and Arvind Kumar @ Bhakku (PW-17) have turned hostile. Inayat Ali (PW-3) father of the deceased is a hearsay witness. Shujawat Ali (PW-8) younger brother of the deceased has stated that a day prior to the incident on the eve of Shab-e-baraat when he was distributing the offerings (*prasad*), at about 8.30 p.m. he saw deceased Asiq standing with two of his friends namely Karan and Vijay, at that time accused/appellants Dabla and Sourabh Shrivastava came there and asked the deceased that Chhotu is calling him and then deceased went along with them. He has stated that in the next morning he informed his father that deceased had gone along with the appellants and on the next day dead body of Asiq was found lying in front of the booking office of Mahindra Travels. Vijay Yadav (PW-9) has also been examined as witness of last seen however in cross-examination he has not supported the prosecution case and has stated

that he could not see the face of those two persons with whom deceased had gone. He has further stated that on being asked by the police he had disclosed the name of the appellants and he does not know the appellants who are present in the court. Poornima Tiwari (PW-11) has stated that about 4-5 days prior to the incident there was some dispute between the deceased and accused persons however there is material improvement in his court statement to that of his diary statement. Karan Yadav (PW-12) is a hearsay witness. Santosh Dhruv (PW-13) is a witness to memorandum Ex.P-13 and seizure Ex.P-14. Dr. Sanjay Basak (PW-14) conducted postmortem examination on the body of deceased Asiq and according to him following injuries were found :

- i) multiple abrasion on left shoulder 1 1/2" x1" superficial region
- ii) abrasion on left collar bone 2" x 1/2" x superficial
- iii) Abrasion on right side iliac region 3" x 2" superficial
- iv) Contusion on left deltoid at shoulder region 2"x1" swelling bluish colour
- v) abrasion on left hypo-gastric region 4"x1" 3"x1" superficial No.2
- vi) multiple abrasion on left leg each on 1"x 1/2"x superficial
- vii) Abrasion on right leg 3"x1/2" x superficial
- viii) contusion on left dorsal palm bluish purple colour 3"x2" swelling
- ix) contusion on back 7"x4"x swelling bluish colour
- x) Abrasion on neck 1"x1/2" superficial
- xi) contusion on right shoulder 3"x2"x bluish colour
- xii) contusion on right arm 3"x2" purple colour
- xiii) Abrasion on right maxillary process 3"x 2"x superficial
- xiv) contusion on left lower eye lids 3"x1" blackish blue colour
- xv) sub conjunctival hemorrhage on left sub conjunction

- xvi) Abrasion on left forehead 1"x1/2"xsuperficial
- xvii) Abrasion on right thigh 3"x 1" superficial
- xviii) contusion on right side region of back No.2 each on 3"x1" bluish colour
- xix) Abrasion on left ear maxillary process 1"x1/2"x superficial
- xx) contusion on left arm 3"x2"
- xxi) contusion on upper lips 1/2"x1/2" bluish colour
- xxii) contusion on left temporal region 1" in diameter bluish colour.

All injuries are ante mortem in nature. According to him, cause of death was coma and shock due to acute head injury with extradural haemorrhage. S.L.Sinha (PW-15) is the ASI who helped in the investigation. Keshav Ram Sahu (PW-16) is the head constable who assisted in the investigation. Jai Singh Dhurve (PW-17) is the Investigating Officer who has done the investigation.

10. It is relevant to note here that in respect of the absconding accused some of the witnesses namely Inayat Ali (PW-7), Sujawat Ali (PW-8), Gajadhar Sahu (PW-9), Kaneez Fatima Sahu (PW-10), Shaheen Parveen (PW-11), Sudarshan (PW-12), Rajesh Mali (PW-13), Karan Yadav (PW-14), Narendra Jain (PW-15), Mukesh Tiwari (PW-16) and Arvind Singh @ Bhakku (PW-17) have been again examined. However they have not deposed anything against the accused/appellants but on the memorandum of accused/appellants club was seized vide Ex.P-14 however there is no FSL report in respect of the seized articles. In the present case, this Court has held that 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. Mere non-explanation on the part of the accused by itself cannot lead to

the proof of guilt against the accused.

11. Close scrutiny of the evidence makes it clear that but for the statement of Shujawat Ali (PW-8) there is no other legally admissible evidence in respect of the appellants. The other witnesses of last seen have not fully supported the prosecution case. This is a case of circumstantial evidence. There is no direct evidence in the sense of eye-witness account to connect the accused with the crime in question. The law is well settled that the conviction of an accused solely on circumstantial evidence can only be based, if all the circumstances are proved, and the chain of circumstances so proved is of conclusive nature and tendency, and they should be such as to exclude every hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. It is not necessary that every one of the proved circumstances by itself must be decisive of the complicity of the accused in the crime. It may be that a particular circumstance relied upon by the prosecution may not be so, yet that circumstance along with other facts, which have also been proved, may tend to strengthen the conclusion of the guilt.

12. Undoubtedly in the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of deceased and are guilty of committing his murder. It would be unsafe to base the conviction on the last seen theory and from the facts and evidence, no other corroborative piece of evidence is found corroborating the last seen theory. We may also make a reference to the decisions in the matter of **Nizam & Another**

Vs. State of Rajasthan (AIR 2015 SC 3430); Kanhaiyalal & Others Vs. State of Rajasthan (2014 (4) SCC 715; Ashok Kumar Vs. State of Maharashtra 2015 (4) SCC 393); S.K.Yusuf Vs. State of West Bengal (AIR 2011 SC 2283); State of Goa Vs. Sanjay Thakran & Another (2007 (3) SCC 755) and Anjan Kumar Sharma Vs. State of Assam (2017 SCC Online SC 622).

In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

In Anjan Kumar Sharma Vs. State of Assam (2017 SCC Online SC 622), it has been held by the Apex Court as under:

21. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in *State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:-

“34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that

the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and thine crime coming to light is after (sic of) a in considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.

22. Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court and acquit the Appellants of the charges of Section 302, 201 read with 34 IPC. The Appellants are directed to be set at liberty forthwith, if not required in any other case.

None of the circumstances relied upon by the prosecution are firmly established and the circumstances do not form a complete chain establishing the guilt of the accused. None of the circumstances relied upon by the prosecution point to the guilt of the accused/appellants and thus the one inference that can be drawn against the accused/appellants is to extend benefit of doubt to them.

13. Consequently, the appeals are allowed. Impugned judgment convicting and sentencing the accused/appellants as mentioned above is set aside. They are acquitted of the charges levelled against them. Accused/appellants are reported to be on bail. Their bail bonds stand discharged.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(Ram Prasanna Sharma)
Judge