

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.338 of 2009****Judgment reserved on 09.01.2018****Judgment delivered on 29.01.2018**

1. Gendram Nirala, S/o. Mangluram Nirala, Aged 40 years, R/o Village Balodi, Thana Sarsiwa, Distt.-Raipur (CG)
2. Santosh Nirala S/o Mangluram Nirala, Aged 31 years, R/o Village Balodi, Thana Sarsiwa, Distt.-Raipur (CG)

---- Appellants**Versus**

- State Of Chhattisgarh Through District Magistrate, Raipur (CG)

---- Respondent

For Appellants	: Shri MA Latif, Advocate
For respondent/State	: Shri Arvind Dubey, Panel Lawyer

DB: Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment**Per Ram Prasanna Sharma, J**

This appeal has been preferred against the judgment of conviction and order of sentence dated 27.01.2009 rendered by First Additional Sessions Judge, Baloda Bazar, Session Division Raipur, (CG) in Session trial No.13/08 wherein the said Court convicted the appellants under Sections 302 read with Section 34 and 397 of the IPC and sentenced them to undergo rigorous imprisonment for life and to pay fine of Rs.500/- each and RI for 7 years and to pay fine of Rs.500/- each respectively with default stipulations.

2. In the present case, name of the deceased is Hagroo who went to Village Girsar Bazar to sell a pair of bulls in the cattle market in the early morning of 19.5.2007. When he did not return on the same day, his family members searched his whereabouts and on

20.5.2007, son of the deceased found his dead body near road of village Balodi. As it was appearing to be a case of murder, the matter was reported by one Gangaram (PW-1) and merged intimation (Ex-P/1) was registered at Police Station Sarsiwa. Inquest was conducted as per Ex-P/4 and the body was sent for autopsy to Community Health Centre, Bilaigarh where Dr. Subrat Nandi (PW-28) conducted autopsy. As per the opinion of the medical expert, cause of death is homicidal due to strangulation and other violent act on the body of the deceased. During investigation, certain seizures were made from the appellants and statements of the witnesses were recorded under Section 161 of CrPC. After completion of investigation, charge sheet was filed, the appellants did not plead guilty and the trial was conducted. Statements of the appellants were recorded under Section 313 of CrPC and after hearing the parties, the trial Court convicted and sentenced the appellants as aforementioned.

3. Learned counsel for the appellants submits as under:

(i) So called extra judicial confession as recorded in the presence of police officers, cannot be proved against the appellants as per Section 25 of the Indian Evidence Act, 1872.

(ii) As seizure of the diary and some other articles are not proved to be used in the commission of crime, therefore, said seizure are irrelevant for consideration of guilt.

(iii) No currency notes were seized from any of the appellants and virtually there is no evidence to connect any of the appellants with the commission of offence of robbery.

(iv) The story of last seen is not established in the facts of the case as no one has seen any of the appellants in the company of the deceased before the incident.

4. On the other hand, learned counsel for the State submits that the judgment of the trial Court is strictly in accordance with law and the same is not liable to be interfered with invoking jurisdiction of the appeal.

5. We have heard learned counsel for the parties and perused the record of the trial court with utmost circumspection.

6. To substantiate the charge, the prosecution has examined as many as 29 witnesses. Maniram (PW-5), Tukeshwar (PW-6), Hiyaram (PW-7), Heeralal (PW-9), Galaram (PW-10) and Bhuneshwar (PW-25) have been proposed by the prosecution to the witnesses of extra judicial confession. But Maniram (PW-5) deposed (in para 5) that first the Police Officers had taken the appellants to the Police Station and thereafter they were brought before the villagers and there appellant Gendram made confession regarding assault to the deceased. Tukeshwar (PW-6), Hiyaram (PW-7), Heeralal (PW-9), Galaram (PW-10) and Bhuneshwar (PW-25) deposed on the same line. From the statements of all the above witnesses, it is established that confession was made before Police Officer where these witnesses were present. From the evidence of these witnesses, it is clearly established that the confession was made in the presence of Police Officer and therefore, such confession cannot be proved as against any of the appellants as per Section 25 of the Evidence Act, 1872.

7. Holesh Ram (PW-18) is the person produced by the prosecution to establish the theory of last seen. He deposed that one year ago he had seen the deceased on the road from Village Balodi to Kedibarban and in the same road both the appellants were going at a distance of 50-60 feet from the deceased. From the statements of this witness, it is not established that on which date he had seen the appellants and the deceased.

8. In the present case, the deceased left his house in the early morning of 19.5.2007 and his dead body was found on the next day early morning. The prosecution is under obligation to establish that the appellants and the deceased were seen together just before the incident. But this is not a case here as per the statement of this witness. This witness is not in a position to clarify on which date he had seen the appellants and the deceased. From his statement, it appears that the deceased was going on the road towards village Keidbarban from Village Balodi and the appellants were going on the same road and the distance between the appellants and the deceased were 50-60 feet. As the road is common for all the residents of the locality, it is but natural that everybody will use the road and movement of people of the locality through the road cannot be termed as theory of last seen. In our considered opinion, the prosecution is not able to establish the theory of last seen.

9. As per the statement of Police Sub Inspector RK Sahu (PW-29), he seized one diary and rope from appellant Santosh, but there is nothing on record to show that the said rope was used in commission of the offence. Again there is no evidence to connect

the diary with commission of crime. No one is there from the prosecution side to identify or to connect the said articles for commission of offence or said diary is removed from the possession of the deceased.

10. Madanlal (PW-21) deposed that the deceased sold the bulls to him for consideration of Rs.5000/- but no amount was seized from any of the appellants, therefore, it cannot be held in absence of evidence that robbery was committed by the present appellants against the deceased. Considering the facts and circumstances of the case, finding arrived at by the trial Court is not sustainable because the same is not based on legal and admissible evidence.

11. Accordingly, the appeal is allowed and conviction and sentence of the appellants are hereby set aside. They are acquitted of the charges framed against them. They are reported to be on bail. Their bail bonds stand discharged. Fine amount, if paid, be returned to the appellants.

**Sd/-
Judge**

(Prashant Kumar Mishra)

**Sd/-
Judge**

(Ram Prasanna Sharma)