

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 166 of 2012**

- Madan @ Jitendra S/o Booti @ Bisun, Aged About 25 Years, R/o Gandhinagar Ward, Jagdalpur, District Bastar (Chhattisgarh).

---- Appellant**Versus**

- State Of Chhattisgarh Through Police Station Bodhghat, District Bastar Chhattisgarh.

---- Respondent**And****CRA No. 605 of 2012**

- Pintu @ Shiv Yadav S/o Nilamber, Caste Mahra, aged 24 years, R/o Gandhi Nagar, Ward Jagdalpur , Distt. Baster (C.G.)

---- Appellant**Vs**

- State Of Chhattisgarh Through - Police Station, Bodhghat, Distt. Bastar C.G.

---- Respondent

For Appellant in CRA No.166/2012	:	Shri Chandresh Shrivastava, Advocate.
For Appellant in CRA No.605/2012	:	Shri Rajesh Tiwari, Advocate.
For Respondent/State	:	Shri Rahul Tamaskar, P.L.

Hon'ble Shri Justice Pritinker Diwaker &
Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment On Board**By Pritinker Diwaker, J****11/04/2017**

As these two appeals arise out of the common judgment dated 11.10.2011 passed by the Sessions Judge, Bastar at Jagdalpur, in S.T. No.90/2008 convicting the accused/appellants under Section 302 read with section 34 of IPC and sentencing them to under to imprisonment for life with fine of Rs. 500/- each, in default of payment of fine amount

to further undergo S.I. for one month, they are being disposed of by this common judgment.

02. As per the prosecution case, on 06.04.2008 deceased Sandeep @ Golu was watching television in the house of her aunt and from there he was taken by the accused/appellants and two minor accused namely Suresh and Bhushan @ Bablu. Further case of the prosecution is that the deceased did not return to his house and on 08.04.2008 his dead body was found near the railway track. Dehati merg Ex.P/7 was recorded on 08.04.2008 at 02.05 pm and thereafter merg intimation Ex.P/8 was recorded on the same day. Inquest on the body of deceased was conducted on 08.04.2008 vide Ex.P/16 and thereafter dead body was sent for postmortem to Maharani Hospital, Jagdalpur vide Ex.P/17. On the same day, postmortem examination on the body of deceased was conducted by Dr. P.L. Meriya (PW/4) who gave his report Ex.P/1 opining the cause of death to be brain hemorrhage due to injury on right frontal head and death was accidental in nature. On 17.04.2008, case diary statement of Anita Nair (PW/2) was recorded wherein she, for the first time, disclosed the fact that the accused persons came to her house and took the deceased along with them on 06.04.2008. Memorandum of co-accused Bhushan @ Bablu was recorded vide Ex.P/11, based on which 13 kg copper wire was seized vide Ex.P/12, and it is that copper wire which was stolen by the accused persons and some dispute took place between them over sharing of profit. After merg inquiry, F.I.R. (Ex.P/9) was registered on 23.04.2008 against the present appellants and two other accused persons under Section 302/34 of IPC. After

investigation, charge sheet was filed against the accused/appellants under Section 302/34 IPC and accordingly charges were framed against them by the trial Court.

03. So as to hold the accused/appellants guilty, the prosecution examined as many as 08 witnesses. Statements of the accused/appellants 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 has convicted and sentenced the accused/appellants as mentioned in para 1 of this judgment. Hence, this appeal.

05. Learned counsel for the appellants submits as under:-

- That the appellants have been convicted solely on the theory of last seen by Anita Nair (PW/2). It has been argued that as per the statement of PW/2, on 06.04.2008 the accused persons came to her house and took the deceased along with them, whereas the body of deceased has been found near the railway track on 07.04.2008 and dehati merg thereof was recorded on 08.04.2008. It has been further argued that the time gap is an essential ingredient in the case of last seen and, in the present case, the prosecution has utterly failed to prove that the time gap between last seen and recovery was so short as to lead to only one presumption that it is the accused/appellants alone who could have committed murder of the deceased.
- Shri Chandresh Shrivastava, counsel for the appellant in

Cr.A.No.166/2012 submits that even the identification of the dead body is disputed because the same has been identified only on the basis of clothes and when the photograph of the dead body was shown to relatives, they have failed to recognize the same. He placed reliance on the decision in the matter of **Ravindra Parkash and Anr. Vs. State of Haryana**¹ and **Rambraksh @ Jalim Vs. State of Chhattisgarh**². Shri Rajesh Tiwari, counsel for the appellant in Cr.A.No.605/2012 placed reliance on the decision in the matter of **Bodh Raj @ Bodha and others Vs. State of Jammu and Kashmir**³.

- That but for the evidence of last seen by Anita Nair (PW/2) there is no other evidence on record and considering the said legal position, merely on the basis of evidence of last seen, the accused persons could not have been convicted;
- That prosecution has failed to prove the death of the deceased to be homicidal and it has been opined by the Doctor conducting autopsy that the death of deceased was accidental, and thus, in the facts and circumstances of the case, it cannot be said that it is the accused/appellants who have killed the deceased. It has been further argued that as per dehati merg (Ex.P/7), one Devnath saw the deceased meeting with the train accident, thus, preset is a case of pure accident and not murder, as has been projected by the prosecution. Lastly, it has been argued that the appellants are in jail since last eight and half years.

1 (2002) 8 SCC 426

2 (2016) 12 SCC 251

3 AIR 2002 SC 3164

06. Learned State counsel supporting the impugned judgment submits that the conviction of the appellants is in accordance with law and there is no infirmity in the same.

07. We have heard counsel for the parties and perused the material available on record.

08. Anita Nair (PW/2) is aunt of the deceased. She has stated that on 06.04.2008 when the deceased was watching television in her house, at about 9.00 pm the accused persons and two juvenile accused came in front of her house, accused Jitendra called the deceased by clapping to come with them, thereafter, deceased went along with them. At about 11.00 pm, mother of deceased came to her house and inquired about him (deceased), on which she replied that deceased had gone along with accused persons. Initially, they thought that the deceased might have gone in some vehicle as he used to do so. She has further stated that on the next morning, accused Jitendra came to her house, demanded water and asked about the deceased on which she told that deceased has not yet come. This witness has further stated that on the third day mother of the deceased came to her and both of them went to police station where they came to know that one unclaimed dead body was found and the same has been buried. On the basis of clothes, chain and bracelet they could identify the dead body to be that of the deceased- Sandeep @ Golu, however, from the photograph they could not identify the same. Here it is relevant to note that case diary statement of Anita Nair (PW/2) was recorded on 17.04.2008 and there is no explanation by the prosecution as to why this witness remain quiet till 17.04.2008.

09. Nisha Das (PW/1) is mother of the deceased. She has supported the statement of Anita Nair (PW/2). Even diary statement of this witness was recorded on 17.04.2008 i.e. after about 11 days from the date when the deceased was missing. Dr. P.L. Meriya (PW/4) conducted the postmortem on the body of deceased vide Ex.P/1 and found blister on all over body, formation of epidermal skin, lacerated wound in the size of 2 x 3 inch on right frontal head and liquid redish black discharge from wound. According to him, the cause of death is brain hemorrhage due to injury on right frontal head and the death was accidental in nature. Alim Khan (PW/7) recorded the First Information Report (Ex.P/9). Kaldiyus Xess (PW/08) is Investigating Officer who has duly supported the prosecution case.

10. Close scrutiny of the evidence makes it clear that but for evidence of last seen of Anita Nair (PW/2) there is absolutely no other evidence against the accused/appellants to prove their complicity in the crime in question. It is well settled position of law that the conviction cannot be recorded against the accused merely on the ground that accused was last seen with the deceased. In other words, conviction cannot be based on the only circumstance of last seen together and normally the Court is required to look for some other corroborative piece of evidence. Most importantly, the theory of last seen comes into play where the time gap, between the point of time when accused and deceased were seen last alive and when the deceased found dead, is so small that possibility of any person other than accused being the perpetrator of crime, becomes impossible.

11. In the present case, as per the evidence of Anita Nair (PW/2) on

06.04.2008 deceased went along with the accused persons and as per dehati merg (Ex.P/7) recorded on 08.04.2008, his dead body was found on 07.08.2008 near railway track. This apart, there is no other corroborative piece of evidence on record showing the involvement of the accused/appellants in commission of crime beyond reasonable doubt. In the facts and circumstances of the case, we find it difficult to support the impugned judgment recording conviction of the accused/appellants.

12. It is by now well settled that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

13. Yet another aspect of the case is that as per the autopsy surgeon PW/4, the death of deceased was accidental in nature. The prosecution, in order to convict the accused/appellants, was required to prove the death of deceased to be homicidal in nature, which is another important feature of the case, but the prosecution has failed to do so. That apart,

as per the contents of dehati merg (Ex.P/7), one Devnath - employee of the Railway had seen the accidental death. It is relevant to note that the said Devnath was a listed witness but has not been examined by the Court below.

14. Thus, considering the evidence collected by the prosecution, this Court is of the opinion that conviction of the accused/appellants under Section 302/34 IPC is not based on due appreciation of the evidence available on record and that being so they are entitled for benefit of doubt. Consequently, the judgment impugned convicting the accused/appellants under Section 302/34 IPC is set aside and they are hereby acquitted of the charge levelled against them. The appellants are in jail, they be set at liberty forthwith if not required in any other case.

15. Appeals are thus allowed.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(R.C.S. Samant)
JUDGE