

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 330 of 2010**

- Belasiya Bai, aged 27 years, Wd/o Brijlal Panika, R/o village - Dadiya, P.S. Marvahi, District - Bilaspur (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : P.S. Marvahi, District Bilaspur (C.G.)

---- Respondent**And****CRA No. 339 of 2010**

- Ashok Kumar S/o Chamruram Panika, aged about - 22 years, R/o village - Dadiya, Police Station - Marwahi, District Bilaspur.

---- Appellant**Vs**

- State of Chhattisgarh Through : Police Station Marwahi, District Bilaspur (C.G.)

---- Respondent

For Appellant in CRA No.330/2010	:	Shri Dheerendra Mishra, Advocate.
For Appellant in CRA No.339/2010	:	Shri Dharmesh Shrivastava, Advocate.
For Respondent/State	:	Smt Madhunisha Singh, PL.

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

Judgment On Board**By Pritinker Diwaker, J****11/12/2017**

As these two appeals arise out of the common judgment dated 25.03.2010 passed by the Additional Sessions Judge (FTC), Pendra

Road, District Bilaspur, in S.T. No.50/2009 convicting the accused/appellants under Sections 302, 302/34, 201 of IPC and sentencing each of them to undergo imprisonment for life with fine of Rs. 100/- and R.I. for one year with fine of Rs.400/- respectively, plus default stipulations, they are being disposed of by this common judgment.

02. As per the prosecution case, accused/appellant Ashok Kumar in Cr.A.No.339/2010 was having illicit relation with accused/appellant Belsiya Bai, wife of deceased Brijlal, in Cr.A.No.330/2010. As the deceased could come to know about illicit relation of the accused persons, in the night intervening 28.02.2009 and 01.03.2009, accused/appellants decided to eliminate deceased Brijlal and then they killed him by causing injuries and threw his body in a dry well near the house of the deceased. On 01.03.2009 at 9.30 am, merg intimation (Ex.P/1) was recorded by Sendlal (PW/1), father of the deceased. On 01.03.2009, inquest on the body of deceased was conducted vide Ex.P/10 and body was sent for postmortem examination to Community Health Center, Marwahi where Dr. B.S. Painkra (PW/12) conducted postmortem on the body of deceased and gave his report Ex.P/11 noticing following injuries:-

- (i) Contusion mark in the size of 5 x 3 cm over right side of back of chest.
- (ii) Contusion with abrasion in the size of 4 x 3 cm over left side of back of chest.
- (iii) Contusion mark in the size of 5 x 4 cm over mid of back of chest.
- (iv) Contusion mark in the size of 10 x 4 cm over right side of back.

The Autopsy Surgeon opined the cause of death of deceased to be coma due to head and chest injuries and death was homicidal in nature.

03. After receiving postmortem report and conducting merg inquiry, FIR (Ex.P/9) was registered on 21.04.2009 under Section 302 of IPC against an unknown person. On 09.08.2009, memorandum of accused/appellant Ashok (A-1) was recorded vide Ex.P/5 wherein he is said to have admitted that he had illicit relation with accused/appellant (A-2) and on the date of incident both of them committed murder of the deceased and threw his dead body into a well. Based on this memorandum, seizure of iron rod was made vide Ex.P/6, however, there is no FSL and Serological reports on record to confirm presence of blood thereon and its origin. After filing of charge sheet, the trial Court framed charge under Sections 302, 302/34 and 201 of IPC against the accused/appellants.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 12 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.

05. 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.

06. Learned counsel for the appellants submit :-

- That there is no eye-witness to the occurrence and conviction of the appellants is based on circumstantial evidence but none of the circumstance from which the inference of guilt of the appellants can be drawn has been proved beyond reasonable doubt and, therefore, there can be no inference that it was the appellants who committed the murder of the deceased.
- That the main piece of evidence relied upon by the trial Court against the accused/appellants is so called statement of last seen by Guddi Bai (PW/2), however, this witness has seen the appellants alone near the well and not deceased along with them. It has been further argued that the said well was near the house of accused/appellant- Belasiya Bai in Cr.A.No.330/2010 and likewise the house of other accused/appellant - Ashok Kumar in Cr.A.No.339/2010 was also near the said well and, therefore, there was nothing unusual if they were standing near the said well.
- That the diary statement of Guddi Bai (PW/2) was recorded on 08.08.2009, whereas according to her own statement, she was interrogated by the police immediately after the incident.
- That the well was not surrounded by parapet and thus accidental death of the deceased cannot be ruled out and even this fact has also been admitted by the Autopsy Surgeon.

07. On the other hand, supporting the impugned judgment it has been argued by the State counsel that conviction of the accused/appellants is in accordance with law and there is no infirmity in the same.

08. We have heard counsel for the parties and perused the material

available on record.

09. Guddi Bai (PW/2) has stated that on the date of incident she saw the accused/appellants near the well of the deceased. She has further stated that on the second day, accused/appellant - Ashok Kumar in Cr.A.No.339/2010 threatened her not to disclose the incident to anyone otherwise she (this witness) would be killed. This witness has admitted that the dwelling units of accused/appellants are near the well. She further states that after three days of the incident, she was called by the police and the statements of the accused persons were also recorded. She has also stated that after about a month of the incident, she was again called by the police and her statement was recorded. It is relevant to note here that the diary statement of this witness was recorded on 08.08.2009 and not on the third day or even after a month of the incident as deposed by her. This witness further admits that as accused persons were relatives, they used to talk with each other.

10. Sendlal (PW/1), lodger of merg intimation (Ex.P/1), has not stated anything specific against the accused/appellants.

11. Chandrawati (PW/3) is mother of the deceased. She has stated that as the appellants were having illicit relation, she had suspicion in her mind.

12. Sona Bai (PW/4) has stated that a day prior to the incident, father of deceased was sitting in her house and at that time the deceased had also come there for having liquor from her.

13. Manishankar (PW/7) and Asha Ram (PW/11) have stated that the well in which the deceased is said to have died after falling was not surrounded by parapet.

14. Indrasen (PW/8) is witness to memorandum (Ex.P/5) and seizure of iron rod vide Ex.P/6.

15. S.L. Patle (PW/9) - Investigating Officer has duly supported the prosecution case. Shiv Prasad Tiwari (PW/10) - Head Constable assisted in the investigation.

16. Dr. B.S. Painkra (PW/12) is the witness who conducted postmortem examination on the body of deceased and gave his report Ex.P/11 opining the death of deceased to be coma due to head and chest injuries and death was homicidal in nature. This witness has stated that if somebody would fall in a well, the injuries sustained by the deceased could have been caused.

17. Close scrutiny of the evidence makes it clear that though the body of deceased Brijlal was found in a well near his house where accused/appellants were said to have seen together talking but there is no conclusive piece of evidence on record showing their involvement in commission of offence and their conviction is based on statement of last seen by Guddi Bai (PW/2), star witness of the prosecution, recovery of iron rod at the instance of accused/appellant - Ashok allegedly used in the commission of offence and motive i.e. illicit relation between the appellants.

18. 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.

19. Likewise, in the case of ***Kanhaiya Lal*** 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.”

20. In the instance case, according to evidence of Guddi Bai (PW/2), she has merely seen the accused/appellants standing near the well and the said well was near the house of accused/appellant No.2 Belsiya Bai and the deceased, whereas another accused/appellant Ashok was also residing near the said well. Thus, presence of the accused/appellants near the well talking to each other cannot be termed as unusual because of their being relatives (neighbourer). Further, careful reading of evidence of PW/2 goes to show that she did not see the accused/appellants and the deceased together near the well, rather she saw the appellants together talking to each other. The evidence of PW/2 in respect of seeing the accused/appellants together near the well where body of deceased was found is not very conclusive in nature and merely on the basis of her statement regarding last seen, it cannot be said with certainty that it is the accused/appellants who had committed murder of the deceased, as has been observed in the aforesaid judgments, and we are to further see whether this evidence of last seen is consistent with other evidence adduced by the prosecution.

21. According to evidence of PW/3, mother of the deceased, as the accused persons used to talk each other and they had illicit relation, she had suspicion in her mind. Expect this, she has not stated anything specific against the accused persons which could bring home their guilt. We are not very much impressed on the evidence of this witness for the

reason that she has simply stated that she saw the accused/appellants together near the well.

22. The other evidence adduced against the appellant is the recovery of iron rod made by the police on the basis of memorandum (Ex.P/5) of accused/appellant Ashok Kumar is not significant to the case of the prosecution because the same was not subjected to the chemical examination, either the forensic test or serological test.

23. So far as motive i.e illicit relation attributed to the appellants is concerned, it has come in the evidence that there was illicit relation between the accused/appellants and appellant Belasiya Bai, wife of deceased, earlier tried to eliminate him, but merely on this basis it would not be safe for us to hold the appellants guilty for commission of offence unless being corroborated by the substantive piece of evidence.

24. Though the facts involved in the case and the evidence on record give rise to the suspicion about the involvement of the accused/appellants in the crime in question, in a series of cases it has been held by the Apex Court that howsoever strong the needle of suspicion moves, it cannot take the place of the evidence. One such judgment of the Apex Court dealing with this fact is **Commissioner of Police, Delhi & Others V. Jai Bhagwan** reported in **2011 (6) SCC 376**.

25. Thus, considering the quality of evidence collected by the prosecution, this Court is of the opinion that conviction of the accused/appellants under Sections 302, 302/34 and 201 of 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 Sections

302, 302/34 and 201 of IPC is set aside and they are hereby acquitted of the charges levelled against them. Accused/appellants in both the criminal appeals are on bail, their bail bonds stand discharged.

26. Appeals are thus allowed.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Arvind Singh Chandel)
JUDGE