

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 388 of 2010

1. Santosh, S/o Bhagwat Sonwani, Caste Satnami, aged 35 years,
 2. Jaswant S/o Dhansai Sonwani, Caste Satnami, aged 20 years,
- Both resident of Village Chhata, Thana Lalpur, District-Bilaspur (CG)

---- Appellants

Versus

- State Of Chhattisgarh through Station House Officer, Bodla, District-Kabirdham (CG)

---- Respondent

For Appellants	:	Shri HS Patel, Advocate.
For Respondent/State	:	Shri Rahul Tamaskar, P.L.

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

Judgment On Board By Justice Pritinker Diwaker

15/12/2017

This appeal arises out of the judgment of conviction and order of sentence dated 7.5.2010 passed by the Sessions Judge, Kabirdham (Kawardha) in ST No.10/2009, convicting each of the appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for life and to pay a fine of Rs.1000/- with default stipulation.

02. In the present case, name of the deceased is Sunil. It is said that the deceased had developed illicit relation with wife of appellant Santosh and therefore, the appellants decided to eliminate him. On 7.10.2008 the appellants took Sunil on their motorcycle towards

Kawardha-Jabalpur road and after consuming liquor in the mid way, they stopped the vehicle in the jungle and committed murder of Sunil by slitting his neck with a blade. After committing murder, the appellants returned to their house and on the way they also washed their clothes. On 10.10.2008 dead body of Sunil was found in Kawardha-Jabalpur road and at the instance of PW-2 Dukhram merg intimation Ex.P/6 was recorded on 10.10.2008. Inquest over the dead body was conducted vide Ex.P/8 on 10.10.2008. The dead body was sent for postmortem, which was conducted on 11.10.2008 by PW-9 Dr. KP Jangdey vide Ex.P/13 who noticed that the tongue was protruded, scrotum and penis absent, body was swollen, very foul smell was emanating, incised wound over perinium region, muscles were cut, incised wound over neck, bruises over left palm and cynosis was present. In his opinion, the cause of death was hemorrhagic shock and asphyxia due to cut injury of major carotid vessels and the nature of death was homicidal. After merg inquiry, on 13.10.2008 FIR (Ex.P/17) was registered under Section 302 of IPC against unknown person. When the deceased did not return for quite some time, on 27.10.2008 a missing report Ex.P/15 was lodged by father of the deceased. During further enquiry, on 17.1.2009 body of the deceased was identified on the basis of photograph and clothes vide Ex.P/1. On 17.1.2009 memorandum of appellant Santosh was recorded vide Ex.P/3, pursuant to which two shaving blades were seized vide Ex.P/5. Memorandum of appellant Jaswant recorded on 18.1.2009 (Ex.P/2) led to recovery of clothes and knife vide Ex.P/4. From the spot, as many as eight articles including wrapper of shaving blade Zorrik and torn pant of the deceased were seized vide Ex.P/10. As per FSL report

Ex.P/19, blood was found on the seized articles. Further, as per Ex.P/20, a piece of the pant seized at the instance of appellant Jawant was found to be the part of the torn pant seized from the spot. While framing charge, the trial Court framed charge under Section 302 and in the alternative, 302/34 of IPC against the appellants.

03. So as to hold the accused/appellants guilty, the prosecution examined 11 witnesses in all. Statements of the accused 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.

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 appellants as mentioned above.

05. Counsel for the appellants submits as under:

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

(ii) that the witnesses to memorandum and seizure have not fully supported the prosecution case.

(iii) that the so-called witness of last seen PW-8 Smt. Aghaniya Bai had never deposed in the Court that she saw the deceased in the company of appellant Santosh whereas in her diary statement she had not actually seen appellant Santosh and deceased going together. Further, even PW-7 Chhedilal as per his Court statement has stated

that the deceased left the village a day or two prior to Dashhara i.e. somewhere around 7-8/10/2008 whereas the dead body has been found on 10/10/2008 and as such, there was sufficient time gap between the alleged last seen and recovery of the dead body.

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

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

08. PW-1 Chitram, father of the deceased, has stated that on the eve of Dashhara, the deceased left his house for Mungeli on his bicycle for purchasing certain articles and after dropping those articles in the house of Dhaniram, he left his house by saying that he is going with appellant Santosh and thereafter did not return. He states that after about 10-15 days, he came to know about death of the deceased and prior to that he had lodged a missing report. He further states that clothes, slippers and chain of the deceased along with his photograph were shown to him and based on that he identified the dead body to be of his son Sunil. He is also a witness to seizure and memorandum. He further states that about eight days prior to the incident, wife of appellant Santosh came to his house and said that she would live in the house of Sunil as his wife because her husband i.e. appellant Santosh used to beat her. However, he asked her to go back. He also identified the Article C and F1 i.e. piece of full pant of Sunil.

09. PW-2 Dukhiram, lodger of merg, is also a witness of inquest. PW-3 Dhaniram is a relative of the deceased in whose house the purchased articles were said to be kept by the deceased by saying that he is going along with appellant Santosh. PW-4 Anand Kumar Jangde is a witness to memorandum of the appellants and seizure. He has supported the prosecution case. PW-5 Ranjanbai, mother of the deceased, has not stated anything specific against the appellants. PW-6 Ramcharan has turned hostile.

10. PW-7 Chhedilal has stated that prior to Dashhara he had gone to the house of his relative at Mungeli and there he met deceased Sunil who requested him to drop him (Sunil) at Daupara, on which he took Sunil on his cycle to Daupara. When they reached near the shop of one Basir, appellant Santosh called out Sunil and then Sunil went to appellant Santosh. When he (this witness) asked Sunil as to where he is going, he replied that he is going to see a girl with Santsoh at Risamali. Thereafter, he (this witness) returned to his village. It is relevant to mention here that this part of the statement that the deceased left the said place along with appellant Santosh has not been stated by this witness in his diary statement. In his diary statement, it has been merely stated that the deceased informed him that he is going along with appellant Santosh.

11. Smt. Aghaniyabai is grand-mother of the deceased to whom it is alleged that the deceased had informed that he is going along with the appellant Santosh. PW-9 Dr. KP Jangdey conducted postmortem on the body of the deceased on 11.10.2008 vide Ex.P/13 and noticed that the tongue was protruded, scrotum and penis absent, body was

swollen, very foul smell was emanating, incised wound over perinium region, muscles were cut, incised wound over neck, abrasions over left palm, cynosis was present. In his opinion, the cause of death was hemorrhagic shock and asphyxia due to cut injury of major carotid vessels and the nature of death was homicidal. PW-10 BL Sharma assisted in the investigation whereas PW-11 Navneet Patil is the investigating officer.

12. Admittedly, there is no direct evidence against the appellants to show their complicity in the crime in question and their conviction rests upon circumstantial evidence, main being the evidence of last seen and recovery of certain incriminating articles at their instance.

13. In the matter of ***Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra, (2008) 3 SCC 210*** the Supreme Court while dealing with circumstantial evidence observed as under:

“11. *In Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343], which is one of the earliest decisions on the subject, this court observed as under:*

“10. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a 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 and it must be such as to show that within all human probability the act must have been done by the accused.”

12. *In Padala Veera Reddy v. State of A.P. [(1989) Supp (2) SCC 706], this court held that when a case rests upon*

circumstantial evidence, the following tests must be satisfied:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
- (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. □*

13. [*In Sharad Birdhichand Sarda v. State of Maharashtra*](#) [(1984) 4 SCC 116], it was held that the onus was on the prosecution to prove that the chain is complete and falsity or untenability of the defence set up by the accused cannot be made basis for ignoring serious infirmity or lacuna in the prosecution case. The Court then proceeded to indicate the conditions which must be fully established before conviction can be based on circumstantial evidence. These are:

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;*
- (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. □

26. The next thing which is to be seen is whether the evidence relating to the recovery of clothes of the appellant and the half blade, allegedly used for commission of crime, is credible and could be relied on for proving the charge of culpable homicide against the appellant. In this context, it is important to note that the prosecution did not produce any document containing the recording of statement allegedly made by the appellant expressing his desire to facilitate recovery of the clothes and half blade. The prosecution case that the accused volunteered to give information and took the police for recovery of the clothes, half blade and purchase of handkerchief is highly suspect. It has not been explained as to why the appellant gave information in piecemeal on three dates i.e. 3.10.1994, 5.10.1994 and 6.10.1994. Room No.45 of "Ganesh Bhuvan" from which the clothes are said to have been recovered was found to be unlocked premises which could be accessed by anyone. The prosecution could not explain as to how the room allegedly belonging to the appellant could be without any lock. The absence of any habitation in the room also cast serious doubt on the genuineness and bonafides of recovery of clothes. The recovery of half blade from the road side beneath the wooden board in front of Ganesh Bhuvan is also not convincing. Undisputedly, the place from which half blade is said to have been recovered is an open place and everybody had access to the site from where the blade is said to have been recovered. It is, therefore, difficult to believe the prosecution theory regarding recovery of the half blade. The credibility of the evidence relating to recovery is substantially dented by the fact that even though

as per the Chemical Examiners Report the blood stains found on the shirt, pant and half blade were those of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the learned Additional Sessions Judge and High Court overlooked this serious lacuna in the prosecution story and concluded that the presence of human blood stains on the cloths of the accused and half blade were sufficient to link him with the murder.”

14. In **Kansa Behera Vs. State of Orissa, AIR 1987 SC 1507** while dealing with recovery of bloodstained articles the Supreme Court held as under:

“11. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.”

15. 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.

16. Likewise, in the case of ***Kanhaiya Lal Vs. State of Rajasthan***, 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.”

17. Keeping in view the aforesaid principles of law relating to circumstantial evidence if we examine the facts and evidence of the present case, it emerges that there is no legally admissible evidence against the appellants connecting them with the crime in question. Though on the memorandum of the appellants certain incriminating articles were seized and blood was also noticed thereon as per FSL report, but in absence of serological report confirming the origin and group of the blood so found, it cannot be held conclusively that the recovered articles had any nexus with the crime in question. Further, as per chemical examiner's report Ex.P/20, the torn piece of pant found from the spot and the other piece of pant seized from appellant Jaswant is found to be the same, but merely on that basis it will not be safe for this Court to uphold conviction of the appellants because it is

settled principle of law that fouler is the offence, higher is the degree of proof.

18. As regard the evidence of last seen by PW-7 Chhedilal, the same does not inspire confidence of the Court because diary statement of this witness is at variance with his Court statement on material particulars. In the Court he has stated that he saw the deceased going with the appellant Santosh whereas in his diary statement he states that the deceased informed him that he is going with appellant Santosh. Furthermore, the evidence of PW-8 Smt. Aghaniyabai also runs contrary to the evidence of PW-7. According to her, when appellant Santosh came to her house, the deceased was working in the barn, Santosh asked for deceased Sunil and then Sunil went with him saying that he is going with Santsoh to see Dashhara fair.

19. On the basis of aforesaid discussions, we are of the opinion that the prosecution has not been able to prove guilt of the appellants beyond all reasonable doubt based on the circumstantial evidence adduced by it. In a case where conviction rests upon circumstantial evidence, the prosecution has to be very cautious and to prove each circumstance to the hilt to exclude the possibility of any person other than the accused being the perpetrator of the crime and that all the circumstances if taken together must lead to only one inference that it is the accused who committed the crime. However, as discussed above, the prosecution has failed to prove its case in this manner and there is a reasonable doubt about the complicity of the appellants in the crime in question. Being so, the appellants cannot be convicted for

the offence under Section 302/34 of IPC and they deserve to be acquitted of the said charge by giving them benefit of doubt.

20. In the result, the appeal is allowed. The impugned judgment is hereby set aside acquitting the appellants of the charge under Section 302/34 of IPC by giving them benefit of doubt. They are reported to be on bail, therefore, their bail bonds stand discharged and they need not surrender.

Sd/
(Pritinker Diwaker)
Judge

Sd/
(A.S. Chandel)
Judge