

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Reserved on 11.11.2017****Delivered on 13.12.2017****Criminal Appeal No. 276 of 2013**

(Arising out of judgment/order dated 30.1.2013 in Sessions Trial No. 25/2012 of the learned Sessions Judge, Jashpur)

- Budhai Ram Korva S/o Birjhumam Korva Aged About 24 Years R/o Village Sarudhap , Kailash Gupha , Thana - Bagicha District - Jashpur C.G.

---- Appellant**Versus**

- State Of Chhattisgarh Through - Incharge P.S. Bagicha , Distt. Jashpur C.G.

---- Respondent

For Appellant	:	Shri Shayam Sunder Lal Tekchandani, Advocate
For State	:	Shri U.N.S. Deo, Government Advocate

Hon'ble Shri Prashant Kumar Mishra, Judge**Hon'ble Shri Sharad Kumar Gupta, Judge****C.A.V. JUDGMENT****Per Sharad Kumar Gupta, Judge**

1. In this Criminal Appeal the challenge levied is to the judgment of conviction and order of sentence dated 30.01.2013 passed by the Sessions Judge, Sessions Division, Jashpur in Sessions Trial No. 25/2012 whereby and whereunder the appellant was convicted for the offence punishable under Sections 366, 376(1), 302 of the Indian Penal Code, 1860 (hereafter referred to as 'IPC') and sentenced to undergo rigorous imprisonments for 5 years, 10 years and life imprisonment respectively and with fine of Rs. 1000/- on each count, and in default of payment, additional rigorous imprisonment for 1 month on each count, with a direction to run all the sentences concurrently.

2. In brief, the unfolded prosecution story is that the deceased was below 18 years of age and resident of village Kailash Gupha. On 07.11.2011, in the morning at around 8:00 hrs the deceased and her cousin sister P.W. 2 Ku. Khushbu had gone towards Mela Dand for the purpose of grazing of the cattle. Near about 11:00 hrs, the appellant reached there and told that cows are grazing the mustard crop of their field. The deceased and Ku. Khushbu moved to drive away the cattle from that field. At that time the appellant told to the deceased to come along with him. Near about 12:00 hrs, the grand-mother of the deceased came there carrying meals for them. The grand-mother asked about the deceased, then Ku. Khushbu narrated the entire story to her. The grand-mother searched for the deceased to nearby places but she did not find her. She went to the house. Thereafter, the father of the deceased P.W. 1 Ram Chandra Ram and his mother again reached there. Ku. Khushbu again narrated the entire story to them. After the search, the dead body of the deceased was found in the Nullah. Ram Chandra Ram suspecting the appellant given information about the incident to the Police Chowki – Pandrapath. On that very day at 20:00 hrs the merg intimation was written and the FIR was lodged in Police Station – Bagicha in '0' number. Later on, FIR No. 158/2011 was registered. After completion of the investigation the charge-sheet was filed against the appellant under Sections 376, 302 of the IPC. The Trial Court framed charges against the appellant under Sections 366, 376(1) and 302 of the IPC. The appellant abjured the charges levelled against him and faced the trial. To bring home the charges, the prosecution examined as many as 14 witnesses. The appellant did not examine any witness on his defence.

3. After conclusion of the trial, the Trial Court convicted and sentenced

the appellant as aforesaid.

4. Shri Shayam Sunder Lal Tekchandani, counsel for the appellant submits that the conviction is based purely on circumstantial evidence but the chain is not complete. No motive has been proved. Thus, the impugned judgment of conviction and order of sentence are improper and bad in law. Thus, they may be set aside.

5. Shri U.N.S. Deo, Government Advocate for the State supported the above mentioned conviction and sentence of the appellant and submitted that the prosecution has proved its case beyond all reasonable doubts. The guilt of the appellant has been established on the basis of cogent evidence available on record. The judgment and order are in accordance with law and do not call for any interference.

6. In the case in hand the prosecution case is not based on direct evidence rather it is based on circumstantial evidence i.e. alleged last seen theory and alleged seizures of different Articles.

7. As per the alleged postmortem report (Ex. P-8), P.W.4 Dr. C. D. Bakhla and P.W. 6 Dr.(Smt.) V. Bakhla had conducted the postmortem of the dead body of the deceased and found 4 abrasions, 1 bruise and 1 lacerated wound of size 2½ cm x 1½ cm x 1 cm on the mid left lower occipital region. On internal examination, they found mass hematoma over dura mater of the brain on C.S. of the left occipital region. The vital organs were found congested, lower half of labia majora was bruised, valva was abraded and congested, hyman membrane was torn. They opined that all the injuries were antimortem in nature, caused within 36 hours by hard and blunt object. The cause of death was neurogenic shock due to head injury and the nature

of death was homicidal.

8. There is no such evidence on record on the strength of which it could be said that Ex.P-8 is not believable. Thus, this Court believes on Ex.P-8.

9. As per the alleged report of R.F.S.L., Raipur Ex. P-18 the blood was found on soil article A, soil Article B, a stone Article C, one Towel Article D, one skirt Article G, one shirt Article H. Blood was not found over the shirt Article F. Semen and sperm were not found over the underwear article E, a skirt article G, one underwear Article I, a slide Article J and a swab Article K.

10. There is no such evidence on the strength of which it could be said that Ex. P-18 does not inspire confidence. Thus, this Court believes on Ex. P-18.

11. In **State of Madhya Pradesh -v- Chhayaram** (1993 JLJ V. 42- Pg 744), the Hon'ble Apex Court had laid down that if the allegedly seized Dhoti and axe are not found stained with human blood, seizure has no effect.

12. In **Neeraj -v- State of Madhya Pradesh** (1991 JLJ V-40, Pg. 564), the High Court of Madhya Pradesh has held that it is not sufficient that article was found blood stained, it should be proved to be human blood with its group.

13. Ex. P-18 reveals only presence of blood. It is not mentioned in it that it was human blood with such group. Thus, on the basis of aforesaid judicial precedents laid down by the Hon'ble Supreme Court, we hold that, respondent does not get any help from the alleged memorandum Ex. P-7 dated 09-11-2011 (Ex. P-7 has been wrongly mentioned because Ex. P-7 has already been marked in the alleged stone examination report) allegedly given by the appellant that he has left the stone on the place of occurrence and clothes have been kept in his house, alleged seizure Ex. P-8 dated

09-1-2011 (Ex. P-8 has been wrongly mentioned because Ex. P-8 has already been marked in the aforesaid post mortem report) by which a stone was seized from the appellant, alleged examination report of the stone Ex. P-7, alleged seizure of blood stained soil and plain soil Ex. P-9, alleged seizure Ex. P-10 of 5 sealed packets containing clothes of the deceased, slide, vaginal swab, alleged seizure of the clothes of the appellant Ex. P-12.

14. Now we shall examine the alleged circumstance of last seen together.

15. P.W. 2, Ku. Khushbu says in para-1 of her statement given on oath that she and the deceased had gone to their field for grazing the cattle. The appellant reached there and told that their cattle are grazing the mustard crop. She and the deceased wanted to go to take out the cattle from the field but the appellant and the deceased went towards the field. Ram Chandra Ram (P.W. 1) also stated the same story in paras-1 & 2 of his statement given on oath.

16. In **S.K. Yusuf -v- State of West Bengal** [(2011)11 SCC 754], the Hon'ble Apex Court has held in para 21 that -

“21. The last seen theory comes into play where the time gap between the point of time when the accused and 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. (Vide: **Mohd. Azad alias Samin v. State of West Bengal** (2008) 15 SCC 449; and **State V. Mahender Singh Dahiya** [(2011) 3 SCC 109]”

17. In **State of Karnataka -v- Chand Basha** [2016 (1) SCC 501], the Hon'ble Supreme Court has observed in para 14 that:-

“14. The prosecution story relies upon the 'last seen together'

theory, which resulted into the death of Ganesh. This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established. Yet, the prosecution has failed to prove the evidence which establishes the 'last seen together' theory beyond reasonable doubt to prove the guilt of the accused. The prosecution merely proved the motive which could have compelled the accused, and that the accused went to the bar with one other person, but the identity of that other person is not clearly established at all. The post-mortem report fails to specify any approximate time of death and in light of the recovery of the dead body on 20.01.2001, after 4 days, which is not a small gap since the deceased disappeared on 16.01.2001, it is not appropriate to convict the accused when his role is not firmly established.”

18. P.W. 2 Ku. Khushbu does not say approximate time of coming of appellant near their field. As per the prosecution story the appellant allegedly reached there near about 11 am. As per the prosecution story, the dead body of the deceased was found in the Nullah near about 4 pm. In Ex. P-8 the approximate time of death of the deceased has not been specified. The time gap between the point of time when the appellant and the deceased were last seen alive and when the deceased was found dead is not so small or there was a close proximity between them, that possibility of any person other than appellant being the author of the crime becomes impossible. Thus, aforesaid judicial precedents laid down by the Apex Court are applicable against the prosecution and in favour of the appellant.

19. Moreover, P.W. 10 Patwari Lalit Sai Sidar says in para 3 of his statement on oath that, this is true that Sr. No. 3 of map Ex. P-5 is the way for commuting to Kailash Gufa from which people used to go and come frequently, Sr. No. 2 Nullah which could be seen from Sr. No. 3. P.W. 2 Ku. Khushbu says in para 4 that the Nullah is 100 meter away from their field. Moreover, allegedly when the deceased not returned back, P.W.2 Ku. Khushbu did not go to their field nor she returned back her house and narrated to anyone about non returning back of the deceased.

20. In Kanhaiya Lal -v- State of Rajasthan (2014) 4 (SCC) 715, while dealing with circumstantial evidence, the Hon'ble Apex Court observed that -

“Circumstantial evidence-Circumstance of last seen together does not by itself and necessarily lead to inference that it was accused who committed the crime. Mere non-explanation on part of appellant by itself cannot lead to proof of guilt against appellant. Motive alleged by prosecution that deceased, as elder of family dissuaded accused to sever his illicit relationship with his sister-in-law had triggered the murder, is not established. Cordial relationship between accused and deceased for a long time stand proved. Conviction of appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct.”

21. In Ashok -v- State of Maharashtra [2015(4) SCC 393] while dealing with the last seen theory, the Hon'ble Apex Court has held that :-

“Last seen theory- Last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused etc., non-explanation of death of deceased, may lead to a presumption.

22. In Rambraksh alias Jalim -v- State of Chhattisgarh (AIR 2016 SC 2381), the Hon'ble Apex Court has observed that :-

“Murder-Deceased was last seen alive in the company of accused seven days before the notice and seizure of bones and clothes of deceased. No explanation given by prosecution for inordinate delay in lodging the complaint and registering the case. Independent witnesses examined by prosecution have not supported the case. A conviction cannot be recorded against accused merely on the ground that accused was last seen with deceased. To record a conviction, the last seen together itself would not be sufficient and prosecution has to complete the chain of circumstances to bring home the guilt of the accused. Last seen evidence also appears to be doubtful. Conviction of appellant cannot be sustained in law and liable to be set aside.”

23. Looking to the above mentioned circumstances and facts of the case we find that above mentioned judicial precedents laid down by Hon'ble Apex Court go against the prosecution rather they go in favour of the appellant.

24. Looking to the above mentioned facts and circumstances, we hold that solely on the basis of statements of para-1 of P.W.2 Ku. Khushbu, para-2 of P.W.1 Ram Chandra Ram (last seen theory) appellant neither could be convicted nor could be sentenced.

25. In Sharad Birdhichand Sarda -v- State of MH (AIR 1984 SC 1622 at pg. 2848), while dealing with the circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are :-

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(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.”

26. Looking to the above mentioned circumstances we find that above mentioned judicial precedent laid down by the Supreme Court is applicable against the prosecution and in favour of the appellant, because chain of evidence is not complete in the case in the hand.

27. In Chanchal Ku. -v- Union Territory Chandigarh (AIR 1986 SC 752) the Hon'ble Apex Court has held that Suspicion however strong cannot take the place of proof.

28. From the alleged last seen circumstance the strong suspicion is casted on appellant but looking to the above mentioned judicial precedent laid down by the Hon'ble Apex Court this Court finds that said suspicion could not take the place of burden of proof.

29. In Manzoor -v- State of UP and Suleman -v- State of up (AIR

1983 SC 295) Hon'ble Apex Court has held that where the prosecution failed to prove the guilt satisfactorily beyond reasonable doubt, the benefit of 'doubt' must go to accused and the accused must be acquitted.

30. In the case in hand an innocent young girl had been brutally murdered which is an unfortunate event, however, we are bound to dispose of the case in hand in accordance with material which has been adduced in evidence.

31. After appreciation of evidence discussed herebefore, this Court holds that the prosecution has failed to prove the charges under Sections 366, 376(1), and 302 of the IPC beyond reasonable doubt against the appellant. Thus, the trial Court has committed an error in convicting and sentencing the appellant as mentioned aforesaid. Thus, the appeal is allowed. The impugned judgment is set aside. The appellant is acquitted of all the charges extending the benefit of doubt.

32. The appellant is reported to be in jail. He be set at liberty forthwith if not required to be detained in any other case.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Sharad Kumar Gupta)
Judge