

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 724 of 2011**

1. Rupesh Kumar son of Sagan Kamar, aged about 25 years, R/o Madheli, PS Magarlod, District Dhamtari, CG

---- Appellant**Versus**

1. State of Chhattisgarh through Station House Officer, PS Mahasamund, District Mahasamund, CG

---- Respondent

For Appellant	:	Shri S.K. Chandel, Advocate
For Respondent/State:		Shri Vaibhav Goverdhan, PL

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Sharad Kumar Gupta****Judgment On Board by Pritinker Diwaker, J****07/04/2018**

This appeal has been filed against the judgment of conviction and order of sentence dated 30.06.2011 passed by Additional Sessions Judge Mahasamund in Sessions Trial No. 54/2010 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life and pay fine of Rs. 1000/-, plus default stipulation.

2. As per the case of prosecution, on 02.08.2010 in between 7 and 8 PM deceased Ganga Prasad Dhimar and the accused/appellant herein were seen quarreling and on the next day i.e. 03.08.2010 body of the deceased was found near a culvert. *Merg* Ex. P-1 was recorded at the instance of village Kotwar namely Gothuram (PW-1). After drawing inquest Ex. P-5, dead-body was sent for postmortem examination which was

conducted by Dr. J.P. Soni (PW-11) who gave his report Ex. P-11. After this, FIR Ex.P-12 came to be recorded on 04.08.2010 against an unknown person for the offence punishable under Section 302 IPC. On the memorandum of accused/appellant Ex. P-2 seizure of club and a scarf (*gamchha*) was made under Ex. P-3 and that of full pant and a piece of blade was made under Ex. P-7. As per FSL report Ex. P-18, full pant seized under Ex. P-7 was stained with blood. However, there is no serological report on record. Allegation against other three accused persons was that they helped the accused/appellant in cocealing the dead-body. Court below framed the charge against the accused/appellant u/s 302 IPC whereas against other three it was under Section 201 IPC.

3. In order to prove the complicity of the accused persons in the crime in question, the prosecution has examined 12 witnesses. Statements of the accused persons under Section 313 Cr.P.C. were also recorded in which they denied their guilt and pleaded innocence and false implication in the case.

4. After hearing the parties, the Court below acquitted the other three accused persons of the charge levelled against them but has convicted and sentenced the accused/appellant herein as mentioned above.

5. Counsel for the accused/appellant submits as under:

(i) That there is no eyewitness to the incident and the entire case of the prosecution is based on circumstantial evidence which is very weak in nature.

(ii) That when on the same set of evidence other three accused persons have been acquitted by the Court below, the accused/appellant herein is also entitled for the same relief.

(iii) That the evidence with respect to accused and the deceased being last seen together by Mohd. Jameel (PW-6) and Chhannulal (PW-8) is not conclusive as the deceased was not known to them. It is most importantly because PW-8 did not even see the dead body of the deceased but yet he becomes the witness to last seen which unfortunately has been relied upon by the trial Court also.

(iv) That though the full pant seized under Ex. P-7 contained blood as per FSL report Ex. P-18 yet in the absence of serological report to establish the origin of the said blood, such seizure has no value in the eye of law.

6. State counsel however supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellant under Section 302 IPC are based on due appreciation of the evidence on record and there is no infirmity in the same.

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

8. Mohd. Jameel (PW-6) - the witness to last seen has stated that he knew the accused persons but did not know the deceased. He has stated that at about 7 PM when the deceased was lying over the pulpit near his puncture repairing shop, accused/appellant herein came there and took him

along. Some hot talk and scuffle is also stated to have ensued between the two and on intervention by the people present there they got apart. What happened thereafter, was not within the knowledge of this witness. Chhannulal (PW-8) – another witness to last seen has also stated that he knew all the accused persons but did not know the deceased either by name or by face. He has then stated that when he was going to supply milk to *Paal Dhaba*, accused/appellant herein and the deceased were seen quarreling by the road side and on his intervention they got separated and went away. In cross-examination also he has stated that he did not know the deceased nor did he see him dead. Gothuram (PW-1) – the village *Kotwar* is the witness who lodged *merg* Ex. P-1 at police station Mahasamund. Shambhu (PW-2) – the father of the deceased and witness to memorandum Ex.P-2, seizure made under Ex. P-3, P-4, P-6 and P-7 as also to that of inquest Ex. P-5 has not stated anything against the accused/appellant. Basant (PW-3) – the brother of the deceased has also not stated anything specific against the accused/appellant. Kanhaiyalal Sahu (PW-4) has not supported the case of prosecution and has been declared hostile. Ghanshyam (PW-5) is the witness to inquest Ex.P-5 has admitted his signature thereon. Arvind Soni (PW-7) is the witness to memorandum Ex. P-2 and seizure made under Ex. P-3, P-4, P-6 and P-7 who too has admitted his signature on all these documents. Darshan Singh (PW-9) and Dhool Singh (PW-10) are the witnesses who assisted in the investigation. Dr. J.P. Soni (PW-

11) is the witness who conducted postmortem examination on the body of the deceased and gave his report Ex. P-11 mentioning therein the presence of lacerated wound on the middle forehead - size 1.5x0.5 cm, abrasion xygomatic arch - size 1x1 cm and incised wound on the right side of back - size 11x0.2 cm; ligature made up of cloth found around throat above thyroid cartilage just below the mandible with knot on left side just below the left ear. Cause of death was cardio respiratory failure due to asphyxia as a result of strangulation. Death has also been opined to be homicidal in nature. Pramila Mandavi (PW-12) is the investigating officer who has duly supported the case of prosecution.

9. Having thus gone through the entire material on record what this Court feels is that the main evidence against the accused/appellant is the evidence of last seen. PW-6 and PW-8 are the two witnesses who claim to have seen the accused /appellant and the deceased together. However, if the statement of PW-6 is seen it becomes apparent that he did not know the deceased. Further, he saw accused and the deceased together in the evening at about 7-8 o'clock but the dead-body was found in the next morning. Likewise, PW-8 also did not know the deceased nor did he see him dead. Time gap between the deceased and the accused being last seen together in the evening at 7-8 PM and the dead-body being located in the next morning is so huge to connect the accused with the crime in question. In so many cases the Apex Court has categorically held that the last seen theory comes into

play where the time-gap between the point of time when the deceased was seen alive with the accused and when he is found dead should be so small that possibility of any person other than the accused being the author of the crime becomes impossible. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt of the accused. Furthermore, though the full pant seized on the memorandum of the accused/appellant was stained with blood as is clear from FSL report Ex. P-18 but in the absence of serological report establishing the origin of blood, such seizure is of no consequence. Thus apart from the fragile and inconclusive evidence of last seen and seizure of blood stained full pant not coupled with the serological report, the prosecution has not led any evidence to arrive at the conclusion of the guilt of the accused. In these circumstance, the accused/appellant deserves benefit of doubt.

10. Thus in the considered opinion of this Court, the judgment impugned passed by the Court below is not a merited one as it is not based on due appreciation of the evidence on record. It is accordingly set aside by allowing this appeal and the accused/appellant stands acquitted of the charge levelled against him.

11. At this stage, it has been pointed out to this Court that by order dated 11.11.2011 the accused/appellant was granted bail but from the report received from the Superintendent,

Central Jail Raipur dated 15.2.2018 in pursuance of the order passed by this Court on 13.1.2018 it appears that the accused/appellant is still under detention. State counsel also confirms that the accused/appellant is still in jail. It is indeed shocking that even 7 year after passing of order granting bail, the accused/appellant could not be set free. Director General (Jail) is directed to ensure that in the cases where bail is granted but the accused has not been released from jail, the jail authorities must send information to this effect to the Court granting bail. Let a detailed report as to how the accused in this case could not be released even 7 year after the bail granted to him, be submitted before this Court by the Director General (Jail) within six weeks from today. Report of the Director General (Jail) should also clearly state as to in how many more jails of Chhattisgarh State the situation is like this where accused persons are languishing in jail even after grant of bail. Let a copy of this order be sent to Director General (Jail), Raipur and the Superintendent, Central Jail, Raipur to ensure its compliance.

12. Needless to say that consequent upon acquittal the accused/appellant be set free immediately.

13. Appeal allowed.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(Sharad Kumar Gupta)
Judge