

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 809 of 2019**

- Dilloo Singh Alias Duloo Ram S/o Shankar Singh Aged About 22 Years Occupation Cultivate, Resident- Village Chaora, Badhani, Jhariya, P.S. Rajpur, District- Balrampur-Ramanujganj, Chhattisgarh.

---- Appellant**Versus**

- State Of Chhattisgarh Through The Station House Officer-Police Station Raipur, District- Balrampur, Ramanujganj, Chhattisgarh.,

---- Respondent

For Appellant	:	Shri Suryakant Mishra and Shri S.A. Ansari, Advocates.
For Respondent/State	:	Smt. Madhunisha Singh, P.L.

Hon'ble Shri Justice Prashant Kumar Mishra,**Hon'ble Shri Justice Gautam Chourdiya, JJ****Judgment On Board By Justice Gautam Chourdiya****31/07/2019**

This appeal arises out of the judgment of conviction and order of sentence dated 11th April, 2019 passed by the II Additional Judge to the Court of Additional Sessions Judge, Ramanujganj, Distt. Balrampur (CG) in S.T. No.R-94/2017 whereby the appellant stands convicted and sentenced as under:

Conviction	Sentence
Under Section 302 of Indian Penal Code.	Life imprisonment, fine of Rs.5,000/-, in default thereof to suffer additional RI for one year.
Under Section 201 (Part-I) of Indian Penal Code.	RI for seven years, fine of Rs.1,000/-, in default thereof to undergo additional RI for one year.

02. As per the prosecution case, on 25.8.2017 merger intimation was lodged by complainant Dharbharan Singh (PW-1) at Police Station – Rajpur to the effect that at about 5-6 am on being informed by his daughter Priti that there was dead body of Ashish in the well, he went there and saw dead body of Ashish in the well. When he informed about the same to mother of the deceased, she told that Ashish did not return home since the night of 23.8.2017. During merger inquiry, from the statements of the witnesses it revealed that on 22.8.2017 at 10-10.30 pm there was dispute between the appellant and the deceased where the appellant assaulted the deceased with a bamboo stick and he had also threatened the deceased of life. At the time of this incident, Sukhram (PW-4) was also present. Inquest over the dead body was conducted vide Ex.P/4 and thereafter, the dead body was sent for postmortem which was conducted on 25.8.2017 itself. The autopsy surgeon (PW-8 Dr. Ramprasad Tirki) in his postmortem report (Ex.P/9A) noticed following injuries/symptoms on the person of the deceased :

“External examination – Mouth closes, eyes closed, rigor both upper and lower limb, washer man appearance in foot and hand. Blood coming from nostril, neck congestion, stool was passed from anal, congestion in chest wall. No external injury seen in other body part.

Internal examination – Abdomen-stomach are empty, chest wall congestion and congestion right and left lung and trachea wall congested, no frothy in lung and trachea. Stool present in large intestine and small intestine, spleen,

kidney congestion, blood collection in plural cavity and rupture of liver right lobe, bladder empty and blood collection in peritoneal cavity.”

In his opinion, the death was homicidal in nature and co-related with police investigation. According to him, the cause of death was internal injury to vital organ and may be asphyxia and that the death occurred 24 to 48 hours prior to the postmortem examination.

On the memorandum of the appellant (Ex.P/6), one bamboo stick was seized vide Ex.P/7. On the basis of mere inquiry, FIR (Ex.P/16) was registered on 3.9.2017 by ASI Shantilal Kujur against the appellant for the offence punishable under Sections 302 & 201. After filing of charge sheet, the trial Court framed charges under Sections 302 & 201 of IPC which was denied by the appellants and he pleaded for trial.

03. So as to hold the accused/appellant guilty, the prosecution examined 14 witnesses in all. Statement of the accused 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.

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 appellant as mentioned above.

05. Counsel for the appellant submits as under:

(i) that there is no eyewitness account to the occurrence and conviction of the appellant 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 it was the appellant who committed murder.

(ii) that the evidence of last seen in the present case is very weak in nature and unless the said evidence gets corroboration from some other piece of evidence, the appellant cannot be convicted.

(iii) that all the important witnesses of the prosecution have turned hostile and not supported the prosecution case.

(iv) that even motive has not been proved by the prosecution for commission of the offence.

06. On the other hand, State counsel supporting the impugned judgment has submitted that conviction of the appellant 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. Close scrutiny of the evidence makes it clear that the trial Court has convicted the appellant mainly on the evidence of PW-1 Dharbharan Singh, PW-2 Seetlal, PW-4 Sukhram, PW-5 Jwala Singh, PW-6 Vinay @ Khiru and PW-12 Indrawati who have stated that the appellant was last seen in the company of the deceased on 22.8.2017 in between 8 pm – 12 in the night and that he had assaulted the deceased by bamboo stick on the said date.

09. The evidence on record goes to show that admittedly, the scuffle

took place between the accused/appellant and the deceased on 22.08.2017 in between 8 pm and 11 pm and thereafter the appellant left the company of the deceased and his dead body was recovered from a well on 25.08.2017.

10. In the matter of ***Rambraksh alias Jalim Vs. State of CG*** reported in ***AIR 2016 SC 2381***, the Hon'ble Supreme Court while dealing with the evidence of last seen 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."

11. 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."

12. PW-1 Dharbharan Singh is a hearsay witness as he came to know about the incident of scuffle between the appellant and the deceased through PW-4 Sukhram and PW-6 Vinay @ Khiru. PW-2 Seetlal, father of the deceased has stated that the deceased had gone with the appellant on the date of incident and thereafter did not return home. He has stated that after about one hour, the appellant came to his house and enquired about the deceased, on which he (this witness) said that the deceased had gone with him (appellant) and did not return thereafter. At that time, the appellant threatened that the deceased had taken money from him and he would beat him. He states that after the said incident his son/deceased did not return home. PW-3 Kumari Preeti saw the dead body of the deceased in the well and informed about the same to her father PW-1.

13. PW-4 Sukhram has stated that on the date of incident at around 9 o' clock while he was standing near a grocery shop, the appellant and Jwala Singh (PW-5) came there and the appellant started scuffling with him and in the meantime deceased Ashish came there. There was fight between the appellant and the deceased and he (this witness) ran away from there whereas Ashish was present on the spot. After some time when he along with the deceased was going to the house of

Sodhan, the appellant met them on the way and started assaulting the deceased with a bamboo stick. He states that after this incident he went to his house and slept there and that the accused/appellant also came to his house. He admits that after 2-3 days of the said incident of *Marpeet* between the appellant and the deceased, the dead body of the deceased was recovered from the well. In cross-examination, he states that after the incident of *Marpeet* between the appellant and the deceased, he and the appellant went to the house of one Khobo and slept there.

14. PW-5 Jawala Singh has also stated that on the date of incident at about 10 pm there was scuffle between the appellant and the deceased and after about 4 days dead body of the deceased was recovered from the well. PW-6 Vinay @ Khiru states that on the date of incident at around 8 pm, there was dispute between the appellant and Jwala Singh near the house of Sodhan and thereafter appellant had a quarrel with Sukhram (PW-4). He states that on the same day, the appellant assaulted the deceased with a bamboo stick and due to fear he ran away from there.

15. Ramgulam (PW-7) is a witness to memorandum of the appellant Ex.P-6 and seizure Ex.P-7. However, this witness has turned hostile. PW-6 Ram Prasad Tirkey conducted postmortem on the body of the deceased and noticed certain injuries/symptoms on his person as mentioned above. According to him the cause of death was injury to vital organ and may be asphyxia and that the death occurred 25 to 48 hours prior to the postmortem examination.

16. PW-9 ASI, Umesh Ram Bhagat, did part of investigation. PW-10 Amrit Singh, Patwari, prepared the spot map Ex.P-14 and inquest Ex.P-5. PW-11 Ramprasad witness to memorandum Ex.P-6 and seizure Ex.P-7 has turned hostile. PW-12 Smt. Indravati, mother of the deceased has stated on the date of incident, the accused/appellant and Jwala Singh (PW-5) came to her house and took her son Ashish with them. She said that at about 12 o' clock in the night the appellant came to her house carrying a club in his hand and enquired about the deceased, on which she told him that he had gone with him (this witness). She states that thereafter her son did not return home. She also states about the threat given by the appellant of beating the deceased as the deceased had taken money from him. PW-13 Shanti Lal Kujur, Investigating Officer has supported the prosecution case. PW-14 ASI, Ramesh Kumar recorded merg intimation Ex.P-1.

17. Thus, from the evidence of the prosecution witnesses, it reveals that the incident of *Marpeet* between the appellant and the deceased took place on 22.08.2017 in between 8 pm and 12 in the night whereas the dead body was recovered from the well on 25.08.2017. As per postmortem report Ex.P-9A, the autopsy surgeon PW-8 has opined that the death of the deceased occurred 24 to 48 hours prior to the postmortem examination which was conducted on 25.08.2017 at 3:30 pm, meaning thereby death of the deceased would have occurred on 23.08.2017 or on 24.08.2017 at around 3:30 pm.

18. It is a well settled principle of law that for basing a conviction on

last seen theory, the prosecution is required to prove that the time gap between the point of time when the appellant was last seen in the company of the deceased and recovery of his dead body is so small which rules out the possibility of any person other than the appellant being perpetrator of the crime in question. However, in the present case, as already observed, there is long time gap between the appellant being last seen in the company of the deceased and his death. As such, the prosecution has not been successful in proving the guilt of the appellant based on the last seen theory in accordance with law.

19. Even the medical evidence is not conclusive in nature. The autopsy surgeon has not given a definite opinion regarding the cause of death. According to the autopsy surgeon cause of death was injury to vital organ or it may be due to asphyxia. However, from perusal of the injuries as mentioned in the postmortem report, it is seen that there was no such severe injury to any vital organ of the deceased which could have resulted in his death. The Doctor has not found any external injury on the person of the deceased whereas according to the prosecution witnesses, the appellant assaulted the deceased with bamboo stick. Though on the memorandum of the accused/appellant Ex.P-6, seizure of bamboo stick/club was made Ex.P-7. However, the witnesses to the memorandum and seizure have not fully supported the prosecution case. Even otherwise, the said weapon of offence seized from the possession of the appellant is of no consequence in the given facts and circumstances of the case.

20. Therefore, regard being had to the over all facts and circumstances of the case, the nature and quality of evidence adduced by the prosecution, the settled legal position in respect of last seen theory as has been held in the matters of *Rambraksh @ Jalim* and *Kanhaiya Lal* (supra), we are of the opinion that the prosecution has not been successful in proving the guilt of the accused/appellant on the basis of evidence adduced by it beyond the shadow of reasonable doubt. Though, the circumstances put forth by the appellant raise suspicion against him but mere suspicion can not be the basis of conviction, howsoever strong it may be. Being so, the trial Court has committed an illegality in convicting the appellant under Sections 302 & 201 of IPC on the basis of such evidence. The appellant deserves to be acquitted of the said charges by giving him benefit of doubt.

21. In the result, the appeal is allowed. The impugned judgment is hereby set aside and the appellant is acquitted of charges under Sections 302 & 201 of IPC by extending him benefit of doubt. The appellant is reported to be in jail, therefore, he is directed to be released forthwith, if not required to be detained in connection with any other offence.

Sd/

(Prashant Kumar Mishra)
Judge

Sd/

(Gautam Chourdiya)
Judge