

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 832 of 2011**

(Arising out of judgment/order dated 30.07.2011 in S.T. No.36/2010 of the learned Additional Sessions Judge, Gariyaband)

- Toran @ Turum @ Turun S/o Burlaram Gond (Manjhi), aged about 25 years, R/o village - Chhindauli, Police Station-Chhura, District - Raipur (C.G.)

---- Appellant**Versus**

- State Of Chhattisgarh Through The Station House Officer, Arakshi Kendra Chhura, District Raipur.

---- Respondent

For Appellant	:	Shri Bharat Rajput, Advocate
For Respondent/State	:	Shri Vivek Sharma, Govt. Advocate and Smt. Smita Ghai, P.L.

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

Judgment On Board**By Pritinker Diwaker, J****25/09/2017**

This appeal arises out of the judgment of conviction and order of sentence dated 30.07.2011 passed by the Additional Sessions Judge, Gariyaband District Raipur, in S.T. No.36/2010 convicting the appellant under Section 302 IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs.100/-, in default of payment of fine amount to undergo S.I. for ten days.

02. In the present case, name of the deceased is Pansingh, maternal uncle of the appellant. It is said that in the night

intervening 4-5/06/2010, the accused/appellant and the deceased after having their meals with other family members, slept in veranda, whereas two other auto drivers were sleeping adjacent to the said veranda. On 05.06.2010, when Neelambar Yadav (PW/4) tried to wake up the deceased, at the relevant time he was found dead. Thereafter, the appellant and Vidyadhar (PW/1) had gone to the police station where at the instance of PW/1, mere intimation (Ex.P/2) was recorded on 05.06.2010 at 10.00 am. Immediately thereafter on 10.10 am, FIR (Ex.P/1) was registered against an unknown person under Section 302 IPC. Inquest on the body of deceased was conducted on 05.06.2010 and body of deceased was sent for postmortem examination to Community Health Center, Chhura vide Ex.P/16-C where Dr. S.P. Prajapati (PW/10) conducted postmortem on the body of deceased and gave his report Ex.P/16 opining the cause of death to be asphyxia and haemorrhage due to incised wound on neck and death was homicidal in nature. On 06.06.2010 itself, memorandum of accused/appellant (Ex.P/8) was recorded, based on which, axe under Ex.P/10, vest & gamcha under Ex.P/11 were seized respectively and as per FSL report (Ex.P/24), blood has been found on the seized articles, however, there is no serological report on record to confirm origin of blood group. After filing of the charge sheet, the trial Court framed the charges against the accused/appellant under Section 302 IPC.

03. So as to hold the accused/appellant guilty, the

prosecution examined as many as 18 witnesses. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him 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 appellant as mentioned in para 1 of this judgment. Hence, this appeal.

05. Learned counsel for the appellant submit:-

- That the appellant has been convicted solely on the basis of circumstantial evidence but the nature of circumstantial evidence relied upon by the prosecution are not of such nature which can be made basis for his conviction.
- That the main piece of evidence against the appellant is recovery of bloodstained axe, vest and gamcha vide Ex.P/10 and P/11 in pursuance of his memorandum (Ex.P/8) but in absence of serological report confirming the origin of blood, mere recovery of bloodstained articles at the instance of the appellant is not alone sufficient to hold him guilty for the offence like murder.
- That another piece of evidence relied upon by the trial Court against the accused/appellant is so called statement of last seen by Vidyadhar (PW/1) and

Neelambar (PW/4), but it has come in the evidence that apart from the appellant, other person were also sleeping under the same roof thus it cannot be said that it is the accused/appellant who had committed murder of the deceased. Lastly, it has been argued that the accused/appellant is in jail for the last more than seven years.

06. On the other hand, supporting the impugned judgment it has been argued that conviction of the appellant is in accordance with law and there is no illegality or infirmity in the same.

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

08. Vidyadhar (PW/1) is son of the deceased and cousin of the appellant. He has stated that on the night of incident accused/appellant and the deceased slept in an open varanda and at about 10.00 in the night when he return from outside, he slept in outside of his house. He has further stated that next morning he was informed that his father had been killed. Thereafter, panchas of the village were called and all of them had gone to police station to lodge the merg intimation and FIR. He is also a witness to inquest (Ex.P/5) but subsequently declared hostile. He states that in his presence no quarrel took place between the appellant and the deceased and he was informed by his grand mother that the accused/appellant and

the deceased had quarreled in the night. He has categorically stated that he has not seen the appellant committing any offence and some unknown person might have killed the deceased.

09. Umen Gond (PW/2), witness to inquest (Ex.P/5), memorandum (Ex.P/8) and seizure Ex.P/9, P/10 and P/11, however, he has not supported the memorandum and seizure thereof.

10. Kam Singh (PW/3), witness to memorandum (Ex.P/8) and seizure Ex.P/9, P/10 and P/11, has fully supported the prosecution case.

11. Neelambar Yadav (PW/4) is witness to inquest Ex.P/5. He has stated that in the night in question he stayed in the house of deceased Pan Singh where he slept along with Pantu and other family members and on the next morning he came to know about the death of deceased. He has further stated that two other persons (auto rickshaw drivers) were also sleeping outside the house of deceased. This witness has stated that he never informed in his diary statement that there was some dispute between the appellant and the deceased over agricultural land.

12. Heeralal (PW/5) and Shobharam (PW/6) are the witnesses to inquest Ex.P/5. Bhupendra (PW/7), Kunwar Singh (PW/8), Jeevan Banjare (PW/15) and Lakheshwar (PW/16) are the Constables who have assisted in the investigation. Dr. G.L. Tandon (PW/9) examined the accused/appellant vide Ex.P/15

and noticed old burn scar on left knee joint.

13. Dr. S. P. Prajapati (PW/10) conducted postmortem examination on the body of deceased vide Ex.P/16 and noticed following injuries:-

- (i) Sharp cutting incised wound of 2" x 1" x 3" over left side of neck.
- (ii) Sharp cutting incised wound of 3" x 1" x 3.5" on front of neck, middle part just above the both sternal end of clavicles with cutting of trachea.

The autopsy surgeon opined the cause of death to be asphyxia, cardio respiratory arrest and hemorrhage due to incised wound on neck and death was homicidal in nature.

14. Supetram (PW/11) and Bheem (PW/12) turned hostile. Goverdhan Singh (PW/17) is Patwari who prepared spot map vide Ex.P/7. Y.D. Dhruv (PW/18) - Investigating Officer has duly supported the prosecution case.

15. Close scrutiny of the evidence makes it clear that there is no legally admissible evidence showing involvement of the accused/appellant in the commission of offence and the appellant has been convicted mainly on the basis of last seen evidence, and recovery affected vide Ex.P/10, P/11 on the basis of memorandum of accused/appellant Ex.P/8.

16. It is well settled position of law that the conviction cannot be recorded against an 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. In the matter of **State of Goa V. Sanjay Thakran**¹, Supreme Court has held as under:-

“In the light of the factors that evidence regarding the recovery of the incriminating materials from the accused persons has been discarded; that there has been sufficient time gap between the instances when the accused persons were last seen together with the deceased persons; and in the absence of any other corroborative piece of evidence to complete the chain of circumstances to fasten the guilt on the accused couple, we are of the opinion that the accused have been rightly given the benefit of doubt by the courts below. We have found that the finding of the High Court that the chain of circumstances is not complete to conclusively establish that either A-1 or A-2 alone or with the common intention of each other have committed the dreadful crime of murder of newly married couple, is correct and merely suspicion, however grave, cannot replace the weight attached to the evidence”.

17. In the present case, PW/1 and PW/4, so called witnesses to last seen have stated that on the night of incident the appellant

1 2007 (3) SCC 755

and the deceased were sleeping in the varanda, PW/1 had slept out of his house and PW/4 along with Pantu and other family members had slept inside the room. Both these witnesses have not fully supported the prosecution case and entire reading of their statements do not establish the fact of their being the witnesses to last seen. Most importantly, apart from the appellant and the deceased, there were several other members sleeping in the house or even outside the house. Thus, the possibility of killing the deceased by someone else cannot be ruled out.

18. Another piece of evidence against the accused/appellant is the seizure of bloodstained axe (Ex.P/10), vest and gamcha (Ex.P/11) on the memorandum of the appellant Ex.P/8, however, there is no serological report confirming the origin of blood group that too of the blood group of the deceased. As such, seizure of axe, gamcha and vest is alone not sufficient to hold the accused/appellant as perpetrator of offence. .

19. 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 clothes 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.

20. Thus, considering the evidence collected by the prosecution, this Court is of the opinion that conviction of the appellant under Section 302 IPC is not based on due appreciation of the evidence available on record and that being so, he is entitled for benefit of doubt.

21. Consequently, the appeal is allowed. The judgment impugned convicting the appellant under Section 302 IPC is set aside and he is hereby acquitted of the charge levelled against him, by extending him benefit of doubt. As the appellant is reported to be in jail, therefore, he be set at liberty forthwith, if not required to be detained in connection with any other case.

22. Appeal is thus allowed.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Ram Prasanna Sharma)
JUDGE