
(2023) 06 CHH CK 0061
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 857 Of 2014

Chhotku @ Laxman Yadav

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 28-06-2023

Acts Referred:

Indian Penal Code, 1860 — Section 302

Code Of Criminal Procedure, 1973 — Section 313, 374(2)

Citation : (2023) 06 CHH CK 0061

Hon'ble Judges : Sanjay K. Agrawal, J;Arvind Singh Chandel, J

Bench : Division Bench

Advocate : Anish Tiwari, Sameer Uraon

Final Decision : Allowed

Judgement

1. This criminal appeal has been preferred by the appellant under Section 374(2) of IPC against impugned judgment dated 30/06/2014 passed by learned Additional Sessions Judge, Mungeli in Sessions Trial No. 15/2013 whereby he has been convicted for offence punishable under Section 302 of IPC and has been sentenced to undergo life imprisonment with fine of Rs. 5000/- and in default of payment of fine, additional R.I. for one month.

2. Case of the prosecution, in brief, is that in the intervening night of 15-16/02/2013 at village Buchipara within the ambit of Police Station City Kotwali, Mungeli, the appellant herein assaulted Premkumar Yadav with laathi and caused his death and thereby, committed the aforesaid offence.

3. Further case of the prosecution is that complainant Babla Yadav (P.W.-1) lodged a report at Police Station City Kotwali, Mungeli that on 15/02/2013, the appellant came to their house under the influence of liquor and started abusing them upon which his son Premkumar and his wife Lalita Bai (P.W.-2) came outside the house and asked the appellant as to why he was abusing his family members then the appellant went towards his house. After 10-15 minutes, the

appellant returned again and started abusing the deceased and the appellant and deceased engaged into a quarrel and they went somewhere together. On the next day, when Lalita Bai (P.W.-2) informed him that her husband Premkumar had not come home and thereafter, his dead body was recovered near Thakurdev temple at about 9:30 AM on 16/02/2013. On the basis of the said information, merger intimation was registered vide Ex. P/1 and first information report was lodged vide Ex. P/2. Spot map was prepared vide Ex. P/3 and naksha panchayatnama was prepared vide Ex. P/17. Summons were issued to the witnesses vide Ex. P/18 and in their presence, inquest was conducted vide Ex. P/19 and the dead body of Premkumar Yadav was subjected to postmortem which was conducted by Dr. S.P. Baghel (P.W.-11) and as per the postmortem report (Ex. P/13), cause of death is said to be coma due to injuries on the brain and nature of death is said to be homicidal. Memorandum statement of the appellant was recorded vide Ex. P/9 and pursuant thereof, a laathi was seized vide Ex. P/10 and the shirt and lungi worn by the appellant were seized vide Ex. P/11. After due investigation, the appellant was charge-sheeted for offence punishable under Section 302 of IPC which was committed to the Court of Sessions for trial in accordance with law. The appellant abjured his guilt and entered into defence.

4. In order to bring home the offence, prosecution examined as many as 17 witnesses and brought on record 23 documents. Statement of the appellant was recorded under Section 313 of CrPC wherein he denied guilt, however, he examined none in his defence.

5. Learned trial Court, after appreciation of oral and documentary evidence on record, finding the death of deceased Premkumar Yadav to be homicidal in nature and further finding the appellant to be the author of the crime in question, proceeded to convict him for offence punishable under Section 302 of IPC and sentenced him as aforesaid.

6. Mr. Anish Tiwari, learned counsel for the appellant, would submit that the trial Court is absolutely unjustified in convicting the appellant for offence punishable under Section 302 of IPC only on the basis of theory of last seen together when there is no further corroborative evidence available on record. Even if the incriminating circumstance of last seen together is taken as it is, then too, in absence of any other corroborative circumstance, it would not be sufficient to convict the appellant, as such, the appellant is entitled to be acquitted.

7. Per contra, Mr. Sameer Uraon, learned State counsel, would submit that prosecution has been able to bring home the offence beyond reasonable doubt and the trial Court has rightly convicted the appellant for offence punishable under Section 302 of IPC on the basis of theory of last seen together, as such, the instant appeal is liable to be dismissed.

8. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost

circumspection.

9. The first question for the consideration would be whether the death of deceased Premkumar Yadav was homicidal in nature ?

10. Learned trial Court has recorded an affirmative finding in this regard and held the death of deceased Premkumar Yadav to be homicidal in nature relying upon the expert medical opinion of Dr. S.P. Baghel (P.W.-11) who has proved the postmortem report (Ex. P/13) in which cause of death is said to be coma due to injuries on the brain and nature of death is said to be homicidal. Considering the statement of Dr. S.P. Baghel (P.W.-11) as well as the postmortem report (Ex. P/13) and the grievous injury suffered by the deceased on his head, we are of the considered opinion that the trial Court has rightly held the death of deceased Premkumar Yadav to be homicidal in nature, particularly when it has not been seriously questioned by learned counsel for the appellant. We hereby affirm the said finding recorded by the trial Court.

11. This brings us to the next question for consideration, which is, whether the trial Court is justified in convicting the appellant only on the basis of the theory of last seen together finding it to be duly established ?

12. The trial Court has convicted the appellant for offence punishable under Section 302 of IPC only on the basis of theory of last seen together holding that he took the deceased along with him at night on 15/02/2013 and thereafter, the dead body of the deceased was recovered at about 09:30 AM on 16/02/2013 and the trial Court has relied upon the statements of Babla Prasad (P.W.-1), Lalita (P.W.-2), Sadhuram (P.W.-4), Shivprasad (P.W.-5), Gajanand (P.W.-6) and Hinslal (P.W.-9) to convict the appellant.

13. A careful perusal of the statements of the aforesaid witnesses would show that father of the deceased, Babla Prasad (P.W.-1) as well as Shivprasad (P.W.-5) and Gajanand (P.W.-6) have stated that Lalita Bai (P.W.-2), wife of the deceased informed them that appellant took the deceased along with him at night and thereafter, deceased did not return home and his dead body was recovered the next day, however, Lalita Bai (P.W.-2) has been declared hostile and she has not supported the case of the prosecution and instead stated that when deceased went outside to quarrel with the appellant, she took him inside the house and then she went to sleep while the deceased was watching TV and thereafter, she does not know what happened to the deceased. On leading question being asked, Lalita Bai (P.W.-2) has not supported the case of the prosecution. Sadhuram (P.W.-4) has stated that on the fateful night at about 11 PM, he heard the voices of appellant and the deceased who were quarreling with each other and it appears from the record that he has not seen both the appellant and deceased together and only heard their voices. As such, there is no clear cut evidence available on record to establish the theory of last seen together. Even if the theory of last seen together is found established, then too, there is no other corroborative evidence available on record to connect the appellant with the

crime in question.

14. In the matter of Jaharlal Das v. State of Orissa (1991) 3 SCC 27, the Supreme Court has noted the fact that at the stage of inquest, the important incriminating circumstance namely, the deceased was last seen in the company of the accused, was not noted and that is not there in the inquest report. Thereafter, in view of the above fact and other evidence on record, their Lordships have held that the deceased was last seen in the company of the accused is not established beyond reasonable doubt.

15. In the matter of In the matter of Arjun Marik v. State of Bihar 1994 Supp (2) SCC 372, it has been held by their Lordships of the Supreme Court have held that conviction cannot be made solely on the basis of theory of 'last seen together' and observed in paragraph 31 as under :-

"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 though a number of witnesses have been examined by 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."

16. Likewise in the matter of State of Goa v. Sanjay Thakran (2007) 3 SCC 755 the Supreme Court has held that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was observed in 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 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. "

17. Similarly, in the matter of *Kanhaiya Lal v. State of Rajasthan* (2014) 4 SCC 715, their Lordships of the Supreme Court have clearly held that 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 and 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. It has been held in paragraphs 15 and 16 as under :-

"15. 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 v. State of Rajasthan* (2010) 15 SCC 588.

16. In view of the aforesaid circumstances, it is not possible to sustain the impugned judgment and sentence. This appeal is allowed and the conviction and sentence imposed on the appellant-accused *Kanhaiya Lal* are set aside and he is acquitted of the charge by giving benefit of doubt. He is directed to be released from the custody forthwith unless required otherwise."

18. In the matter of *Anjan Kumar Sarma v. State of Assam* (2017) 14 SCC 359 their Lordships of the Supreme Court have clearly held that in a case where other links have been satisfactorily made out and circumstances point to guilt of accused, circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In absence of proof of other circumstances the only circumstance of last seen together and absence of satisfactory explanation, cannot be made basis of conviction.

19. Finally in the matter of Navneethakrishnan v. State by Inspector of Police (2018) 16 SCC 161, their Lordships of the Supreme Court have clearly held that evidence of last seen is an important piece of evidence, but accused cannot be convicted solely on the basis of evidence of last seen together and it requires corroboration and held as under:-

"18. ... It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone can't discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration."

20. In the matter of State of Goa v. Sanjay Thakran and another (2007) 3 SCC 755, their Lordships of the Supreme Court found that there was considerable time gap of approximately 8½ hours when the deceased was last seen alive with the accused persons and their Lordships held that there being a considerable time gap between the persons seen together and the proximate time of crime, the circumstance of last seen together, even if proved, cannot clinchingly fasten the guilt on the accused.

21. In the instant case also, the appellant and deceased were seen alive on the night of 15/02/2013 at 11 PM whereas the dead body of deceased Premkumar Yadav was recovered on 16/02/2013 at about 09:30 AM with a gap of more than 10 hours, as such, there is considerable time gap between the last seen together and the time when the dead body of the deceased was recovered. Therefore, it cannot be held that only the appellant is the author of the crime in question and in absence of corroboration, it cannot be held that he has caused the death of deceased.

22. Reverting to the facts of the case in light of the aforesaid legal position, it is quite vivid that prosecution has not been able to clearly establish that the appellant was last seen together with the deceased and except relying upon the theory of last seen together, no other incriminating links have been satisfactorily made out and no other incriminating circumstance which leads to the hypothesis of guilt against the appellant has been proved by the prosecution. As such, in absence of proof of other circumstances or chain of circumstances, only the theory of last seen together cannot be made sole basis for conviction of the appellant as it would be unsafe to rest conviction only on the theory of last seen together and even the theory of last seen together has not been clearly established by the prosecution in the instant case. Therefore, we are of the considered opinion that learned trial Court is absolutely unjustified in convicting the appellant for offence punishable under Section 302 of IPC. We hereby set aside the conviction so recorded and the sentence so awarded by the trial Court to the appellant vide the judgment impugned. The appellant is hereby acquitted

of the charges leveled against him giving him benefit of doubt and he be released forthwith, if his detention is not required in any other case.

23. Accordingly, this criminal appeal stands allowed.

24. Let a certified copy of this order along with the original record be transmitted to trial Court concerned for necessary information and action, if any.