

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 354 of 2013****Reserved on 16.02.2018****Pronounced on 12.03.2018**

[Arising out of judgment/order dated 13.03.2013 in Sessions Trial No. 141/2012 of the learned 3rd Additional Sessions Judge, Bilaspur]

Anil Soni @ Rinku S/o Thaleswar Prasad Soni Aged About 25 Years R/o Village Kera, P.S. Shivrinarayan, Hal - Police Line Bilaspur C.G., Chhattisgarh

---- Appellant**Versus**

State Of Chhattisgarh Through - P.S. Civil Line, Distt. Bilaspur C.G., Chhattisgarh

---- Respondent

For Appellant	:	Shri Gagan Tiwari, Advocate
For Respondent/State	:	Shri Vivek Sharma, Government Advocate

**Hon'ble Shri Pritinker Diwaker &
Hon'ble Shri Sanjay Agrawal, JJ**

C. A. V. Judgment**Per Sanjay Agrawal, J.**

1. This criminal appeal has been preferred by the appellant under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C. in short) against the judgment dated 13th March, 2013 passed by the 3rd Additional Sessions Judge, Bilaspur (C.G.) in Sessions Trial No.141/2012 whereby the appellant has been convicted under Section 302 of the Indian Penal Code (for brevity, the IPC) and sentenced to life imprisonment with fine amount of Rs.1,000/- and, in default of payment of fine amount, he has to undergo additional imprisonment for one month.
2. Case of the prosecution, in short, is that on 02.05.2012 at 10.00 pm, the accused/appellant Anil Soni along with his friend Sudhir Sharma came to the deceased Prakash Chand Agrawal at his quarter No.39 and took him to the

terrace of the third floor of the same building and because of their previous enmity they killed him by throttling his neck and absconded after keeping the dead body near the water tank of the terrace.

3. Based upon the aforesaid incident, merg intimation (Ex.P.1) was lodged by the deceased's brother Makhanlal Agrawal on 03.05.2012 at 06.15 am and on the strength of merg intimation (Ex.P.1), F.I.R. (Ex.P.32) was registered at 18:15 hours (06.15 pm) by the Station House Officer, Civil Lines, Bilaspur (C.G.) against the two accused persons, namely, Anil Soni and Sudhir Sharma under Sections 302, 201 and 34 of the IPC. Inquest was conducted on the body of the deceased vide Ex.P.3 on 03.05.2012. After the inquest, dead body was sent for autopsy. Post-mortem examination was conducted by Dr. R.K.Shukla (P.W.9) on 03.05.2012, who gave post-mortem report (Ex.P.27) by opining that cause of death is respiratory arrest due to asphyxia resulting from throttling.
4. After investigating the matter, the offence punishable under Section 302, 201 & 34 of IPC has been registered against the appellant Anil Soni and one Sudhir Sharma by the concerned Station House Officer, who submitted its final report before the Chief Judicial Magistrate, Bilaspur on 29.07.2012 and the matter was thereafter committed to the District and Sessions Judge, Bilaspur for its trial.
5. After considering the prima facie materials available on record, charges under Section 302 read with Section 34 and 201 of IPC have been framed against the appellant Anil Soni and one Sudhir Sharma on 25.08.2012. They pleaded not guilty in connection with the aforesaid crime, as framed, and claimed to be tried.
6. In order to prove the guilt, the prosecution has examined as many as 14

witnesses while none was examined by the accused persons in their defence.

7. After considering the evidence led by the prosecution, the trial Court, vide its impugned judgment, has convicted the appellant and sentenced him as aforesaid while acquitting the co-accused Sudhir Sharma of the commission of the alleged crime. Hence, this appeal.
8. Being aggrieved, the appellant has preferred this appeal. Shri Gagan Tiwari, learned counsel for the appellant submits that the judgment under appeal as passed by the Court below is apparently contrary to law as the same has been passed without considering the evidence in its proper perspective. He submits that there is no eye-witness and based upon the weak circumstantial evidence, the trial Court ought not to have convicted the appellant with regard to the offence punishable under Section 302 of the IPC. He submits further that the theory of last seen together cannot by itself form the basis of holding the appellant guilty of the alleged offence. In support, he placed his reliance upon the decisions rendered in the matters of ***Kanhaiya Lal v. State of Rajasthan*** reported in (2014) 4 SCC 715, ***Ashok v. State of Maharashtra*** reported in (2015) 4 SCC 393 and ***Anjan Kumar Sarma and others v. State of Assam*** reported in (2017) 14 SCC 359 and submitted that the judgment impugned as passed by the trial Court is perverse in the eye of law and deserves to be set aside.
9. On the other hand, Shri Vivek Sharma, learned counsel for the State supported the impugned judgment by submitting, inter alia, that it has been passed upon due consideration of the statement of the wife of the deceased, namely, Maya Agrawal (P.W.13) along with other documentary evidence, and therefore, does not require to be interfered.

10. We have heard learned counsel for the parties and perused the entire record carefully.
11. Smt. Maya Agrawal (P.W.13) is the wife of deceased Prakash Chand Agrawal. She has stated in her evidence that on the date of incident, i.e., on 02.05.2012 at 10.00 pm she along with her family members was watching the T.V. at their Government quarter No.39. At the relevant time, someone rang the door bell. Upon hearing so, she opened the door and saw the appellant Anil Soni standing outside the house/quarter, who enquired about her husband. Upon queries being raised by her (deceased's wife), he replied that there is some work with him and asked her to send him to the terrace of the said building as he is also the resident of quarter No.41 of the same building. She informed her husband that Anil Soni is calling you, then her husband came out and told her that he will come back. She has stated further in her cross-examination at para 14 that both went towards terrace of the said building. She has stated further that when her husband did not come back even by 11.10 pm, then she went to the quarter No.41 and knocked the door in order to know the whereabouts of her husband whereupon one Ashwini Soni, the relative of the appellant, opened the door and informed that her husband is sleeping inside the house and will come in the morning. This witness has stated further that she went to the terrace also but could not see anything due to darkness and thereafter she came back to her home and went to sleep but could not have a sound sleep. Due to which, she got up at 2.30 am and found that the lights of quarter No.41 were on and suspected why the lights were on even at that time and thereafter she fell asleep. She has further stated that the next morning she went to the terrace of the said building where she found the dead body of her husband lying near the water tank. She immediately informed to one Painkra, who is residing in

front of her quarter. He, in turn, upon seeing the dead body informed the same to deceased's elder brother Makhanlal Agrawal, who was on duty at that point of time at Police Control Room, Bilaspur. After his arrival, she narrated the entire story of the incident.

12. This witness (P.W.13) has stated further that her husband had seen the accused persons coming along with the girls and they often used to bring the girls and consume liquor. She has stated further that her husband told the accused Anil Soni for stopping of all these activities as members of the colony are living with their families. This fact was informed by her husband and upon knowing it she advised her husband not to interfere in their matter. According to her, this might have been the reason of conspiracy being hatched by them to eliminate her husband.
13. Makhanlal Agrawal (P.W.1), brother of the deceased, is Head Constable in Police Control Room and was on duty on the fateful day. He has stated that Government quarter No.39 was allotted to him wherein he resides along with his deceased brother and his family members. He received the information from one of his colleagues regarding the death of his brother and immediately, after getting the said information, he rushed to the house where Maya Agrawal, the deceased's wife, narrated the entire incident to him. Thereafter, he lodged the merged intimation (Ex.P.1) on 03.05.2012. Sunil Kumar (P.W.2) is a Constable and was witness to the Panchnama (Ex.P.5). Gajpati Sidar (P.W.3) is a Revenue Inspector, who has prepared the Nazri Naksha (spot map) (Ex.P.11) on 15.06.2012. Yogesh Agrawal (P.W.4) is a witness to the seizure memo Ex.P.13 & Ex.P.15. Rajendra Singh (P.W.5) is a Head Constable and reached to the said quarter where people gathered. These witnesses are, thus, formal in nature.
14. Shiv Kumar (P.W.6) is the witness to the inquest (Ex.P.3) and has turned

hostile. Balram Singh Thakur (P.W.7) is the witness of memorandum (Ex.P.18 & Ex.P.19) and also of the seizure memos (Ex.P.20 & Ex.P.21) but has not supported the prosecution story and turned hostile. Dilip Tiwari (P.W.8) is a formal witness, who has taken the photos of dead body from different angles. Dr. R.K.Shukla (P.W.9) is the medical officer, who has conducted the post-mortem examination on the dead body on 03.05.2012 and has submitted his post-mortem report (Ex.P.27) giving opinion as to cause of death on account of respiratory arrest due to asphyxia resulting from throttling. Ishwar Singh Thakur (P.W.10) is a formal witness and has turned hostile. Likewise, Vikram Singh Thakur (P.W.11) has also turned hostile without supporting prosecution case. Santosh Sharma (P.W.12) and Ajay Shankar Tripathi (P.W.14) are investigating officers and have supported the prosecution case.

15. From perusal of the statements of aforesaid prosecution witnesses, it is evident that there is no eye-witness to the incident occurred on 02.05.2012 and the entire case is based upon the statement of deceased's wife Maya Agrawal (P.W.13) and that by considering her evidence, the trial Court has convicted the appellant in relation to the commission of crime in question.
16. In view of the aforesaid facts and circumstances, we are, therefore, focusing on her (P.W.13) evidence in order to ascertain the fact as to the involvement of the appellant in crime in question. As reflected from her testimony, it has unequivocally come on the surface that on the fateful day, i.e., on 02.05.2012 at 10.00 pm, the deceased's wife Maya Agrawal (Ex.P.13) was watching the T.V. along with her family members and at that relevant time, the accused Anil Soni came and upon his calling her husband Prakash Chand Agrawal, both went to terrace. It is also not in dispute that the dead body of her husband has been found near the water tank of the terrace of quarter No.41 where the appellant along with his family members was residing. No such

evidence is available on record, by which, it could be held that he was alive thereafter during the said period and/or after leaving the company of the appellant. Pertinently to be noted here that both, the deceased and the appellant, were the residents of the same building situated at Police line, Bilaspur (C.G.). The deceased Prakash Chand Agrawal was residing with his family members at quarter No.39 of the said building while appellant at quarter No.41. Once it has come on record, as we gathered from the testimony of the deceased's wife Maya Agrawal (P.W.13), that deceased had accompanied the appellant Anil Soni in the night to the terrace of the said building and has not returned even by the time when his wife went for sleeping, then in such circumstances, the appellant was under an obligation to show by placing the cogent and clinching evidence that the deceased was alive during that relevant period. However, no evidence as such, pointing out the said fact, was placed on record by the appellant so as to hold that the deceased was alive after leaving his company. Since the deceased was found dead in the terrace of the same building during the period where it was not possible for anyone else either to meet him or to approach him at the place of occurrence, therefore, in absence of any evidence as required to be established by him under Section 106 of the Indian Evidence Act, 1872 (for short, the Act of 1872), the only conclusion would, therefore, be that the appellant Anil Soni alone is responsible for the alleged crime.

17. It is true that the circumstances of last seen together, as contended by Shri Gagan Tiwari, cannot by itself form the basis of holding the appellant guilty of the offence, but it would be a relevant circumstance in a case, like the present one, where there was no possibility of any other person either to meet the deceased or approach him at the place of incident or before the commission of crime in the intervening period. Therefore, the contention of

learned counsel for the appellant, under such circumstances, cannot be accepted.

18.1 We shall now consider the case laws cited by the learned counsel for the appellant. The reliance as placed in the matter of **Ashok v. State of Maharashtra** (supra) is, however, noted to be distinguishable. The facts involved in the said case were entirely on different footing with that of the instant case. That is the case where three persons, namely, the wife and minors of the appellant were found dead respectively on 29.08.2008 and 30.08.2008 and the first information report was lodged only on 27.09.2008, i.e., after lapse of about one month and the prosecution has evidently failed to offer any explanation whatsoever in lodging such a delayed F.I.R. In that factual scenario, the Hon'ble Supreme Court has not accepted the theory of last seen together. However, in the instant case, the deceased was called upon by the appellant Anil Soni in the night at 10.00 pm on the fateful day and his dead body was found on the terrace of quarter No.41 of the same building on the next day morning. Therefore, in absence of any explanation offered by the appellant in this regard, as required under Section 106 of the Act of 1872, the reliance as placed by the counsel for the appellant would not be of any helpful to him.

18.2 Likewise, the principles laid down in the matter of **Kanhaiya v. State of Rajasthan** (supra), as relied upon by Shri Gagan Tiwari, are also distinguishable from the facts involved in the present case. In that case, although the deceased (Kala) was seen with the accused (Kanhaiya Lal) on the fateful day, but it was observed by the Supreme Court that the motive as alleged in the said case that the appellant Kanhaiya Lal had illicit relation with the wife of the deceased's younger brother was not found to be proved. Contrarily, it was found that there was no dispute between them and instead

they had cordial relationship for a long time. As a consequence, it was held that in absence of proof of motive, the conviction merely on the basis of last seen theory cannot be held to be sustainable. However, in the instant matter, the deceased had raised objection against the appellant bringing girls in the colony and that was the motive, by which, the appellant committed the alleged offence.

- 18.3 Similarly, further reliance of counsel for the appellant in the matter of **Anjan Kumar Sarma and others v. State of Assam** (supra) would also not be of any help to him as the principles laid down in the said matter is fully distinguishable from the facts of the present case.
19. The Supreme Court, however, while considering the theory of last seen together in the matter of **Trimukh Maroti Kirkan v. State of Maharashtra** reported in **(2006) 10 SCC 681** has explained the same at paragraph 22 of its judgment as under:

“22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not suffer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram v. State of H.P.*, (1972) 2 SCC 80 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with “khukhri” and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra*, (1992) 3 SCC 106 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In *State of U.P. v. Dr. Ravindra Prakash Mittal*, (1992) 3 SCC 300, the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband

was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In *State of T.N. v. Rajendran (1999) 8 SCC 679* the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.”

20. Yet, in the case of ***State of Goa v. Sanjay Thakran and another*** reported in **(2007) 3 SCC 755**, it has been held by the Supreme Court at paragraph 34 as under:

“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 seen together and the crime coming to light is after (*sic* of) a considerable long duration. There can be no fixed or straitjacket 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 of 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.”

21. By applying the principles as laid down by the Supreme Court in the facts and circumstances of the present case and considering the fact that the deceased was found dead in the same building where appellant also resides and that in absence of any explanation offered by the appellant as required under Section 106 of the Act of 1872, the only conclusion would, therefore, be that the appellant Anil Soni alone is responsible for the commission of alleged offence punishable under Section 302 of the IPC. The trial Court has, therefore, not committed any illegality by placing its reliance upon the evidence of Maya Agrawal (P.W.13) in arriving at a conclusion that the appellant is the author of the crime and is liable to be punished under Section 302 of the IPC. We, therefore, uphold the said finding.
22. Consequently, we do not find any substance in this appeal. This appeal is accordingly dismissed.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Sanjay Agrawal)
JUDGE