

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgement Reserved On 21.8.2018
Judgement Delivered On 25.09.2018

CRA No. 1154 of 2012

1. Madhu @ Lingo, S/o Kopa Markam, aged about 22 years, R/o Village Pallevaya , P.S. Bhairamgarh, Distt. Bijapur, Chhattisgarh
2. Rainu Mandawi @ Shriniwas S/o Rajman Tangala, aged about 28 years, R/o Village Todpalli, Distt. Aadilabad (Andhra Pradesh)

---- Appellants

Versus

- State Of Chhattisgarh S/o Through - P.S. Bhanupratappur , Distt. Kanker C.G.

---- Respondent

CRA No. 891 of 2013

1. Shani Ram Pudo, S/o Dasru Pudo, aged about 32 years, R/o Village Naghur, Kacche Thana Chowki, PS Bhanupratappur, Distt. Kanker, Chhattisgarh
2. Dhanesh Boga @ Dhongiya, S/o Sunder Boga, aged about 26 years, R/o Village Rasoli, Kacche Thana Chowki, PS Bhanupratappur, District Kanker, Chhattisgarh

---- Appellants

Versus

- State Of Chhattisgarh S/o Through PS Bhanupratappur Distt. Kanker C.G.

---- Respondent

Cr.A. No.1154/2012

For Appellant	:	Shri D.K. Gwalre, Advocate
For Respondent	:	Shri A. Pillai, Dy. Advocate General with Shri N.K. Mehta, Panel Lawyer

Cr.A. No.891/2013

For Appellant	:	Shri Sandeep Shrivastava, Advocate
For Respondent	:	Shri A. Pillai, Dy. Advocate General with Shri N.K. Mehta, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Judgement

The following judgment of Court was delivered by P. Diwaker, J

25/09/2018

1. Since the above criminal appeals arise out of the same incident, they are being heard together and decided by this common judgment.
2. The appellants in the above appeals have challenged the judgment of conviction and order of sentence dated 8.11.2012 passed by the Sessions Judge, North Bastar, Kanker in S.T. No.42/2010 convicting them under Sections 147, 148, 364, 302/149 of the Indian Penal Code (for short 'the IPC') and sentencing each of them to undergo RI for 1 year; RI for 2 years, RI for 10 years and RI for life with fine of Rs.500/-, with usual default clause, respectively.
3. In the present case name of deceased is Kheluram.
4. The prosecution case, in brief, is that on 3.10.2009 the deceased, his wife and Nutan Singh (PW-9) had gone to the house of Arjoram, uncle of Nutan Singh (PW-9) and when they were dining in the house of Arjoram, the accused persons named in FIR along with few unknown persons dressed in dark colour uniform & armed with weapons arrived at the house of Arjoram in search of the deceased and after finding him, took him along with them towards village Rasauli after tying both his hands with rope. On 4.10.2009 at the instance of Nutan Kumar (PW-9), FIR (Ex.P-9) was registered against accused/appellant Shani & others for the offence punishable under Sections 147, 148, 149, 364 of IPC read with Section 25, 27 of the Arms Act. On 7.10.2009 at about 12 in the noon Hiraram (PW-3) noticed the body of deceased lying in an open field. Dehati Merg was recorded vide Ex.P-3. Inquest over the body of deceased was prepared vide Ex.P-4 on 7.10.2009. Body of deceased was sent for post-

mortem examination to the Community Health Centre, Bhanupratappur where Dr. R.D. Koreti (PW-1) conducted post-mortem examination of the body of deceased and noticed one incised wound in the size of 4x6 inch in the anterior part of neck, fracture of hyoid bone, skin, muscle & artery of neck were cut. He opined that the cause of death was haemorrhagic & neurogenic shock and duration of death of deceased was 15 to 25 hours prior to post-mortem examination. One letter dated 6.10.2009 (Ex.P-7) containing threat of naxalites to the persons who were acting as police informer or helping the police in any manner was seized from the spot vide seizure memo of Ex.P-8. In the FIR it has been further mentioned that accused Dhanesh Boga alias Dhongiya was one of the members of naxalitie gang who came in search of the deceased.

5. After completion of investigation, charge sheet for the offence punishable under Sections 147, 148, 364, 302/149 of IPC was filed against the accused/appellants and accordingly the charges were framed by the trial Court against them. To substantiate the charges, the prosecution has examined 12 witnesses in all. Statements of accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
6. The trial Court after hearing the parties in the matter and considering the material available on record, by the impugned judgment convicted & sentenced the accused/appellants in the manner as described above.
7. Counsel for accused/appellants in Criminal Appeal No.1154/2012 submits that the appellants have not been named by any of the witnesses as the members of naxalite gang who took the deceased along with them and their conviction is solely based on the testimony of PW-9 who has stated in the Court that he identified these appellants by their voice, but there is no evidence that PW-9 was acquainted from the manner of speech, gait

and voice of the appellants and as such, the claim of PW-9 that he had identified the appellants herein by their voice cannot be accepted and it is not safe to convict them only on the basis of aforesaid shaky evidence. Furthermore, according to PW-9 Nutan Kumar, the naxalites had covered their faces and therefore also it was very difficult for him to identify the appellants merely on the basis of their voice. Reliance is placed on the judgements reported in AIR 1965 SC 712, AIR 2009 SC 1012 & (2011) 4 SCC 143.

8. Counsel appearing for accused/appellants in Criminal Appeal No.891/2013 submits that no test identification parade of these appellants has been conducted and only general allegations have been made against them that they were the members of the naxalite gang who took the deceased along with them. He further submits that deceased was allegedly kidnapped on 3.10.2009, whereas his body was found lying in an open field on 7.10.2009 and there is absolutely no evidence as to where was the deceased in between 3.10.2009 & 7.10.2009. Referring to the post-mortem report, it has been argued that duration of death was 15-25 hours prior to post-mortem examination, which was conducted on 7.10.2009 at 5 in the evening and thus in all probabilities the deceased must have been murdered on 6.10.2009 in the evening. Under these circumstances, the appellants cannot be connected with the crime on the basis of last seen theory because the time gap between the time when the deceased was last seen alive in the company of naxalites and when the body of deceased was found is too long and it is settled position in law that where time gap is long it would be unsafe to base the conviction on the "last seen theory". Lastly, he submits that even if the entire prosecution story is accepted in its entirety, then the appellants herein are liable to be convicted only for the offence punishable under Section 364 of

IPC for which normally sentence of life is not awarded. He submits that the appellants are in jail for the last about nine years and therefore their sentence can be reduced to the period already undergone by them.

9. State counsel however supports the judgment impugned and submits that the findings recorded by the Court below convicting & sentencing the accused/appellants in the manner described above are based on due appreciation of evidence on record and there is no infirmity in the same warranting interference in exercise of appellate jurisdiction. He submits that names of accused Shaniram Pudo & Dhanesh Boga find mention in FIR (Ex.P-9) and even in the statement recorded under Section 161 CrPC, almost all the witnesses have mentioned the names of aforesaid appellants. He further submits that accused Shaniram & Dhanesh were the members of naxalite gang who kidnapped the deceased and for which a prompt named report was lodged on 4.10.2009 itself. He further submits that though there was considerable time gap when the deceased was abducted/kidnapped by the naxalites and disclosure of his dead body, but it is evident from the testimonies of prosecution witnesses that the deceased was forcibly taken by the accused persons along with others from the house of said Arjoram and thereafter his dead body was found lying in an open place. In these circumstances, the onus was on the accused persons to explain as to when and where they had left the deceased and/or as to what had happened to the deceased after they had taken him along with them, however, they failed to render any reasonable/plausible explanation in this regard. He submits that in the given facts and circumstances of the case, the legal presumption under Sections 106 & 114 of the Evidence Act can be taken in aid for maintaining the conviction. Reliance is placed on the judgment reported in AIR 2014 SC 2936.

10. We have heard counsel for the parties and perused the impugned judgment and record of the trial Court.
11. Dr. R.D. Koreti (PW-1) is the doctor who conducted post-mortem of the body of deceased. He opined that incised wound was caused by sharp object, cause of death was due to haemorrhagic & neurogenic shock and the death was homicidal in nature. The duration of death was within 15 to 25 hours from the time of post-mortem examination.
12. Jeevdhan Yadav (PW-2) is the police constable to whom the doctor had handed over the bloodstained vest of the deceased and the same was seized vide seizure memo Ex.P-2.
13. Hiraram (PW-3) is the villager who first noticed the body of deceased lying in the field. He is also lodger of Dehati Merg (Ex.P-3).
14. Ajruram (PW-4), younger brother of deceased, is the hear-say witness who came to know about the villagers that the deceased was captivated by naxalites. He is also a witness to inquest (Ex.P-4), spot map (Ex.P-6), slip (Ex.P-7) written by naxalites and seizure memo (Ex.P-8).
15. Surjo Bai Darro (PW-5) is the wife of deceased. She has stated that she knew accused Dhanesh & Shaniram, whereas she does not know accused Madhu & Renu. She has stated that she is unable to identify the naxalites as they had covered their faces. According to her, when she and her husband (deceased) was eating food in the house of Nutam (PW-9), 10-12 naxalites in green colour uniform and carrying gun in their hands came to there and asked as to who is Kheluram. According to her, accused Dhanesh & Shaniram pointed towards her and said that this witness is wife of Kheluram (deceased). According to this witness, thereafter they brought her husband from the house of Hire Singh and said to her that her husband is a police informer, he used to inform the police about their activities and saying so, they took her husband with

them towards Nedgaon Jungle after tying both his hands with rope and thereafter they killed her husband by silting his throat and thrown his body in the field of Hiraram.

16. Radha Bai (PW-6), brother of deceased, has stated that about 100 naxalites came to the village and took the deceased along with them. Shaniram & Dhanesh Bonga were also members of the gang of naxalites. She has further deposed that body of deceased was found lying in the field of Hiraram.
17. Nirmala Bai (PW-7) & Hire Singh (PW-8) have deposed in a manner almost similar to the version of PW-6.
18. Nutan Singh (PW-9) is the person at whose instance FIR (Ex.P-9) was registered. He has deposed that on the fateful night when the deceased and his wife were eating food in his house, all of a sudden, 35-40 naxalities wearing green colour uniform and carrying guns, knife in the hands entered his house and asked from him as to who is Khedu Darro and when he pointed towards the deceased, the accused persons took him along with them towards village Rasauli Nagaod. He has further stated that all the four accused persons present in the Court were present on the spot along with the naxalites and they were also armed with guns. In the cross-examination this witness has stated that he could not identify the naxalities as their faces were covered with cloth. He has further stated that he had identified accused Dhanesh, Shaniram, Rainuram & Madu by their voices. He, out of his own, stated that as they reside at a distance of 1.5 kilometre from his village, therefore, he is familiar to their voices.
19. Mohan Singh (PW-10) has not stated anything incriminating against any of the appellants.
20. Ravindra Mandavi (PW-11) is the police person who assisted in the investigation. K.N. Tiwari (PW-12) is the investigating officer who has duly

supported the prosecution case.

21. As regards the complicity of accused/appellants namely Madhu & Rainu (Cr.A. No.1154/2015), conviction of these appellants is based on the evidence of Nutan Kumar (PW-9), according to whom, he had identified these appellants by their voice. The law with regard to voice identification is settled that if the Court is satisfied about the identification of person by evidence of identification of voice alone no rule of law prevents its acceptance as the sole basis for conviction. Voice identification becomes very crucial and reliable when the parties are known to each other since earlier. But, at the same time, it is also settled that conviction based on identification of voice alone may not be safe as accurate voice identification is much more difficult than visual identification.

In **Kishnia & ors v. State of Rajasthan** reported in **(2004) 11 SCC 567** the conviction was sustained on identification by voice at night due to previous acquaintance between the witness and the accused. In **Dalbir Singh v. State of Haryana** reported **(2008) 11 SCC 425** it was observed that even an ocular identification at night was difficult but if the person was acquainted and related to another, identification *inter alia* by voice was sustainable.

In the case of **Inspector of Police, T.N. v. Palanisamy @ Selvan** reported in **AIR 2009 SC 1012** has observed that where the witnesses were not closely acquainted with the accused and claimed to have identified the accused from short replies given by him, evidence of identification by voice is not reliable. In **Nilesh Dinkar Paradhkar v. State of Maharashtra** reported in **(2011) 4 SCC 143** the Supreme Court has held that evidence of voice identification is at best suspect, if not wholly unreliable. Accurate voice identification is much more difficult than visual identification. Though, this observation was made by Supreme

Court with reference to identification of voice on the basis of recorded conversation; yet, the principles apply with slightly less force to the identification of live voice as well.

22. The Division Bench of Madhya Pradesh High Court vide judgment dated 17.5.2017 passed in Criminal Appeal No.00148/2005 (**Virendra Singh v. State of Madhya Pradesh**) has observed thus:-

23. Identification by voice has to be considered carefully by the court as accurate voice identification is much more difficult than visual identification. The Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. Voice identification alone, that too from the chorus voices of quarrel or scuffle, without any corroborative evidence is always risky to relied upon to base the conviction. The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances. The ability of the individual to identify voices in general and the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a listener must be established beyond all reasonable doubts by cogent, positive, affirmative and assertive evidence. The prosecution can not take recourse to the weaknesses of the defence. Voice can be identified by means of voice identification parade.

24. Keeping in view all the precautions necessary to rely upon the voice identification, when we examined the evidence produced by the prosecution in the present case, we find that there is no evidence that the witnesses Ghanshyam and Bhanwar Singh were acquainted from the

manner of speech, gait and voice of the appellants. There is no evidence about clarity of the voice on the contrary the witnesses have said the voices they identified were of quarrel, screams and scuffle. Therefore, the conviction can not be based on the voice identification in this case.

23. In the case in hand, Nutam Kumar (PW-9) has deposed that on the date of incident 35-40 naxallites forcibly entered his house and taken the deceased on the pretext that he was acting as informer to the police. In the cross-examination he has stated that all the naxalites had covered their faces, appellants Madhu & Rainu were also members of naxalites gang and he had identified them by their voice. He has further stated that he is acquainted with the voice of appellants as they are residing at a distance of 1.5 kilometre away from his village. True it is that some persons have got peculiarities of speech, such as stammering, stuttering, lisping or speaking with a nasal tone, and such a voice can easily be detected. However, in the case in hand, Nutan (PW-9) has not disclosed to the Court as to what words were uttered by these accused/appellants which enabled him to identify them from their voices. There is also nothing on record to show that these appellants were intimately known to PW-9 before the incident or he had previous acquaintance with them or he had any occasion earlier to talk to these accused/appellants or to hear their voices making it possible for him to identify either of them by voice, which he heard at the time of kidnapping of the deceased. In other words, there is no evidence that Nutan (PW-9) was acquainted from the manner of speech, gait and voice of the appellants.

That apart, according to Nutan (PW-9), a gang of naxalites comprising 35-40, entered his house covering their faces and had taken the deceased along with them. Thus, apart from being the part of mob,

the accused/appellants had also covered their faces and in these circumstances, it was next to impossible as to which of them had been vocal at that time. Further, when there was a great mob only one of them is not expected to have spoken at a time. Thus, in such a situation, the identification made by PW-9 on the basis of voice cannot be taken as a substantial piece of evidence against the accused/appellants. Apart from the evidence of PW-9, there is no other positive evidence connecting the accused/appellants with the crime in question and being so, they are entitled to be acquitted by extending them benefit of doubt.

24. As regards the complicity of accused/appellant Shaniram & Dhanesh Boga, evidence on record shows that on 3.10.2009 numbers of naxalities came to the house Nutan (PW-9) and took the deceased with them branding him to be the informer of police. On 4.10.2009 report (Ex.P-9) was lodged by Nutan Kumar (PW-9) mentioning that the deceased was taken from his house towards jungle by the gang of naxalites consisting of accused Shaniram & Dhongia Gond. On 7.10.2009 the body of deceased was found lying near the field of one Hiraram of village Nedgaon. According to Radha Bai (PW-6), Nirmala Bai (PW-7) & Hire Singh (PW-8), hundreds of naxalites wearing naxal uniform and carrying gun came and taken the deceased with them on the pretext that he was acting as an informer to the police. Version of the aforesaid witnesses get corroboration from the promptly lodged FIR (Ex.P-9) which finds mention of names of accused Shaniram & Dhongia as the members of naxalite gang who took the deceased along with them. The defence has cross-examined these witnesses but failed to put any dent on their testimonies. The identity of these accused/appellants are also not in dispute because the prosecution witnesses have categorically stated that both the accused are also the residents of the same locality in which they are residing.

Thus, it has been established by the prosecution that at the time of abduction of deceased both the aforesaid accused were present at the spot as members of gang of naxalites.

The police got the post-mortem done, which revealed that cause of death was haemorrhagic & neurogenic shock due to severance of neck. The doctor (PW-1) opined that the death was homicidal in nature. Evidence on record establishes that accused/ appellants Shaniram & Dhanesh @ Dhongia were also the members of naxalites gang which took the deceased along with them suspecting him to be the informer of the police and thereafter body of deceased was found lying in the field of Hireram with cut injury over neck.

Section 106 of the Evidence Act postulates that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. This Section has been designed to deal with certain exceptional cases in which it would be impossible or at any rate, it is proportionately difficult for the prosecution to establish the facts which are especially within the knowledge of the accused and which should be proved by him without difficulty or inconvenience.

When it has been established from the unchallenged statements of prosecution witnesses that the deceased was taken by the naxalites consisting of accused/appellant Shaniram & Dhanesh, the only inference that could be drawn is that these accused were knew the circumstances leading to death of deceased. Thus, as per Section 106 of Evidence Act, the onus was on accused/appellants Shaniram & Dhanesh to explain the events that had occurred after they had taken the deceased along with them. However, in the statements recorded under Section 313 CrPC, they failed to offer any explanation as to what they did after they took away the deceased and on the contrary they took the plea of complete denial. In

absence of any explanation from the side of accused persons as to how and in what manner they left the deceased or how and in what manner the dead body was found lying in the field, an adverse inference under Section 106 of the Evidence Act is to be drawn against them. In other words, by applying the theory of last seen and drawing the presumption under Section 106 of the Indian Evidence Act, it can be safely concluded that accused/appellants Shaniram & Dhanesh Boga were the murderers.

No doubt, the principle of last seen comes into play where the time gap between the point of time when the deceased and accused 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 crime becomes impossible. However, it cannot be said that in all cases where there is a long time gap between the above two points, the evidence of last seen together is to be rejected. In such cases also the evidence of last seen together would be relevant if the prosecution succeeds in establishing that in the intervening period there was no possibility of any other person meeting or approaching the deceased. The Hon'ble Supreme Court in *State of Goa v. Sanjay Thakran & another* reported in (2007) 3 SCC 755 has observed thus:-

“34. From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the

accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together

with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

25. In the case in hand also, admittedly there is a considerable time gap between the point when the deceased was taken away by naxalities and when his dead body was recovered. From the statements of prosecution witnesses it is apparent that on 3.10.2009 a group of naxals came to the house of Nutan (PW-9) and on the pretext that the deceased is an informer of the police took him along with them towards forest after tying both his hands. Normally, the areas covered by rich and thick forest are used as shelters and hiding places by the naxalities. This being the position, prior to murdering the deceased, he must have been kept in a place situated inside the thick & dense forest, which is normally not easily accessible to public or police. Thus, there was no possibility of coming any third person in between the period when the deceased was taken away by naxalities and death of the deceased. In other words, in the given facts and circumstances of the case, it can be safely presumed that there was no possibility of any other person meeting or approaching the deceased during the intervening period when accused persons took the deceased along with them and when his body was found. This apart, the defence has not adduced any evidence showing that somebody had seen the deceased alive in between the aforesaid two points. Therefore, it cannot be said that the long time gap between the last sighting of deceased with the accused/appellants to the time of death opens the possibility of intervention of other persons.
26. Upon analysis of evidence in respect of accused/appellant Shaniram & Dhanesh Boga, we are of the view that the prosecution has been able to prove beyond all reasonable the guilt of these accused/appellants.

27. In the result;

- Criminal Appeal No.1154/2012 filed by appellants Madhu @ Lingo & Rainu Manawi @ Shriniwas is allowed. Impugned judgment dated 08.11.2012 convicting and sentencing them under Sections 147, 148, 364 & 302/149 of IPC are set aside and they are acquitted of those charges. They are reported to be in jail. They be set at liberty forthwith if not required to be detained in jail in connection with any other offence.
- Criminal Appeal No.891/2013 filed by appellants Shaniram Pudo & being meritless is hereby dismissed. Since they are already in jail, no direction regarding their surrender etc. is needed.

Sd/-
(Pritinker Diwaker)
Judge

roshan/-

Sd/-
(Vimla Singh Kapoor)
Judge