

NAFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 846 of 2012**

- Dadu Ram @ Dadan S/o Thaneshwar Yadav, aged about 35 years, R/o Chantidand, Police Chowki - Belgahna, P.S. - Kota, District Bilaspur (C.G.) (wrongly mentioned as R/o Chantidih instead of Chantidand in the impugned judgment)

---- Appellant**Versus**

- State of Chhattisgarh Through : P.S. - Police Chowki Belgahna, P.S. - Kota, District Bilaspur (C.G.)

---- Respondent

For Appellant : Shri Vinay Dubey, Advocate.
For Respondent/State: Shri Avinash K. Mishra, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Gautam Chourdiya

Judgment On Board**By Pritinker Diwaker, J****19/06/2018**

01. This appeal arises out of the judgment of conviction and order of sentence dated 28.06.2012 passed by Sessions Judge, Bilaspur (C.G.), in Sessions Trial No.129/2011 convicting the accused/appellant under Section 302 of IPC and sentencing him to undergo rigorous imprisonment for life with fine of Rs.500/-, in default of payment of fine amount to further undergo S.I. for one month.

02. In the present case name of the deceased is Katku Baiga. The appellant and the deceased were good friend and

used to spend maximum time with each other. On 15.06.2011 at about 5.00 PM, they were found in the intoxicating condition and thereafter on the next day i.e. on 16.06.2011 at about 8.00 AM deceased Katku Baiga was found in the injured condition lying near the Chantidand Road. It is further alleged that the deceased also made oral dying declaration before the villagers and succumbed to his injuries. At the instance of Dasru (PW/5), un-numbered merg (Ex.P/8) was recorded on 16.06.2011 followed by numbered merg (Ex.P/23). On 16.06.2011 itself, un-numbered FIR (Ex.P/7) was recorded and based on merg inquiry, numbered FIR (Ex.P/22) was recorded on the same day against the appellant under Section 302 IPC. On 17.06.2011, inquest on the body of deceased was conducted vide Ex.P/3 and body was sent for postmortem examination which was conducted on the same day by Dr. Nand Raj Kanwar (PW/8) who gave his report Ex.P/19 noticing following injuries/symptoms:-

- (i) Abrasion with contusion over forehead one on right lateral side and another on right cheek.
- (ii) Left ear swollen blueish with bleeding through left ear.
- (iii) Abrasion over jaw.
- (iv) Abrasion over chest and neck with scratching.
- (v) Abrasion over left arm with contusion.
- (vi) Abrasion over left lip.

The Autopsy Surgeon opined the cause of death of deceased to be head injury and death was homicidal in

nature.

03. After filing of charge sheet, the trial Court framed charge under Section 302 of IPC against the appellant.

04. So as to hold the appellant guilty, the prosecution examined as many as 9 witnesses. Statements of the appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the appellant as mentioned in para 1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellants submit :-

- That there is no eye-witness to the occurrence and the conviction of appellant is based on circumstantial evidence but none of the circumstances from which the inference of guilt of appellant can be drawn has been proved beyond reasonable doubt and therefore there can be no inference that it was the appellant who committed the murder.
- The main piece of evidence against the appellant is the oral dying declaration of the deceased made before the villagers including Bannu Ram (PW/3) but the evidence of PW/3 has been disbelieved by the trial Court. It has

been further argued that as per PW/3, the deceased was not in a fit state of mind to make the oral dying declaration and was unable to speak properly.

- That the evidence relied upon by the trial Court against the appellant is alleged oral dying declaration and evidence of last seen by Gopal (PW/4) but from the evidence of PW/4, it is apparent that he saw the accused/appellant and the deceased prior to 12 hours when the deceased was found in injured condition. It has been further argued that the time gap between last seen and recovery of body is so large where possibility of the deceased being killed by some third person cannot be ruled out.
- That the appellant is in jail for about seven years.

07. On the other hand, supporting the impugned judgment it has been argued that conviction of the appellant is in accordance with law and there is no infirmity in the same.

08. We have heard counsel for the parties and perused the material available on record.

09. Jagdish Prasad Yadav (PW/1) is the Patwari who prepared spot map vide Ex.P/1.

10. Tilak Ram (PW/2), witness to alleged oral dying declaration of the deceased and inquest (Ex.P/3), has turned hostile.

11. Bannu Ram (PW/3), witness to oral dying declaration of the deceased, has stated that on being asked the deceased

disclosed that he was assaulted by Dadu. However, in cross-examination, this witness had admitted the fact that when the deceased was questioned by Tialk (PW/2), whirring sound was coming from his throat and it was not clear.

12. Gopal (PW/4), witness to last seen, has stated that in the previous evening at about 5.00 PM, he met the appellant and the deceased, they were in drunken condition and when he (this witness) asked the deceased to come along with him, he refused to come and both the appellant and the deceased left towards Chantidand and on the next day he came to know that the deceased has expired.

13. Dasru (PW/5) is the informant.

14. Gulab Singh (PW/6), witness to seizure of stone made from the place of occurrence, has turned hostile.

15. S.R. Gupta (PW/7) is the Investigating Officer who has duly supported the prosecution case.

16. Dr. Nand Raj Kanwar (PW/8) conducted postmortem examination on the body of deceased and gave his report (Ex.P/19) opining the cause of death of deceased to be head injury and death was homicidal in nature.

17. Shrinivas Pandey (PW/9) - A.S.I, assisted in the investigation.

18. Close scrutiny of the evidence makes it clear that the appellant has been convicted solely on the basis of statement of Gopal (PW/4), witness to last seen. However, this witness has stated that he saw the appellant and the deceased in drunken

condition prior to 15 hours when the deceased was found in the injured condition. It is well settled position of law that the conviction cannot be recorded against an accused merely on the ground that he was last seen with the deceased. In other words, conviction cannot be based only on the circumstance of last seen together and normally the Court is required to look for some other corroborative piece of evidence. Most importantly, the theory of last seen comes into play where the time gap, between the point of time when accused and deceased were seen last alive and when the deceased found dead, is so small that possibility of any person other than accused being the perpetrator of crime, becomes impossible. The Supreme Court in the matters of **State of Goa V. Sanjay Thakran¹, Yusuf V. State of West Bengal², Anjan Kumar Sharma V. State of Assam³, Nijam V. State of Rajasthan⁴, Kanhaiyalal V. State of Rajasthan⁵** and this Court in the matter of **Smt. Jiteshwari Bai V. State of CG⁶** has held that while basing the conviction on the last seen theory, it is safer to look for corroboration from other circumstance and evidence adduced by the prosecution.

19. In the present case, the deceased was found in the injured condition about 1/2 km away from the alleged place where he was last seen in the company of the appellant by PW/4 prior to

1 2007 (3) SCC 755

2 AIR 2011 SC 2283

3 2017 SCC 622

4 AIR 2015 SC 3430

5 2014 (4) SCC 715

6 2015 (S) SCC 393

15 hours. Considering the overall statement of PW/4, it will not be safe for us to uphold the conviction of the appellant only on the basis of statement of this witness unless being corroborated by the substantive piece of evidence and this witness cannot be treated as a witness to last seen for the reason that after about 15 hours the body of deceased found that too 1/2 km away from the alleged place. There is a long gap between the last seen and recovery of body and the possibility of deceased being killed by some third person cannot be ruled out. The evidence of PW/4 is not very conclusive in nature and on the basis of aforesaid evidence it cannot be said with certainty that it is the appellant who has committed murder of the deceased. Therefore, the finding of the trial Court accepting testimony of this witness for the purpose of last seen is not justified.

20. The Supreme Court in the matters of **Sattatiya @ Satish Rajanna Kartalla V. State of Maharashtra, (2008) 3SCC 210** and **Sharad Birdhichand Sarda V. State of Maharashtra [(1984) 4 SCC 116]** has held that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any

reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

21. That apart, the evidence of Bannu Ram (PW/3) relating to oral dying declaration cannot be used against the appellant as according to him when the deceased was disclosing the fact, whirring sound was coming from the throat of the deceased which was not very clear and thus it cannot be inferred that it is the appellant who has killed the deceased. Furthermore, it has come in the evidence that the deceased and the appellant were good friends, they used to spend maximum time with each other and motive has been proved by the prosecution. Taking the cumulative effect of the evidence adduced by the prosecution, we are of the view that the trial Court has erred in law in convicting the appellant under Section 302 IPC.

22. Thus considering the evidence collected by the prosecution, this Court is of the opinion that conviction of the appellant under Section 302 IPC is not based on due appreciation of the evidence available on record and that being so he is entitled for benefit of doubt. Consequently, the judgment impugned convicting the appellant under Section 302 IPC is set aside and he is hereby acquitted of the charge levelled against him. The appellant is reported to be in jail.

He be set at liberty forthwith, if not required in any other case.

23. Appeal is thus allowed.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Gautam Chourdiya)
JUDGE

Vijay