

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 147 of 2010

1. Manoj Choubey, son of Satyanarayan Choubey, aged 34 years,
2. Raju @ Pradeep Choubey S/o Satyanarayan Choubey, aged 27 years,

Both R/o Vill. Birkoni, Police Outpost- Naila, PS Jangir, Janjgir Champa (CG)

---- Appellants

Versus

- State Of Chhattisgarh through Police Outpost-Naila, P.S. Janjgir, Distt. Janjgir-Champa (CG)

---- Respondent

For Appellants	:	Shri VC Ottalwar, Advocate.
For Respondent/State	:	Smt. Smita Ghai, Panel Lawyer.

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

Judgment On Board By Justice Pritinker Diwaker

30/11/2017

This appeal arises out of the judgment of conviction and order of sentence dated 3.2.2010 passed the Additional Sessions Judge, Janjgir, Distt. Janjgir-Champa in S.T. No.150/2009 convicting the appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for life and pay a fine of Rs.1000/- with default stipulation.

02. As per the prosecution case, on 4.3.2009 in between 6-7 pm deceased Ghanshyam Singh had gone to the shop of appellant No.1 Manoj Choubey and when he did not return for about 2-3 hours, his

mother PW-7 Baidehibai went to the shop of Manoj Choubey. At that time, the deceased was sitting with Manoj Choubey and he promised his mother of returning soon, however, he did not return thereafter and ultimately, PW-7 slept in her house. Next morning at about 7.30 am, appellant Manoj Choubey went to the house of PW-7 and informed her about death of Ghanshyam Singh. Unnumbered merg intimation Ex.P/8 was recorded on 5.3.2009 at 11.30 am at the instance of PW-6 Prahlad Singh, cousin of the deceased. Thereafter numbered merg Ex.P/9 was also recorded on 5.3.2009 at 1.10 pm. Inquest on the dead body was conducted on 5.3.2009 vide Ex.P/2 and thereafter the body was sent for postmortem which was conducted on the same day vide Ex.P/5 by PW-3 Dr. Sandeep Kumar Sahu. The autopsy surgeon noticed diffused contusions over chest, lower portion of abdomen and multiple lacerations in the liver. In his opinion, the cause of death was extensive liver injury caused by hard and blunt object resulting in massive internal hemorrhage and the mode of death was syncope. However, the nature of death could not be determined. Nothing was done for about 20 days and on 25.3.2009 a typed written report Ex.P/15 was lodged by PW-7 Baidehibai alleging in it that after death of her son she had sent her nephew Prahlad (PW-6) for lodging report but the same was not registered and she has suspicion over the appellants that they have committed murder of her son due to some money dispute. In the said written report she has stated that on 8.3.2009 appellant No.2 Raju Choubey, brother of appellant No.1 Manoj Choubey, had come to her and offered two canes of oil and Rs.1000/- for performing last rites of her son and when she refused the same, he went back. After receiving written report and upon completion of merg

enquiry and postmortem, FIR (Ex.P/22) was registered on 27.3.2009 under Section 302 of IPC against unknown person. On 10.5.2009 memorandum of appellant Manoj was recorded vide Ex.P/16 which led to recovery of a bamboo stick vide Ex.P/18. Likewise, memorandum of appellant Raju Choubey recorded on 10.5.2009 (Ex.P/17) led to recovery of one stone of about 10 kg. However, there is no FSL report. After filing of charge sheet, the trial Court framed charge under Section 302/34 of IPC against the appellants.

03. So as to hold the accused/appellants guilty, the prosecution examined 12 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 can be drawn has been proved beyond reasonable doubt and therefore, there can be no inference that it were the appellants who committed murder.

(ii) though on the memorandum of the appellants, certain seizures have been effected but in absence of report of the chemical examiner, the same lose its significance.

(iii) that there is inordinate delay in lodging the FIR by the

complainant PW-7. Had the facts as narrated in the written report (Ex.P/15) were within the knowledge of PW-7, the same should have been disclosed by her soon after the incident to the police authorities but it has not been done.

(iv) that the so-called statement of accused/appellant Raju @ Pradeep before PW-4 Shivraj Singh and PW-8 Sarita Singh implicating appellant Manoj is inadmissible under the law.

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

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

08. PW-1 Bharat Singh is a witness to inquest Ex.P/2 and spot map Ex.P/3. In cross-examination he admits that the deceased used to consume liquor excessively and that family members of the deceased had suspicion that he might have fallen under the influence of liquor and died as a result thereof. PW-2 Rajkumar Kenwat has not supported the prosecution case and turned hostile. PW-3 Dr. Sandeep Kumar conducted postmortem on the body of the deceased on 5.3.2009 vide Ex.P/5 and noticed diffused contusions over chest, lower portion of abdomen and there were multiple lacerations in the liver. In his opinion, the cause of death was extensive liver injury caused by hard and blunt object resulting in massive internal hemorrhage and the mode of death was syncope. However, the nature of death could not be determined. He has admitted the fact that if one who consumes

liquor excessively or has internal ailments, falls down, the possibility of occurrence of such lacerations cannot be ruled out. In para-8 he has stated that though in his query report Ex.P/6 he has stated there is more possibility of the death being homicidal but at the same time has stated that the possibility of it being accidental one can also not be ruled out.

09. PW-4 Shivraj Singh has stated that when appellant Raju came to Rajkumar, he was also present there. There appellant Raju informed Rajkumar that he has suspicion over appellant Manoj that he might have committed murder of the deceased. PW-5 Bhuneshwar Panda, Police Constable, helped in the investigation. PW-6 Prahlad Singh lodged unnumbered merged intimation Ex.P/8, is a witness to inquest Ex.P/2 and spot map Ex.P/3.

10. PW-7 Baidehibai, mother of the deceased and main witness of the prosecution, states that on 4.3.2009 at about 6 pm deceased left his house by saying that he is going to accused/appellant Manoj. When he did not return till 9 pm she went to the shop of Manoj and there she saw accused Manoj and the deceased sitting together and that the deceased promised her that he would be returning soon but he did not return. Then she returned and slept in her house and next morning at about 7.30 am accused Manoj came to her house and informed about death of the deceased. She states that on the third day of the incident, accused/appellant Raju @ Pradeep came to her and informed that it is appellant Manoj who killed the deceased and requested her not to disclose her name and in lieu of that he would give her two canes of oil and one thousand rupees. He also threatened her of dire

consequences if she disclosed his name. She has further stated that her statement was not recorded by the police though she went to police station three-four times for giving her statement and therefore, after about 20 days of the incident she made a typed written complaint Ex.P/15. She admits that on the third day ceremony of the deceased she did not disclose anything to anyone and that relations between the appellant Manoj and the deceased were very cordial.

11. PW-8 Sarita Singh, wife of the deceased, has stated that on the 3rd day of the incident accused/appellant Raju came to her mother-in-law and offered two canes of oil and Rs. 1000/- and further informed her that it is appellant Manoj who killed the deceased. PW-9 Chandrashekhar Singh Chandel and PW-12 Durga Singh are the witnesses to memorandum of the appellants Ex.P/16 & P/17 and seizure Ex.P/18 & P/19. PW-10 Harprasad Pandey, investigating officer, has supported the prosecution case. PW-11 Ashok Singh Raj, Patwari, prepared the spot map Ex.P/13.

12. Close scrutiny of the evidence makes it clear that but for the statement of PW-7 Baidehibai, mother of the deceased, there is no other legally admissible evidence. However, the evidence of PW-7 also does not inspire confidence and appears to be doubtful because she kept quiet for a considerable period of 20 days after the death of her son. In her typed written report Ex.P/15 she has stated that after death of her son she had sent her nephew Prahlad (PW-6) for lodging report but the same was not registered and she has suspicion over the appellants that they have committed murder of her son due to some money dispute. In the said written report she has stated that on

8.3.2009 appellant No.2 Raju Choubey, brother of appellant No.1 Manoj Choubey, had come to her and offered two canes of oil and Rs.1000/- for performing last rites of her son and when she refused the same, he went back. If all these facts were within the knowledge of this witness she would have disclosed all these things to the police immediately because she had enough opportunity to do so. However, she made a written complaint only on 25.3.2009 and thereafter her statement under Section 161 was recorded on 28.3.2009. Further, according to her she saw the deceased last time alive in the company of the appellant Manoj at about 9 pm on 4.3.2009 whereas body of the deceased was found next morning at 7.30.

13. 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.

14. 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.”

15. In the present case, the deceased is said to have been last seen alive in the company of appellant Manoj by PW-7 Baidehibai at 9 pm in his house whereas his dead body was seen on the next day at 7.30 am near the brook and further there is no evidence that the deceased and the appellant Manoj were seen near the brook on the date of incident. As such, the evidence of last seen does not appear to be conclusive in nature.

Even the prosecution has failed to attribute any motive to the appellants. According to PW-7 relations between the deceased and appellant Manoj were very cordial. As regards seizure of certain articles at the instance of the appellants, though the witnesses to the memorandum and seizure have supported the prosecution case but there is no report of the chemical examiner to confirm that it was having any blood, that too of the group of the deceased and as such, could lead to an inference that these articles had any nexus with the crime in question.

16. 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.”

17. So far as statement of appellant Raju @ Pradeep before PW-4 & PW-8 implicating appellant Manoj in the crime in question is concerned, the same has no evidentiary value under the law and therefore, no inference of guilt could be drawn on the basis of such evidence. This apart, medical evidence in this case is also not conclusive. PW-3 Dr. Sandeep Kumar, the autopsy surgeon, could not determine the nature of death. He has admitted the fact that if one who consumes liquor excessively or has internal ailments, falls down, the possibility of occurrence of such lacerations as were noticed on the person of the deceased cannot be ruled out. He has also admitted the fact that though there is more possibility of the death being homicidal but at the same time has stated that the possibility of it being accidental one can also not be ruled out.

18. Thus considering the overall facts and circumstances of the case in light of above legal position, the nature and quality of evidence adduced, we are of the opinion that the prosecution has not been successful in proving the guilt of the appellants on the basis of evidence adduced by it beyond reasonable doubt. Though the

circumstances raise suspicion against the appellants but mere suspicion can not be the basis of conviction, howsoever strong it may be. Being so, the trial Court has committed an illegality in convicting the appellants under Section 302/34 of IPC on the basis of such evidence. The appellants deserve to be acquitted of the said charge by giving them benefit of doubt.

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

Sd/

(Pritinker Diwaker)
Judge

Sd/

(Arvind Singh Chandel)
Judge