

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 142 of 2012**

- Ganesh Ram S/o Naiharsay Maghwar , R/o Village - Poota, Thana - Udaiur, Distt. Sarguja C.G.

---- Appellant**Versus**

- State Of Chhattisgarh, through Police Station Udaipur, Dist-Sarguja.

---- Respondent

For Appellant	:	Smt. Ranjana Jaiswal, Advocate
For Respondent/State:		Shri Dheeraj Wankhede, Government Advocate with Shri Aditya Sharma, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Sanjay Agrawal

Judgment On Board**07/10/2017****Sanjay K. Agrawal, J.**

1. This appeal is directed against judgment of conviction and sentence awarded by 1st Additional Sessions Judge, Ambikapur, in which, the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to life imprisonment and fine of Rs.500/- and in default to pay fine amount, the appellant shall suffer additional rigorous imprisonment for two months.

2. Brief facts, necessary for disposal of this appeal, are as under:

(a) It is the case of the prosecution that on the intervening night of 29.09.2009 and 30.09.2009 at about 4.00 am at village Puta (Patarapali), the appellant murdered his wife by strangulation and by causing injury by wooden stick.

(b) It is the admitted fact that the deceased was the wife of the appellant – Ganesh Ram and on fateful day, the game 'Karma' was being played in the house of Amresh Baiga where the mother of the appellant – Dulari Bai (P.W.3) and father – Naihar Sai (P.W.1) were present and they had participated in 'Karma'. Merg intimation (Ex.P.4) was lodged by the appellant on 30.09.2009 at 06.15 pm at the Police Station Udaipur. Thereafter, F.I.R. (Ex.P.12) was registered on 03.10.2009 at 12.30 pm by Bachha Yadav (P.W.9) against the appellant for the offence punishable under Section 302 of the I.P.C. Inquest was done vide Ex.P.2 on 30.09.2009 and Post-mortem on the dead body was conducted by Dr. A.R. Jayant (P.W.6) on 01.10.2009 vide Ex.P.5, in which, cause of death was opined to be Asphyxia due to strangulation and on account of injury suffered by deceased.

(c) The jurisdictional police submitted charge sheet against the appellant. Upon committal, the appellant abjured the guilt, pleaded innocence and led no evidence in defence whereas the prosecution, in order to bring home the appellant guilty, has examined as many as 10 witnesses and brought on record the documentary evidence, i.e., Ex.P.1 to Ex.P.18 in support of its case. The statement of the appellant/accused under Section 313 of the Cr.P.C. was recorded.

(d) The learned trial Judge, upon appreciation of the oral as well as the documentary evidence on record, found the appellant guilty for offence punishable under Section 302 of the I.P.C. and sentenced him for the period already mentioned in the open paragraph of the judgment, against which, this appeal has been preferred by appellant questioning the judgment of conviction and order or sentence being unsustainable in the eye of law.

3. Smt. Ranjana Jaiswal, learned counsel appearing for the appellant /

accused would submit as under:

- i. that the prosecution has miserably failed to prove the offence against the appellant beyond reasonable doubt and the conviction recorded is based on no evidence, and therefore, the judgment of conviction and order of sentence is liable to be set aside.
 - ii. that the appellant has been convicted only on the basis of alleged evidence of last seen together whereas there is no evidence to connect the appellant to the said offence.
 - iii. that the extra judicial confession made by the appellant was not found reliable.
 - iv. that merely on the basis of the evidence the appellant has been convicted is one memorandum and recovery, which have not been found proved by the learned trial Judge.
4. On the other hand, Mr. Dheeraj Wankhede, learned counsel for the State would support the impugned judgment of conviction recorded and sentence awarded by the trial Court.
5. We have heard learned counsel for the parties and considered the rival submissions and gone through the records of the trial Court with utmost circumspection.
6. The question for consideration would be whether the death of Sunita Bai was homicidal in nature owing to injury caused by the appellant?
7. In order to prove the nature of death of Sunita Bai, the prosecution has examined Autopsy Surgeon Dr. A.R.Jayant as P.W.6, who has conducted the post-mortem and submitted his report vide Ex.P.5 (pages 36 to 39). He stated that four injuries were found on the body of deceased and cause of death was Asphyxia due

to strangulation and nature of the death was homicidal in nature. It is not seriously disputed by the appellant. The learned trial Court has also recorded the nature of death to be homicidal in nature. Accordingly, it is held that the death of Sunita Bai was homicidal in nature.

8. This brings us to the next question as to whether the appellant had caused the death of Sunita Bai. P.W.1 Naihar Sai is the father of deceased. He clearly stated in his examination-in-chief that on the date of incident, the appellant was along with him as he, his wife and granddaughter Kaushalya had gone to the house of Amresh Baiga to play 'Karma' dance and when they came back to their home, found the house door opened and further found that his daughter-in-law was lying dead and they informed to Kaliram P.W.2, Sidhan P.W.4 and Ramnath P.W.5. This witness has been declared hostile by the prosecution and in the cross-examination, he stated that in his presence and in presence of Kaliram P.W.2, Sidhan P.W.4 and Ramnath P.W.5, his son (appellant) came before them and made an extra judicial confession that he has committed murder of his wife Sunita as she came to the house in an inebriated condition at 4.00 am, in the morning. P.W.2 Kaliram is the witness, who is the Sarpanch of the village Puta. He has also been declared hostile and in his cross-examination, he has denied the suggestion that the appellant came to him and Naihar Sai P.W.1 on that day and made extra judicial confession regarding commission of murder of his wife before them. P.W.2 Kaliram further stated in para 5, he stated that on the occasion of 'Karma' play, the appellant was not present or he must have been in his house along with deceased Sunita. P.W.3 Dularibai is the mother of the appellant, who has also been declared hostile. She only stated that her daughter-in-law Sunita Bai was present in the house as she had not gone to the house of Amresh Baiga to participate in 'Karma' dance and while she was coming to the home, on the way, she met the appellant/accused and she was forbidden to cry by the appellant. P.W.4 Sidhan has also been declared hostile. He has refuted the fact of extra judicial confession having been made by the appellant in presence of P.W.1 Naihar Sai and P.W.2

Kaliram. He has also refuted the factum of presence of the Ganesh Ram at the place of 'Karma' in the house of Amresh Baiga. Similar is the statement of P.W.5 Ramnath, who has also refuted the factum of extra judicial confession having been made by the appellant in his present.

9. P.W.7 Jamuna is the witness of statement of memorandum and recovery (Ex.P.7 & Ex.P.8). He has not supported the case of prosecution and has been declared hostile. Likewise, P.W.8 Tilkeshwar Yadav is also the witness of memorandum and recovery (Ex.P.7 & Ex.P.8). He has also not supported the case of the prosecution and has been declared hostile. Shri B.P.Yadav P.W.09 is the Investigating Officer, who recorded the statements of P.W.1 Naihar Sai, P.W.2 Kaliram and P.W.5 Ramnath and also recorded the F.I.R. Ex.P.12. P.W.10 P.S.Dhruv is also the Investigating Officer.

10. The trial Court has held that the prosecution has failed to prove the factum of extra judicial confession, alleged to have been made by the accused/appellant, to the P.W.1 Naihar Sai, P.W.2 Kaliram, P.W.4 Sidhan and P.W.5 Ramnath. The trial Court has also held that memorandum (Ex.P.7) and recovery (Ex.P.8) has not been proved by the prosecution. It was also held that though the recovery, pursuant to disclosure statement, has not been proved but the fact the wooden stick has been recovered from the house of the appellant as an important incriminating evidence against the appellant. The trial Court also held that the appellant was only person who was present in his house along with deceased as he has not been noticed in the house of Amresh Baiga where 'Karma' dance was being played and the statement of P.W.1 Naihar Sai that the appellant was present in the house of Amresh Baiga is not reliable as P.W.1 Naihar Sai made the statement to protect his son.

11. Now the question whether the conviction awarded to the appellant by the learned Sessions Judge on the basis of aforesaid last seen theory is based on evidence available on record?

12. In ***Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622***, the Supreme Court has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-152 as under:

“152.A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in *Shivaji Sahebrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622)* where the following observations were made:

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

13. While dealing with the evidentiary value of last seen theory, the Supreme Court, in the case of ***State of Goa v. Sanjay Thakran and another and another connected appeal, (2007) 3 SCC 755*** held that in case of last seen together the proof of last seen together would be relevant if the prosecution establishes that in the intervening period there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the

crime. Para 34 of the said judgment reads thus:-

“34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

14. The Apex Court in the case of ***Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai***, (2003) 1 SCC 534 has held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter, then it would be obligatory on the accused to explain the circumstances in which the missing person and the accused parted company.

15. Reverting back to the facts of the case in hand, the following principles of law laid down before their Lordships in the above cases, it would be apparent that the prosecution has to bring clear cut and clinching evidence on record to prove the theory of last seen together. But in the present case, the father of the appellant

had stated that the appellant was present in the house of Amresh Baiga where 'Karma' dance was being played. P.W.2 Kaliram, in para 5 of his statement, had simply stated that the appellant Ganesh was not noticed in the house of Amresh Baiga and he must have been present in his house along with deceased Sunita. Witness Ramnath P.W.5 also stated that Ganesh was not present in the house of Amresh Baiga and only the mother and daughter of the appellant were present in the house of Amresh Baiga.

16. From the aforesaid piece of evidence, it cannot be held that the appellant was the only person, who was present in his house along with deceased Sunita, particularly, when the house of the appellant was found opened, as admitted by P.W.3 Dulari Bai. It was the duty of the prosecution to prove the theory of last seen together by bringing on record clinching and reliable evidence, which was absolutely lacking in the present case. It has not been proved that in the house, only the appellant was the person, who was present along with deceased. Therefore, the theory of last seen together is not proved beyond doubt by the prosecution. It would be safe to record the conviction on the basis of conjectures and surmises that the appellant must have been present along with his wife Sunita Bai on the fateful day. The prosecution has failed to prove the theory of last seen together by acceptable evidence.

17. The factum of extra judicial confession was not found reliable by the trial Court and no other evidence is available on record to connect the present appellant for the aforesaid offence.

18. On the basis of aforesaid discussion, we are clearly of the opinion that the prosecution has failed to bring home the offence under Section 302 I.P.C., beyond reasonable doubt, and therefore, we are unable to uphold the judgment of conviction and order of sentence recorded by the learned trial Court convicting the appellant for the offence under Section 302 of the I.P.C.

19. As a fallout and consequence of the aforesaid discussion, the appeal is allowed and the conviction of the appellant under Section 302 of the I.P.C. and the sentence awarded thereunder are hereby set aside. The appellant is reported to be in jail. We hereby direct that the appellant be released forthwith, if not required in any other case.

Sd/-

(Sanjay K. Agrawal)
Judge

Sd/-

(Sanjay Agrawal)
Judge