

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 921 of 2010

- Bhojram, S/o Late Chandrika Prasad Sahu, Aged 37 years, R/o Urga Chowki, P.S. Kotwali, Korba, C.G.
- Smt. Subhadra Bai W/o Bhojram, Aged about 31 years, R/o Urga Chowki, P.S. Kotwali, Korba, C.G. (Appellant No. 2 Is On Temporary Bail For A Period Of One Month)

---- Appellants

Versus

- State Of Chhattisgarh, Through District Magistrate Korba, district Kotba

---- Respondent

For Appellants	:	Ms. Shivali Dubey, Advocate
For Respondent/State	:	Shri Anil Pillai, Dy.A.G.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Smt. Justice Rajani Dubey

Judgement on Board by Pritinker Diwaker, J.

29/08/2018

This appeal has been preferred against the judgment and order dated 19.11.2010 passed by the Second Additional Sessions Judge, (FTC) Korba in Sessions Trial No. 65/2008 convicting the accused/appellant No.1 Bhoj Ram for the offence punishable under Sections 302 IPC and sentencing him to undergo imprisonment for life with fine of Rs. 100/- whereas convicting the accused/appellant No.2 Subhadra Bai for the offence punishable under Section 201 IPC and sentencing her to undergo imprisonment for life with fine of Rs. 100/- plus default stipulations.

2. As per prosecution case, deceased Gowri Bai wife of Pyarelal was having illicit relation with accused/appellant No.1 Bhojram. The said relation was objected by husband of Gowri Bai as well as accused/appellant No.2 Subhadra Bai. On 12.07.08, accused/appellant No.2 called Gowri Bai to her house and it is said that accused/appellant No.1 committed her murder by hitting her head with a *neem* branch and thereafter causing her death by strangulation. Allegation against appellant No.2 is that she assisted accused/appellant No.1 in disposing of the dead body. When Gowri Bai was not found, on 15.07.08 missing report Ex.P-7 was lodged by Pyarelal informing the police that Gowri Bai is missing since 12.07.08. On 16.07.08, dead body of the deceased, packed in a gunny bag was found in a pit near the canal which was identified by the family members of the deceased to be that of Gowri Bai. On 16.07.08, itself unnumbered merg Ex.P-6 was recorded and soon thereafter inquest was prepared vide Ex.P-6. *Dehati Nalishi* Ex.P-10 was recorded on 16.07.08 and based on dehati nalishi un exhibited FIR was registered against unknown person under Section 302 and 201 IPC. Post mortem examination on the body of the deceased was conducted on 16.07.08 vide Ex.P-1 by Dr.Jyoti Sahu (PW-1) and according to her cause of death was due to major injuries on head and suffocation leading to asphyxia and the death was homicidal in nature. On the memorandum Ex.P-16 of accused/appellant dated 17.07.08 seizure Ex.P-12 was given effect to and a nylon rope, wooden club and one motor cycle were recovered however there is no FSL report on record. After filing of charge sheet, the trial judge has framed charge against the appellants under Sections 302 and 201 IPC.

3. In order to establish the guilt of the accused/appellants, prosecution has examined 15 witnesses. Statement of the accused/appellants were recorded under Section 313 of the Cr.P.C. in which they denied the charges levelled against them and pleaded their innocence and false implication in the case. This apart two defence witnesses have also been examined.

4. After hearing the parties, the trial Court by judgment impugned, has convicted and sentenced the accused/appellants as mentioned in paragraph 1 of the judgment. Hence the present appeal.

5. Contention of counsel for the appellants is as under :

i) that there is no eyewitness to the occurrence and conviction of the appellants is based on circumstantial evidence but none of the circumstances 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.

ii) that the main piece of evidence against the appellants is the evidence of last seen by Pitamber (PW-3) brother-in-law of the deceased but the said witness is not reliable. Pitamber (PW-3) in fact had not seen the deceased and the appellants together and this fact was informed to him by his wife Kumari Bai.

iii) that even otherwise the evidence of last seen is being treated as a weak type of evidence and unless the said evidence is corroborated by other evidence accused/appellants could not have been convicted.

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

the same.

7. Heard counsel for the parties and perused the material available on record.

8. Pitamber (PW-3) is the brother-in-law of the deceased. He has stated that three days prior to the death of the deceased she was called by the accused persons. He has further stated that on 12.07.08, deceased was called by the accused persons and thereafter she did not return. In cross-examination he however has stated that the fact that the accused/appellants called the deceased, was informed to him by his wife and he had not seen the accused/appellants calling the deceased as at the relevant time he was not there in his house. Dr. Jyoti Sahu (PW-1) conducted postmortem examination vide Ex. P-1 and according to her, cause of death was due to major injuries on the head and suffocation leading to asphyxia and the death was homicidal in nature. Budhram Singh Dhruv (PW-2) is the patwari who prepared spot map Ex.P-4. Dr. R.D.Raj (PW-4) assisted Dr. Jyoti Sahu (PW-1) in conducting postmortem examination. Pyarelal (PW-5) is the husband of the deceased at whose instance the missing report Ex.D-1 was registered. Shanti Bai (PW-7A) is the mother of the deceased, had not stated anything specific. Krishna Kumar (PW-9) is a witness to inquest. Lallan Singh (PW-10) is the Investigating Officer who has done the investigation. Kartik Ram (PW-11) is a witness to inquest (Ex.P-5) and seizure (Exs. P-12,13,14 & 15). Ekadashi (PW-12) is a witness to seizure Ex.P-2 and 3. Bharat Lal Rathore (PW-13) assisted in the investigation. Ramu (PW-14) is a witness to inquest Ex.P-6. Chhedilal (PW-15) is a witness to memorandum Ex.P-16.

Sidar Singh Paikara (DW-1) has stated that at the relevant time appellant No.1 was on duty, had turned hostile.

9. Close scrutiny of the evidence on record makes it clear that there is no legally admissible evidence against the accused/appellant showing his involvement in commission of murder of deceased and the conviction is solely based on the circumstantial evidence i.e. last seen evidence, but on a close and careful scrutiny of the evidence it is clear that there is no positive evidence to conclude that the accused and the deceased were last seen together. To prove the last seen theory, the prosecution has examined Pitamber (PW-3), but this witness has nowhere stated to have seen the deceased in the company of accused/appellant prior to his death. According to PW-3, he was informed by his wife that the deceased was called by the accused/appellant and that the accused persons had not come in his presence to call the deceased. Thus, this witness (PW-3) cannot be treated to be the witness of last seen. Even otherwise, the last seen theory comes into play when 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. In the present case, as per prosecution case, the deceased had gone to the house of accused/appellants on 12.07.2008 and her body was found lying in a pit beside the canal on 16.7.2008. Thus, the time gap between the time at which the wife of PW-3 saw the deceased going to the house of accused/appellants and when the body of deceased was found on 16.7.2008 is considerably long. So, the possibility of other persons coming in between is very much there

and therefore, it is very much difficult, if not impossible, to conclude that it is the accused/appellants who are responsible for the homicidal death of the deceased.

As regard the recovery of club etc. on the basis of memorandum (Ex.P-16) of accused/appellant, unfortunately report of FSL was not produced by the prosecution before the Court and even the explanation has not been furnished as to why FSL report has not been obtained and produced before the Court although it was necessary to ascertain as to whether said club etc. were actually used in commission of offence or not and as to whether the blood found on it was human blood and that too of the blood group of the deceased. Non-production of FSL report in the Court by the prosecution is fatal as in the absence thereof it is difficult to reach to the conclusion that the seized articles have been used in commission of offence. Thus, no presumption could be drawn that the accused/appellants were the guilty of murder.

10. In the light of the above discussion, we are of the view that the prosecution has not been successful in proving the involvement of the accused/appellants in the crime in question.

11. Consequently, the appeal is allowed. Impugned judgment convicting and sentencing the accused/appellants as mentioned above is set aside. They are acquitted of the charge levelled against them, by extending them benefit of doubt. Accused/appellants are in jail, they be set free forthwith if not required to be detained in any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Rajani Dubey)
Judge