

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 632 of 2008

1. Somaru, son of Amso, aged 45 years, Occupation : Agriculturist,
2. Guddu @ Bhutung, son of Somaru, aged about 25 years, occupation : Agriculturist,
3. Lal Sai, son of Chindhwa, aged about 30 years, occupation : Agriculturist.

All are by caste : Pahadi, Korwa, resident of village Amadarha, P.S. Darima, Distt. Surguja (CG)

---- Appellants

Versus

- State Of Chhattisgarh through the police station Darima, Distt. Surguja (CG)

---- Respondent

For Appellants	:	Miss Neha Verma, Advocate.
For Respondent/State	:	Mr. Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment On Board By Justice Pritinker Diwaker

23/06/2017

This appeal arises out of the judgment of conviction and order of sentence dated 30.6.2008 passed by the Sessions Judge, Surguja (Ambikapur) in S.T. No.359/07 convicting the appellants under Sections 302/34 & 201 of IPC and sentencing each of them to undergo imprisonment for life, pay a fine of Rs.500/- and RI for three years, pay a fine of Rs.200/- with default stipulations respectively.

02. As per the prosecution case, about two weeks prior to 29.8.2007

daughter of appellant No.1 Somaru eloped with Sukhram and started living with him. About a week thereafter, the said daughter was recovered from the house of Gomna, brother of Sukhram and deceased Patwari. On 26.8.2007 said daughter of Somaru again left her house and the appellants apprehending that she must have gone to the house of Sukhram or Gomna, on 27.8.2007 went to the house of Sukhram, however, they could not get Sukhram. The appellants searched the house of Gomna but daughter of Somaru could not be found there also. Thereafter, the accused/appellants left his house by extending threat that out of six brothers (Gomna and five others) one would be subject to any incident. Further case of the prosecution is that on 27.8.2007 one Gyan Prakash (PW-1) saw three accused persons and the deceased going towards the dam and on the next day naked dead body of the deceased was found in the dam. Merg intimation Ex.P/14 was recorded on 28.8.2007 at the instance of PW-3 Gomna. Inquest on the dead body was conducted on 28.8.2007 vide Ex.P/2 and then it was sent for postmortem which was conducted on 29.8.2007 by PW-8 Dr. BL Kaushal who apart from other injuries noticed depressed fracture of skull bone and opined that the cause of death was asphyxia due to drowning and head injury and the death was homicidal in nature. On 31.8.2007 FIR (Ex.P/16) was registered against unknown person under Section 302 and 201 of IPC. On 1.9.2007 memorandum of the appellants were recorded vide Ex.P/3, P/5 and P/4 respectively and based on the memorandum of appellant No.1 Somaru, one stone of about 2 to 2 ½ kg was recovered from near the dam vide Ex.P/6. After filing of charge sheet, the trial Court framed charges against the accused persons under Sections 302/34 and 201

of IPC.

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 them as mentioned above. Hence this appeal.

05. Counsel for the appellants submits as under:

(i) that there is no eyewitness to the incident and the appellants have been convicted only on the basis of weak type of circumstantial evidence.

(ii) that the only piece of evidence against the appellants is the so-called statements of last seen by PW-1 Gyan Prakash and PW-3 Gomna.

(iii) apart from the evidence of last seen, seizure of stone vide Ex.P/6 has also been taken into consideration against the appellants but in absence of any FSL report or expert report, the same cannot be connected with the crime in question and it is of no consequence.

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

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

08. PW-1 Gyan Prakash is the alleged witness of last seen. He has stated that he knew the appellants by their face and not by name. He knew the deceased Patwari and his brother Gomna. On the date of incident when he along with his wife, neighbour Rajkumar and his wife were going to jungle, as it was raining they took shelter in the house of Gomna and there the accused persons came and 2-3 other ladies also came there. The accused persons had consumed liquor and threatened Gomna. He has further stated that thereafter the accused persons left the place and on the same day at about 4 pm when he was returning from jungle, he saw the accused persons and the deceased going towards the dam and all of them had consumed liquor. In cross-examination he has stated that in his diary statement he did inform the police that in his presence the accused persons threatened Gomna, however, if the same is not recorded he could not tell the reason.

09. PW-3 Gomna, brother of the deceased, has stated that on the date of incident at about 6 pm he saw his brother going towards the dam and ahead of him the accused persons were going. PW-2 Indruram is a witness of inquest. PW-4 Mitthuram, PW-5 Chhabinath and PW-6 Sangali, both witnesses of memorandum and seizure, have turned hostile. PW-7 Shambhu Prasad Gupta, Patwari, prepared the spot map Ex.P/10. PW-8 Dr. BL Koushal conducted postmortem on the body of the deceased and noticed depressed fracture on the skull bone, there was laceration below this fracture, which was caused by

some heavy object. In his opinion the cause of death was asphyxia due to drowning and head injury and the death was homicidal in nature. PW-9 Rameshwari Bai has turned hostile. PW-10 UL Dewangan recorded mere intimation. PW-11 Neeraj Chandrakar, investigating officer, has supported the prosecution case.

10. Indisputably, there is no eyewitness account of the incident in the present case and the entire case of the prosecution hinges upon the evidence of last seen by PW-1 Gyan Prakash and PW-3 Gomna, who have stated that they had seen the deceased last time alive in the company of the appellants.

11. In the matter of ***Rambraksh alias Jalim (supra)*** 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.

12. Likewise, in the case of ***Kanhaiya Lal (supra)*** 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.”

13. The other piece of evidence against the appellants is seizure of a stone at the instance of appellant No.1 but there is no FSL report or report of the expert to prove that blood was found on this article. Moreover, witnesses to the memorandum and seizure PW-5 and PW-6 have also not supported the prosecution case. As such, this circumstance has also not been proved to the hilt by the prosecution.

14. Thus having examined the facts and circumstances of the case in the light of above legal position, it will not be safe for us to hold the appellants guilty of the offence under Section 302/34 and 201 of IPC merely on the basis of evidence of last seen. Even otherwise, in absence of any positive evidence it cannot be held as to which of the three accused committed murder and the law does not permit us to assume many things which is not part of the evidence. Though the circumstances raise suspicion against the appellants but mere suspicion can not be the basis of conviction, howsoever strong it may be. Considering the over all nature and quality of evidence, we are of the opinion that the prosecution has not been able to prove its case beyond the shadow of reasonable doubt and as such, the trial Court has committed an illegality in convicting the appellants under Section 302/34 and 201 of IPC on the basis of such evidence. The appellants deserve to be acquitted of the said charge by giving them benefit of doubt.

15. In the result, the appeal is allowed. The impugned judgment is hereby set aside and the appellants are acquitted of charge under Sections 302/34 and 201 of IPC by extending them benefit of doubt. Appellants are reported to be on bail, therefore, their bail bonds stand discharged and they need not surrender.

Sd/

(Pritinker Diwaker)
Judge

Sd/

(R.C.S. Samant)
Judge