

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 91 of 2013**

1. Phool Singh Kanwar S/o Shaniram Kanwar Aged About 32 Years
R/o Village - Tapra, Thana - Balko Nagar, Distt. - Korba C.G.
2. Her Singh @ Hem Singh Kanwar S/o Kartikram Kanwar Aged
About 30 Years R/o Village - Bhalu Satka, Thana - Balko Nagar,
Distt. - Korba C.G.

---- Appellants**Versus**

- State Of Chhattisgarh Through Police Station-Balko, Distt. -
Korba C.G.

---- Respondent

For Appellants : Shri R.R. Soni, Advocate.

For Respondent/State : Shri Ravindra Agrawal, P.L.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Sanjay Agrawal****Judgment On Board By Justice Pritinker Diwaker****23/02/2018:**

This appeal arises out of the judgment of conviction and order of sentence dated 26.12.2012 passed by the Sessions Judge, Korba in S.T. No.101/2011 convicting each of the appellants under Sections 302/34 of IPC and sentencing them to undergo imprisonment for life and pay a fine of Rs.3000/- with default stipulation.

02. In the present case, name of the deceased is Bal Singh Kunwar whose dead body was found in a jungle on 14.8.2011. It is alleged that the deceased was last seen alive in the company of the accused/appellants by PW-10 Santosh Lakda and PW-11 Ramnath Lakda and on the next day his dead body was found. On 14.8.2011 FIR (Ex.P/1) was registered at the instance of PW-1 Jagraval Singh, son of the deceased, against unknown person under Section 302 of IPC. Inquest on the dead body was conducted on 14.8.2011 vide Ex.P/3 and thereafter the body was sent for postmortem which was conducted on the same day vide Ex.P/4 by PW-7 Dr. RK Divya. The autopsy surgeon noticed incised wounds over right side of eye lid, right side of upper lip, left side of upper lip, over chin, left lower lid orbital region; abrasions over left side of chest clavicle region; contusion on forehead; depressed fracture of frontal bone of left side and slice wounds over dorsum of penis and right side of scrotum. All these injuries were caused by hard and blunt as well as sharp edged weapon. In his opinion, the cause of death was coma due to compression of brain as a result of head injuries and that the death was homicidal in nature. On the memorandum of appellant No.1 Phool Singh recorded on 16.8.2011 (Ex.P/6), one club was seized vide Ex.P/7. Memorandum of appellant No.2 Her Singh was also recorded on the same day vide Ex.P/8. From the place of occurrence, plain & bloodstained soil, slippers and two lungis were seized vide Ex.P/11. As per FSL report Ex.P/20, blood was found on Article D – lungi of appellant No.1, however, origin and group of the same could not be determined due to its disintegration. After filing of charge sheet, the trial

Court framed charge under Section 302/34 of IPC against the appellants.

03. So as to hold the accused/appellants guilty, the prosecution examined 11 witnesses in all. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellants as mentioned above.

05. Counsel for the appellants submits as under:

(i) that there is no eyewitness account to the occurrence and conviction of the appellants is based on circumstantial evidence but none of the circumstances from which inference of guilt can be drawn has been proved beyond reasonable doubt and therefore, there can be no inference that the appellants were the perpetrator of the crime in question.

(ii) that merely on the basis of evidence of last seen by PW-10 and PW-11, the appellants cannot be held guilty. The evidence of last seen in the present case is very weak in nature and unless the said evidence gets corroboration from some other conclusive piece of evidence, the appellants cannot be convicted.

(iii) even motive has not been proved by the prosecution for

commission of the offence.

(iv) though as per FSL report blood was found on the lungi of appellant No.1 Phool Singh, but in absence of any evidence confirming the origin and group of the said blood, the said report loses its significance.

06. On the other hand, State counsel supporting the impugned judgment has submitted that conviction of the appellants is strictly in accordance with law and there is no illegality or infirmity in the impugned judgment warranting interference by this Court.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-10 Santosh Lakda is a witness of last seen. He has stated that on the date of incident, it was raining; the deceased came to his house on bicycle and thereafter, the accused persons came there and took the deceased with them. He states that it is appellant No.1 Phool Singh who had taken the deceased with him whereas the other accused was standing out. He states that there was no quarrel between the accused persons and the deceased at the time when they left his house. He has further clarified that he had not seen accused No.2 near the verandah nor any test identification was conducted by the police. He has stated that he had not disclosed the names of the appellants to the police because he did not know their names.

09. PW-11 Ramnath, brother of PW-10, has made somewhat similar

statement as has been made by PW-10. He has stated that on the date of incident at about 4-5 accused/appellant No.1 Phool Singh and the deceased had come to his shop and in the night brother of the deceased came to his shop and enquired about the deceased, on which he told him that the deceased had come to his shop and then went away from there. He states that on the next morning he came to know about killing of deceased. At this stage he was declared hostile and in cross-examination by the prosecution states in para-4 that on the date of incident it was raining; deceased had taken shelter in the verandah of his house; the accused persons appeared to be drunk; on that day son of the deceased came to his house and enquired about his father/deceased, on which he told him that the deceased and appellant No.1 Phool Singh went towards jungle and next day he was informed by son of the deceased that his father/deceased was lying dead in the jungle. He has also stated that he has no acquaintance with accused/appellant No.2.

10. PW-1 Jagrawal Singh is son of the deceased, who lodged the FIR. PW-2 Koushal Patel and PW-3 Dharam Das, witnesses to memorandum (Ex.P/6 & P/8) and seizure (Ex.P/7), have partly supported the prosecution case. PW-4 Ku. Prerna Singh, Patwari, prepared the spot map (Ex.P/11). PW-5 Ramcharan Rathia and PW-6 Satpal Singh have turned hostile. PW-7 Dr. R.K. Divya conducted postmortem on the body of the deceased on 14.8.2011 vide Ex.P/4 and noticed incised wounds over right side of eye lid, right side of upper lip, left side of upper lip, over chin, over left lower lid orbital region; abrasions over left side of chest clavicle region; contusion on

forehead; depressed fracture of frontal bone of left side and slice wounds over dorsum of penis and right side of scrotum. All these injuries were caused by hard and blunt as well as sharp edged weapon. In his opinion, the cause of death was coma due to compression of brain as a result of head injuries and that the death was homicidal in nature. PW-8 Baburam, Sarpanch, is a witness to inquest. PW-9 MB Patel, investigating officer, has supported the prosecution case.

11. Close scrutiny of the evidence makes it clear that there is no direct evidence against the appellants connecting them with the crime in question and their conviction rests upon circumstantial evidence i.e. the evidence of last seen by PW-10 & PW-11 and recovery of incriminating articles i.e. club, slippers and lungis.

12. As regards the evidence of last seen, in the matter of ***Rambraksh alias Jalim Vs. State of CG*** reported in ***AIR 2016 SC 2381*** it has been held as under:

10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where 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. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

11. In a similar fact situation this Court in the case of *Krishnan v. State of Tamil Nadu* [(2014) 12 SCC 279, held as follows:

“21. The conviction cannot be based only on circumstance of last seen together with the deceased. In *Arjun Marik v. State of Bihar*, (1994) Supp (2) SCC 372):

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

22. This Court in *Bodhraj v. State of J&K* (2002) 8 SCC 45) held that:

“31. The last seen theory comes into play where the time

gap between the point of time when the accused and the 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.”

It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together.

23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.

24. In *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438), this Court held that in the absence of any other links in the chain of circumstantial evidence, the appellant cannot be convicted solely on the basis of “last seen together” even if version of the prosecution witness in this regard is believed.

12. In the present case as noticed above the Sessions Court as well as the High Court convicted the appellant/accused No.2 on the basis of last seen evidence, the correctness of which is also doubtful. The High Court had failed to appreciate the aforesaid fact and erred in affirming the judgment of conviction passed by the Sessions Court. We are satisfied that the conviction of the appellant cannot be sustained in law and liable to be set aside.

13. Likewise, in the case of ***Kanhaiya Lal Vs. State of Rajasthan*** reported in ***2014 AIR SCW 1828*** it has been held as under:

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

14. The theory of last seen – the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and

the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh vs. State of Rajasthan* (2010) 15 SCC 588.”

14. In the present case, there are two witnesses namely PW-10 Santosh and PW-11 Ramnath who have been cited as witnesses to last seen. From their statements it is seen that they are not acquainted with appellant No.2 Her Singh; it is appellant No.1 Phool Singh who had taken the deceased with him and at that time appellant No.2 was standing out of their house. They have admitted the fact that while the deceased was going with the appellants, there was no dispute or quarrel between them whereas in the diary statement PW-10 has stated that the appellants took the deceased forcibly. However, in the Court he denied to have made any such statement to the police. From their evidence it is clear that the deceased was last seen with the appellants at about 4-5 pm whereas his dead body was found next day morning. As such, there was sufficient time gap between the discovery of dead body and the deceased being last seen with the appellants and being so, the possibility of any person other than the accused being the perpetrator of the crime cannot be ruled out. Merely on the basis of their evidence regarding last seen, it would be hazardous to infer guilt of the appellants, as has been observed in the aforesaid judgments, particularly when no motive whatsoever has been attributed to them for commission of such a heinous offence, and therefore, we are to further see whether this evidence of last seen is consistent with other evidence adduced by the prosecution.

15. The other piece of evidence relied upon by the trial Court is the recovery of incriminating articles i.e. club and lungis. The said evidence is also not conclusive in nature, firstly for the reason that the witnesses to memorandum and seizure i.e. PW-2 Koushal Patel and PW-3 Dharam Das have not fully supported the prosecution case. According to them, appellant No.2 Her Singh did not disclose anything to the police before them, all the articles including the club were seized from the spot and appellant No.1 Phool Singh did not give anything to the police whereas seizure memo Ex.P/7 mentions that the club was seized on being produced by appellant No.1 Phool Singh. Secondly, even if the seizure of the articles is taken to have been effected at the instance of the appellants, the prosecution has failed to establish any nexus of these articles with the crime in question. Though as per FSL report (Ex.P/20) blood was found on the lungi, allegedly belonging to appellant No.1 Phool Singh, but there is no evidence to prove origin and group of the said blood.

16. In ***Kansa Behera Vs. State of Orissa, AIR 1987 SC 1507*** while dealing with recovery of bloodstained articles the Supreme Court held as under:

“11. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood

especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn."

17. Keeping in view the aforesaid principles of law relating to circumstantial evidence if we examine the facts and evidence of the present case, it emerges that there is no legally admissible evidence against the appellants connecting them with the crime in question. When a case rests solely upon this circumstantial evidence, each of the circumstances has to be proved to the hilt leaving no room for any doubt consistent with the innocence of the appellant. However, as noticed above, that has not been done in this case.

18. Thus considering the overall facts and circumstances of the case, the nature and quality of evidence adduced by the prosecution in light of the aforesaid principles of law, we are of the opinion that the prosecution has failed to prove guilt of the appellants beyond all reasonable doubt. This being the position, the benefit of doubt must be credited to the appellants and they deserve to be acquitted of the charge leveled against them.

19. In the result, the appeal succeeds and is, accordingly, allowed. The impugned judgment is hereby set aside and the appellants are acquitted of the charge under Section 302/34 of IPC by giving them benefit of doubt. Accused/appellant No.2 Her Singh @ Hem Singh is reported to be on bail, therefore, his bail bonds stand discharged and

he need not surrender. Since accused/appellant No.1 Phool Singh Kanwar is behind the bars, he be set free forthwith if not required to be detained in connection with any other offence.

Sd/

(Pritinker Diwaker)
Judge

Sd/

(Sanjay Agrawal)
Judge