

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 33 of 2010

- Bharat Sen, S/o Mannu Sen, Caste Nai, R/o Village Pratappur, Police Station Nawagarh, District Durg.

---- Appellant

Versus

- State Of Chhattisgarh, through the Police Station Nawagarh, District Durg.

---- Respondent

For Appellant	:	Shri P.P.Sahu & Shri R.K. Pali, Advocates.
For Respondent	:	Shri Adhiraj Surana, Dy. Govt. Advocate.

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

Judgement

Per P.Diwaker, J

02/08/2017

1. By this criminal appeal, the accused/appellant has challenged the legality and propriety of the judgment of conviction and order of sentence dated 31.12.2009 passed by the Additional Sessions Judge, Bemetara in S.T. No.20/2009 by which he has been convicted for the offence punishable under Section 302 of the Indian Penal Code (for short 'IPC') and sentenced to undergo RI for life & to pay a fine of Rs.500/-, in default to undergo additional RI for 2 months.
2. In the present case name of deceased is Ajit alias Golu.
3. Case of the prosecution is that the accused/appellant used to suspect fidelity of his wife and was under an impression that she was having illicit

relationship with the father of deceased and therefore he was keeping grudge against him. On 13.2.2009 Nawdha Ramayan was organized in the village and all the villagers including the accused/appellant and the deceased assembled there to listen. It is further case of the prosecution that accused/appellant took the deceased along with him outside the village and committed his murder by pressing his neck and thereafter threw his body in the brook. On 14.2.2009 at about 7.00 a.m. the body of deceased was found lying in the brook. Merg Intimation (Ex.P-1) was recorded at the instance of Mantram (PW-1). Inquest (Ex.P-3) was conducted over the body on 14.2.2009. Body of the deceased was sent for post-mortem examination which was conducted by Dr. T.N. Mahingleshwar (PW-18) vide Ex.P-11 and he opined that mode of death was coma and asphyxia due to throttling & drowning and the death was homicidal in nature. Based on merg enquiry, FIR (Ex.P-10) was registered on 15.2.2009 under Section 302 IPC against unknown person. On 24.2.2009 confessional statement of accused/appellant was recorded vide Ex.P-6 wherein he confessed that it is he who had killed the deceased.

4. After investigation, charge sheet against the accused/appellant was filed. The Court below framed the charge under Section 302 of IPC against the accused/appellant. The prosecution in order to bring home the charge levelled against the accused/appellant examined 19 witnesses in all. Statement of accused/appellant was recorded under Section 313 of Cr.P.C. in which he abjured his guilt and pleaded innocence & false implication.
5. The trial Court after appreciation of the entire evidence on record came to the conclusion that the prosecution has been able to establish the offence charged against the appellant and accordingly convicted and sentenced him in the manner as described above.

6. Counsel for the appellant submits that;

- the entire conviction of the appellant is based on the circumstantial evidence i.e. last seen, but the evidence rendered on this point by the prosecution fell short of the requirement to bring home the said circumstance. Last seen evidence is only in relation to appellant being present at Nawdha Ramayan where the deceased was also present. There is no evidence on record to even remotely suggest that the appellant took the deceased along with him.
- the alleged confession was made in presence of a police officer and therefore the same is not admissible in evidence.
- mere allegation of threat without there being any evidence or visit to another village on the date of incident would not make the appellant liable for the offence like murder.

7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.

8. We have heard learned counsel for the parties and perused the evidence on record as also the impugned judgment.

9. Mantram (PW-1), father of deceased, is the person at whose instance FIR and Merg Intimation was recorded. He has stated on the fateful night after having dinner, his wife and children including the deceased had gone to listen Nawdha Ramayan programme organized in the village. His wife and three children returned home in the night but the deceased did not and when he enquired about the whereabouts of deceased from his wife, she told that he is playing at the place where programme is going on. Thereafter he went to sleep. He has further stated that when the deceased did not return till next morning, he went in his search and when

he was searching his son, his nephew Ranjeet came and informed that body of Golu is lying in the brook. In the cross-examination this witness has stated that the accused/appellant was under an impression that he had illicit relations with his wife and therefore he gave a threat to him, however, no report in this regard was lodged by him against the accused/appellant.

10. Vishnu Singh (PW-2) is the witness of inquest (Ex.P-3). Santosh Singh Thakur (PW-3) is another witness of inquest (Ex.P-3). He is also witness to spot map (Ex.P-4), arrest memo (Ex.P-5) & confessional statement (Ex.P-6).

11. Sheetla Bai (PW-4), mother of deceased, has stated that on the fateful night she along with her children including deceased had gone to attend Nawdha Ramayan organized in the village. She returned home from there at 10-11 in the night. She has further stated that while coming back to home, she did not find her son Ajeet (deceased) there and therefore she asked her neighbour Fagu to send her son back to house on seeing him. She has further that the accused/appellant offered Rs.10/- to the group reciting Nawdha Ramayan. She has further stated that at about 10-11 in the night she returned her home from the programme but her son did not return and stayed there. When her son did not return till next morning, she enquired about the whereabouts of her son from the accused/appellant and he asked her to go and search her son in the brook and therefore she went towards the brook to search her son and there she found her son lying dead in the brook. She has stated that she saw the deceased alive last time in the company of accused/appellant.

12. Firanta (PW-5) is another witness of last seen. This witness has stated that he saw the accused/appellant and the deceased going together from the place where Nawdha Ramayan programme was organized. Next

morning he came to know that somebody had thrown the body of deceased in the brook after committing his murder.

13. Lalit Singh (PW-6) is the witness of inquest (Ex.P-3) and confessional statement made by accused vide Ex.P-6.
14. Hemkumari (PW-7) is another witness of last seen. This witness has stated that the accused/appellant had offered Rs.10/- through the deceased and thereafter she did not see the accused/appellant and the deceased. Ranjit (PW-8) is the person who first noticed the body of deceased lying in the brook. S.D. Puraina (PW-13) is the Patwari who prepared the spot map Ex.P-9.
15. R.P. Singh (PW-15) is the investigating officer who has duly supported the prosecution case.
16. Dr. T.N. Mahingleswar (PW-18) is the person who conducted post-mortem examination on the body of deceased and opined that mode of death is coma and asphyxia due to throttling & drowning and the death was homicidal in nature.
17. We have heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
18. In this case, the prosecution relied on two incriminating circumstances, namely, (i) the deceased was lastly seen alive in the company of accused/appellant; and (ii) confession made by accused/appellant.
19. We shall see whether these circumstances have been proved and the proved circumstances form a complete chain without any missing link proceeding towards the appellant also as the perpetrator of crime.
20. To prove 'last seen' circumstance the prosecution has mainly relied on the testimonies of Sheetla (PW-4), mother of deceased, Firanta (PW-5) & Hemkumar (PW-7) but on close and careful scrutiny of the evidence of these witnesses, we are of the opinion that their testimonies are weak on

this point. What has come in the statements of these witnesses is that Nawdha Ramayan programme was organized in the village in which the accused/appellant was also present and during the course of recitation, accused/appellant had offered Rs.10/- through the deceased to the group reciting Nawdha Ramayan. Thus, according to these witnesses, the accused/appellant was also present in the close proximity of the area where the deceased was. It has not been deposed by any of the witnesses that they saw the deceased leaving that place along with accused/appellant or any of them had seen the accused/appellant at the place from where the body of the deceased was recovered or nearby the same in close proximity of time. Mere presence of the accused/appellant at the place where the deceased was also present by itself cannot be regarded conclusive so as to establish the complicity of accused/appellant in the offence of murder of deceased. The last seen theory comes into play where the time gap between the point of time when the accused and 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 crime becomes impossible. Here in this case, there is no conclusive evidence to the extent that the deceased was last seen alive in the company of the accused/appellant and soon thereafter he was found dead. In these circumstances, we have no hesitation in saying that the Court below has erred in concluding that there was sufficient material on record to show that the deceased was last seen alive in the company of the appellant.

True, PW-5 Firanta has stated that he saw deceased and accused/appellant going together, but in the statement recorded under Section 161 CrPC he did not disclose this fact to the police, as is evident from Para-4 of the cross-examination of this witness, and he discloses

such fact for the first time while making statement before the Court during trial that too on being asked by the Court and not of his own. Since he did not disclose the aforesaid fact at the first instance, no reliance can be placed on his statement and the same is liable to be discarded as it lacks credence.

21. Another incriminating circumstance projected by the prosecution is the statement made by the accused/appellant purporting to confess the fact that he had killed the deceased. In the instant case, it is apparent from documents on record that the accused/appellant was taken into police custody on 15.2.2009 and the confessional statement was made by him on 24.2.2009. Thus, it is clear that at the time of recording of confessional statement, the accused/appellant had been in custody. A glance of the document Ex.P-6 also reveal that the alleged confession was not made in the immediate presence of a Magistrate. Therefore, in view of Section 26 of the Evidence Act the statement purporting to be the confession is inadmissible in evidence, as the same cannot be proved against the accused/appellant. Section 26 of the Evidence Act reads as follows:-

“26. Confession by accused while in custody of police not to be proved against him.- No confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.”

22. The Court below has also considered the circumstance of abscondance of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against

the doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. Thus, mere abscondance of the appellant cannot be taken as a circumstance which give rise to draw an adverse inference against him.

23. For the foregoing reasons, we are of the considered view that none of the circumstances relied on by the prosecution in the instant case has been proved and they do not form a complete chain unerringly proceeding towards the appellant as an author of the crime. It does not exclude hypothesis of innocence in favour of the appellant.
24. In the result, the appeal is allowed. Impugned judgment of the trial Court is hereby set aside. The appellant is acquitted of the charge under Section 302 IPC. The appellant is reported to be on bail. His bail bonds stand discharged.

(Pritinker Diwaker)
Judge

(RP Sharma)
Judge

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