

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.394 of 2009

Judgment Reserved on : 31.10.2017

Judgment Delivered on : 31.1.2018

Vimla Bai, W/o Ashok Kumar Bhardwaj, aged about 25 years, Occupation Cultivator, R/o Village Beltukari, P.S. Kharora, Tahsil and District Raipur, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Kharora, Tahsil and District Raipur, Chhattisgarh

--- Respondent

For Appellant	:	Shri R.K. Jain, Advocate
For Respondent/State	:	Shri Neeraj Kumar Mehta, Panel Lawyer

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

Per Arvind Singh Chandel, J.

1. This appeal is directed against the judgment dated 6.4.2009 passed in Sessions Trial No.164 of 2008 by the Sessions Judge, Raipur convicting the accused/Appellant under Section 302 of the Indian Penal Code and sentencing her with imprisonment for life and fine of Rs.1,000/- with default stipulation.
2. Case of the prosecution, in brief, is that Divya (deceased), aged about 6 years, was daughter of Laxmi Prasad. Laxmi Prasad is brother of Ashok (PW1), husband of the Appellant. On 19.8.2008, the Appellant, Rukhmani Bai (PW5) and the deceased were present at home. Ashok had gone to the house of his in-laws and rest of the family members had gone to the agricultural field. At

about 2:30 p.m., some members of the family including Terasbai returned home. They did not find the deceased at home. On making search for her, her dead body was found in the well situated in the *badi* (fence) of the house. Morgue Intimation (Ex.P5) was lodged by Mohitram (PW7). Inquest (Ex.P2) was prepared. First Information Report (Ex.P8) was registered on 23.8.2008. Post mortem examination of the dead body was conducted by Dr. B. Kathotiya (PW6) and report thereof (Ex.P4) was prepared by him. He opined that the death was asphyxial due to drowning. It is alleged that Ashok (PW1) was having more affection with deceased Divya than other children, therefore, the Appellant caused her death by pushing her into the well. After investigation, a charge-sheet was filed against the Appellant for offence punishable under Section 302 of the Indian Penal Code. Charge was framed against her under Section 302 of the Indian Penal Code.

3. To rope in the Appellant, the prosecution examined as many as 11 witnesses. Statement of the Appellant was also recorded under Section 313 of the Code of Criminal Procedure in which she denied the guilt. No witness has been examined in her defence.
4. After trial, the Trial Court convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant argued that the whole prosecution story is based on the last seen theory and extra judicial confession of the Appellant. It was further submitted that the case of the prosecution is based on very weak circumstantial

evidence. Testimony of witnesses of last seen Trivenibai (PW2) and Rukhmani Bai (PW5) is not reliable. As per the statement of Trivenibai (PW2), she had seen the deceased, the Appellant and one other child Ku. Rani together near the well. Thereafter, the Appellant had taken both the children towards the *badi* (fence). It was Rani only who could tell about what had happened, but she has not been examined by the prosecution. It was further argued that the statement of Ashok (PW1) regarding confessional statement of the Appellant is not acceptable because the Appellant is his second wife. Ashok was under suspicion that his brother and the Appellant were in an illicit relationship with each other and the child who took birth from the Appellant was a result of the said illicit relationship. Since Ashok wanted to get rid off the Appellant, he concocted a false story of extra judicial confession of the Appellant after 3-4 days of the incident. It was further argued that there was no motive for the Appellant to commit the alleged offence.

6. Per contra, Learned Counsel appearing for the State, supporting the impugned judgment, submitted that statements of Trivenibai (PW2) and Rukhmani Bai (PW5) are reliable. In her statement under Section 313 of the Code of Criminal Procedure, the Appellant has not explained that what did she do with Divya after taking her to the *badi*. The Appellant has made extra judicial confession before her husband Ashok (PW1) and, therefore, statement of Ashok is reliable. The prosecution has successfully proved motive for the Appellant to commit the offence.
7. We have heard Learned Counsel appearing for the parties and perused the material available on record including the impugned

judgment with utmost circumspection.

8. Ashok (PW1) has stated that Divya, who was aged about 6 years, died due to drowning in water and her dead body was recovered from inside the well. He has further stated that on the fateful day and time, only Divya, the Appellant and Rukhmani Bai (PW5) were present at home. Because of presence of the Appellant at home at the relevant point of time, he asked her about the occurrence, but she did not tell him anything. After 2-3 days of the occurrence, on being told by him to the Appellant that statements of witnesses had been recorded by the police and there was nothing for her to worry and thereafter on being asked from her about the truth of the occurrence assuring her that he will not disclose anything, she told him that she had taken Divya and other child Rani to the *badi* for feeding them cucumber. She had given cucumber to Rani in the *badi* and sent her away, but had stopped Divya there. She had made Divya climb up on the surrounding wall of the well and had thereafter pushed her into the well. He has further stated that she had also told him that thereafter she returned home and went to the house of Trivenibai (PW2) and after visiting the house of Trivenibai, she returned home. She had also told him that when Rukhmani Bai (PW5) asked her about Divya, she told her that she had given cucumber to Divya and sent her along with Rani. He has further stated that on being questioned why did she do so, she answered that since he was having more affection with Divya than other children, she did so. He has further stated that she used to prevent him to express more affection with Divya.

9. Trivenibai (PW2) has deposed that she had seen Rani and Divya

sitting near the well in the afternoon. When she asked from the children with whom had they come there, Divya told her that they had come there along with the Appellant. At that time, the Appellant also reached there. Thereafter, the Appellant, saying that she will feed both the children cucumber, took them along with her to the *badi*. After an hour, the Appellant along with her younger child came to her house, but, at her house, she, saying that she was not feeling well, stayed for 2 minutes only and returned for home. Thereafter, the dead body of Divya was found in the well.

10. Kotwar Hirudas (PW3), who is the witness of inquest (Ex.P2), has supported the case of the prosecution. Patwari Rambagas (PW4), who prepared the spot-map (Ex.P3), has stated that he had done inspection of the well and found that sufficient water was available therein for drowning. He has further stated that a surrounding wall was also constructed over the well.
11. Rukhmani Bai (PW5), mother-in-law of Mohitram (PW7) has stated that on the date of incident, only 3 members, i.e., the Appellant, Divya and she herself were present at home. The Appellant had taken Divya along with her saying that she will feed her cucumber. After an hour, she returned alone. On being asked, she told that Divya had gone out for playing. In the evening, dead body of Divya was found.
12. Dr. B. Kathotiya (PW6), who conducted post mortem examination on the dead body of Divya and gave report (Ex.P4), has stated that the death was asphyxial due to drowning.
13. Mohitram (PW7) has stated that all of them had gone to the

agricultural field and when they returned home, they did not find Divya. On making search for her nearby, she was not found. Ultimately, Rukhmani Bai (PW5) told them that the Appellant had taken Divya along with her saying that she will feed her cucumber. Thereafter, they found dead body of Divya in the well. He has further stated that he lodged the Morgue Intimation (Ex.P5).

14. Pooran Lal Kurre (PW8) has deposed that dead body of Divya was found in the well. The matter was reported in the police station. After 2-3 days of the incident, Ashok (PW1) told him that the Appellant had pushed Divya into the well.
15. Assistant Sub-Inspector S.P. Dhritlahre (PW9) has done the morgue inquiry. Assistant Sub-Inspector L.R. Giri (PW10) has investigated the alleged offence. Head Constable Kamal Singh Chandrakar (PW11) has recorded the Morgue Intimation (Ex.P5).
16. Case of the prosecution is based only on the circumstantial evidence of (i) last seen theory and (ii) extra judicial confession made by the Appellant before her husband Ashok (PW1). In **AIR 2016 SC 2381 (Rambraksh alias Jalim v. State of Chhattisgarh)**, it has been observed by the Supreme Court thus:

“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 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.

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.”

17. Similarly, in **2014 AIR SCW 1828 (Kanhaiya Lal v. State of Rajasthan)**, it has been observed by the Supreme Court as follows:

“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.”

18. In the instant case, regarding the last seen theory, it is the case of the prosecution that deceased Divya had been last seen with the Appellant by Trivenibai (PW2), neighbour of the Appellant. On minute scrutiny of the evidence of Trivenibai, it is clear that at the relevant time, when this witness had seen deceased Divya along with the Appellant, one other girl Rani was also with them. As per the statement of Trivenibai, when she had seen the two girls with the Appellant near the well, at that time, the Appellant had taken both the girls towards the *badi*. Later on, the dead body of Divya was found in the well. In these circumstances, it was Rani, who could only disclose that she and deceased Divya had gone with the Appellant towards the *badi*. But, Rani has not been examined by the prosecution in Court nor her statement under Section 161 Cr.P.C. has been recorded. Rukhmani Bai (PW5), grand mother-

in-law of the Appellant, has stated that the Appellant after returning told her that Divya had gone out for playing. Thereafter, dead body of Divya was found in the well. In these circumstances, Rani was the material witness, but she has not been examined by the prosecution.

- 19.** Regarding the extra judicial confession of the Appellant, there is only one witness, i.e., Ashok (PW1), husband of the Appellant. As per the prosecution story and the statement of Ashok, the said extra judicial confession was made after 2-3 days of the incident. Ashok has stated that the Appellant had told him that he was having more affection with Divya than other children, therefore, she had caused Divya to fall down in the well. But, the above statement of Ashok regarding his affection with Divya more than the other children is not supported by any of the other witnesses or other family members of Ashok. In paragraph 8, Ashok has admitted that prior to 15 days of the incident, the Appellant had given birth to a girl child. Even if it is considered for the sake of argument that Ashok was having more affection with Divya than the other children, the Appellant had no reason to have jealous with Divya because she had already given birth to a girl child 15 days prior to the incident. In these circumstances, the alleged motive of the Appellant put-forth by the prosecution for committing murder of Divya does not inspire confidence of this Court to hold her guilty.
- 20.** It is the defence of the Appellant that her husband Ashok was under a wrong impression that an illicit relationship had been developed between her and the brother of her husband. Ashok was also under suspicion that her newly born girl child was out of

the said illicit relationship between her and the brother of her husband. In paragraphs 11 and 15 of the cross-examination of Ashok (PW1), he has admitted that when the Appellant was arrested, the newly born child of the Appellant was also in jail with the Appellant. He has further admitted that he did not visit the jail to see the Appellant or his newly born child. Ashok has further admitted that within 2 months of the incident, Ashok married a new girl and brought her to his house as his wife. From the above, it is clear that Ashok did not have any attraction or affection with his newly born child/baby delivered by the Appellant. Within 2 months of the incident, he brought his house another woman as his wife. In these circumstances, there appears substance in the defence taken by the Appellant.

- 21.** A minute examination of the entire evidence of the prosecution makes it apparent that the statement of Ashok (PW1) regarding extra judicial confession of the Appellant is suspicious. The last seen theory is also not established. Substantive material witness Rani has also not been examined in this regard by the prosecution. The so called motive also does not inspire confidence of this Court to convict the Appellant. In our opinion, the offence alleged against her under Section 302 of the Indian Penal Code is not proved beyond reasonable doubt and, therefore, she is entitled to get benefit of doubt.
- 22.** Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charge framed against her.
- 23.** It is reported that the Appellant is on bail. Her bail bonds shall

continue for a further period of six months from today in terms of
Section 437A of the Code of Criminal Procedure.

Sd/-

(Pritinker Diwaker)
JUDGE

Sd/-

(Arvind Singh Chandel)
JUDGE