

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 844 of 2005

1. Phiruram Kewat S/o Ramulal Kewat, aged about 19 years.
 2. Maniram S/o Firatram Kewat, aged about 20 years.
 3. Dwarika Prasad S/o Dilchand Kewat, aged about 23 years.
- All R/o village Devraha, P.S. Bilaigarh, District Raipur (C.G.)

---- Appellants

Versus

- State Of Chhattisgarh Through : Police Station Bilaigarh, District Raipur (C.G.)

---- Respondent

For Appellants.	:	Shri Ashok Soni, Advocate.
For Respondent/State	:	Smt. Madhunisha Singh, P.L.

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

Judgment On Board

By Pritinker Diwaker, J

01/08/2017

This appeal arises out of the judgment of conviction and order of sentence dated 28.09.2005 passed by 2nd Additional Sessions Judge, Baloda Bazar, in S.T. No.59/2005 convicting the accused/appellants under Sections 302/34, 201/34 IPC and sentencing them to undergo imprisonment for life with fine of Rs.500/-, R.I. for five years with fine of Rs.500/- each, plus default stipulations.

02. In the present case, name of the deceased is Rishi Kumar. As per the prosecution case, aunt of accused/appellant No.3-Dwarika Prasad was teased by elder brother of deceased Rishi Kumar and some maarpeet had taken place between them, as a result of which

accused/appellant Dwarika (A-3) was annoyed with him. Accused/appellant Phiruram Kewat (A-1), Maniram (A-2) and deceased Rishi Kumar were close friends and it is said that on 18.11.2004, the accused/appellants took the deceased along with them towards river side to attend the call of nature and there they committed his murder by causing grievous injuries by axe, spade and lathi. After committing his murder, body of deceased was buried near the bank of Mahanadi river. On 25.11.2004, Omprakash (PW/1) saw the body of deceased near bank of river and accordingly he lodged merger intimation Ex.P/1 on 26.11.2004. Inquest on the body of deceased was prepared vide Ex.P/3 and body was sent for postmortem examination to Community Health Center, Bilaigarh where Dr. Narayan Singh (PW/7) conducted postmortem on the body of deceased and gave his report Ex.P/21 opining the cause of death of deceased to be shock due to head injury. After merger inquiry, FIR Ex.P/27 was registered on 27.11.2004 under Sections 302 and 201 IPC against an unknown person. On 03.12.2004 memorandum of accused/appellants Phiruram Kewat (A-1), Maniram (A-2) and Dwarika Prasad (A-3) were recorded vide Ex.P/6, P/8 and P/9 respectively, based on which, axe from A-1, spade from A-2 and club from A-3 were seized vide Ex.P/7, P/9-A and P/10 respectively. That apart, one half shirt and jeans were seized vide Ex.P/11 from accused/appellant Maniram (A-2), one full-pant and T-shirt were seized vide Ex.P/12 from accused/appellant Phiruram (A-1) and one full shirt and lungi were seized vide Ex.P/13 from accused/appellant Dwarika (A-3). Seized articles were sent for FSL, however, as per FSL report Ex.P/26 no blood was found on the articles

seized from the appellants. During investigation, diary statements of Omprakash (PW/1), Sukdev (PW/2), Maharshi Kumar Kawratya (PW/3) and Mahendra Kumar Kenwat (PW/9) were recorded on 27.11.2004 and 30.11.2004 respectively wherein they have stated that on 18.11.2004 they had seen the accused/appellants and the deceased together. In-fact, the entire case of the prosecution is based on statement of last seen made by these four witnesses.

03. On completion of investigation, charge sheet for the offence punishable under Sections 302/34, 201/34 IPC was filed against the appellants and accordingly charges were framed against them by the trial Court.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 10 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 all the appellants as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellants submits:

- That the appellants have been convicted solely on the basis of circumstantial evidence but the nature of circumstantial evidence is not as such which can be made basis for their conviction.
- That evidence of last seen by PW/1, PW/2, PW/3 and PW/9 is

doubtful.

- That the deceased went missing from 18.11.2004 but no missing report was lodged by any of the relatives of the deceased. Once the deceased was missing from 18.11.2004 & PW/1, PW/2, PW/3 and PW/9 alleged to have seen the deceased in the company of accused/appellants, in natural course, this fact would have been disclosed by them to the police and other villagers.
- That even in the mere intimation Ex.P/1 lodged by PW/1, date 18.11.2004 and the time 8.00 pm appears to have been added subsequently.
- Though on the basis of memorandum of the accused/appellants certain articles were seized but in absence of FSL and serological report, the said seizure is of no consequence as no blood has been found on it.

07. On the other hand, supporting the impugned judgment it has been argued by learned counsel for the State that conviction of the accused/appellants is strictly in accordance with law and there is no infirmity in the same. Learned State counsel submits that Omprakash (PW/1) has categorically stated that he had seen the deceased in the company of accused/appellant Phiruram Kewat (A-1) and there is no reason before this Court to disbelieve the same.

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

09. Omprakash (PW/1) - uncle of the deceased, has stated that on 18.11.2004 accused/appellant Maniram (A-2) took the deceased along

with him towards river and thereafter deceased did not return. He has further stated that on the second day missing report was lodged, however, it has been observed by the learned trial Court that no such missing report is on record. He has also stated that deceased was extensively searched and on 27.11.2004 his body was found half-buried near the bank of river. Sukhdev (PW/2) is the father of deceased who has stated that on 19.11.2004 he saw accused/appellant Maniram (A-2) and the deceased going towards the pond and after listening Ramayan he (this witness) returned to his house at around 12.00 in the midnight. He has also stated that when his son did not return, Maniram (A-2) was called but he showed his ignorance about the deceased. This witness has further stated that as his brother had lodged the missing report, therefore, he did not. Here it is relevant to note that no such missing report is on record. Maharshi Kumar Kaiwartya (PW/3) and Mahendra Kumar Kenwat (PW/9) have stated that on 28.11.2004 they had seen accused/appellant Phiruram Kewat (A-1) and Maniram (A-2) in the company of deceased. Shivnarayan (PW/4) is the witness to memorandum Ex.P/6 of accused/appellant Phiruram (A-1) and seizure thereof made thereunder vide Ex.P/7. Bhupendra Nath Sahu (PW/5) is the Patwari who prepared spot map Ex.P/19. Dr. Narayan Singh (PW/7) is conducted the postmortem on the body of deceased vide Ex.P/21 and found following injuries :

- (i) Hairs with skin, eyes, nose and maxillary bone were not present. Left bone of jaw was not present. Brain was empty.
- (ii) Little finger of left hand was thawed.

(iii) Testicle was not present and left parietal bone was fractured.

(iv) Right parietal bone was fractured.

The Doctor has opined that the cause of death of deceased was shock due to head injury and mode of death was homicidal in nature.

10. R.G. Soni (PW/8) is the Investigating Officer who has duly supported the prosecution case. As per the documents, seized articles i.e. axe, space, club, pants and shirt of the accused persons were sent for FSL, however, FSL report Ex.P/26 shows that no blood was found on the seized articles.

11. Close scrutiny of the evidence makes it clear that but for evidence of last seen by PW/1, PW/2, PW/3 and PW/9 there is no other evidence against the accused/appellants. The witnesses of last seen have stated that on 18.11.2004 they had seen the deceased in the company of accused/appellant Phiruram (A-1) and Maniram (A-2) but these witnesses kept quiet till 27.11.2004 and 30.11.2004 and for the first time in the diary statements they have disclosed this fact. The deceased was reported to be missing from 18.11.2004 and once this fact came within the knowledge of PW/1, PW/2, PW/3 and PW/9, in normal course, they could have disclosed the same to police but they did not do so. Even otherwise the evidence of last seen alone is not sufficient to convict a person unless some other corroborative evidence is there. The Supreme Court in the matters of **State of Goa V. Sanjay Thakran¹, Yusuf V. State of West Bengal², Anjan Kumar Sharma V. State of Assam³, Nijam V. State of Rajasthan⁴**,

1 2007 (3) SCC 755

2 AIR 2011 SC 2283

3 2017 SCC 622

4 AIR 2015 SC 3430

Kanhaiyalal V. State of Rajasthan⁵ and this Court in the matter of **Smt. Jiteshwari Bai V. State of CG**⁶ has held that while basing the conviction on the last seen theory, it is safer to look for corroboration from other circumstance and evidence adduced by the prosecution. In the instant case also though, PW/1-uncle of deceased has stated that he had lodged the missing report but the same is not available on record. Thus, in the absence of definite evidence that appellants and deceased were last seen together, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of the deceased. The trial Court while convicting and sentencing the accused/appellants has not considered the evidence of these witnesses in its proper perspective and thereby committed an illegality. It is the prosecution case that aunt of appellant No.3 was teased by elder brother of deceased and some maarpeet was taken place between the accused/appellant No.3 and deceased but the prosecution witnesses have nowhere uttered a single word about this dispute and there is no documentary and substantive piece of evidence on record which could have been made basis for their conviction.

12. Another piece of evidence against the accused/appellants is seizure made under Ex.P/7, P/9-A, P/10, P/11, P/12 and P/13 by which axe, spade, club and shirts, jeans, T-Shirt and pants of the accused/appellants have been seized but as per FSL report (Ex.P/26) no blood has been found on the seized articles. The prosecution has not been able to prove complete chain of circumstances to connect the accused/appellants in commission of crime. Taking the cumulative

5 2014 (4) SCC 715

6 2015 (S) SCC 393

effect of the evidence adduced by the prosecution, we are of the view that the trial Court has erred in law in convicting the accused/appellants under Sections 302/34 and 201/34 IPC.

13. Thus considering the evidence collected by the prosecution, this Court is of the opinion that conviction of the accused/appellants under Sections 302/34 and 201/34 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 Sections 302/34 and 201/34 IPC is set aside and they are hereby acquitted of the charge levelled against them. The appellants are on bail, their bail bonds stand discharged.

14. Appeal is thus allowed.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Ram Prasanna Sharma)
JUDGE