

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.556 of 2009

APPELLANT:
(In Jail)

Mithun Gendre

Versus

RESPONDENT:

State of Chhattisgarh

AND

Criminal Appeal No.766 of 2009

APPELLANTS:
(In Jail)

1. Santosh Kumar
2. Raju Ratre

Versus

RESPONDENT:

State of Chhattisgarh

{Appeals under Section 374 (2) of the Code of Criminal procedure, 1973}

(Reserved for judgment on 13-2-2014)

Present:

Mr. N.S. Dhurandhar, counsel for the appellant in Cr.A.No.556/2009.

Mr. Malay Kumar Bhaduri, counsel for the appellants in Cr.A.No.766/2009.

Mr. Sameer Behar, Panel Lawyer for the State/respondent.

Division Bench: -

Hon'ble Mr. T.P. Sharma and
Hon'ble Mr. C.B. Bajpai, JJ

JUDGMENT
(25-2-2014)

1. Cr.A.No.556/2009 filed on behalf of Mithun Gendre and Cr.A.No.766/2009 filed on behalf of Santosh Kumar & Raju Ratre against the common judgment dated 27-7-2009 passed by the 7th Additional Sessions Judge (FTC), Durg in S.T. No.92/2008 are being disposed of by this common judgment.
2. By aforesaid two criminal appeals, the appellants namely Mithun Gendre, Santosh Kumar & Raju Ratre have challenged legality and propriety of the judgment of conviction & order of sentence dated 27-7-2009 passed by the 7th Additional Sessions Judge (FTC), Durg in S.T. No.92/2008, whereby &

whereunder learned Additional Sessions Judge after holding the appellants guilty for causing homicidal death of Anil Sharma in sharing common intention and concealing the evidence of criminal case, convicted them under Sections 302 read with Section 34 & 201 of the IPC and sentenced to suffer imprisonment for life & pay fine of Rs.1,000/- each, in default of payment of fine to further suffer SI for six months and RI for seven years & pay fine of Rs.500/- each, in default of payment of fine to further suffer SI for three months, respectively.

3. Conviction is impugned on the ground that without any iota of evidence, the trial Court has convicted & sentenced the appellants and thereby committed illegality.
4. As per case of the prosecution, deceased Anil Sharma was in the habit of gambling. On the fateful evening of 3-10-2007 deceased Anil Sharma was present near Bamhnin pond under banyan tree. The appellants were playing game with deceased Anil Sharma. On account of money, quarrel took place between the appellants & the deceased, then the appellants assaulted and chased the deceased towards Vishwa Bank Colony. The deceased did not return to his house on which is brother Anand Sharma tried to search him, but did not find Anil Sharma, whereupon on second day morning he lodged missing report at Police Station Purani Bhilai vide Ex.P-13, in which he has informed the police that the deceased was with the appellants. On 4-10-2007 at about 12 noon, Anand Sharma (PW-12) was searching for the deceased along with the police. He noticed towel and chappal of the deceased near Bamhnin pond. They closely made search, then they found one dead body in a paddy field which was identified as the dead body of Anil Sharma. They noticed injuries, then Anand Sharma (PW-12) lodged dehati nalishi to the police on the spot vide Ex.P-27 against the appellants and also lodged morgue vide Ex.P-28.

5. The Investigating Officer after summoning the witnesses vide Ex.P-15, prepared inquest over the dead body of the deceased vide Ex.P-14. Dead body was identified as the body of Anil Sharma vide Ex.P-16. Red colour towel and one chappal of right leg were seized from the spot vide Ex.P-20. One undergarment was seized near Vishwa Bank Colony vide Ex.P-21. Bloodstained and plain soil were recovered from the spot where the body was lying vide Ex.P-22.
6. Dead body was sent for autopsy to Government Hospital, Durg vide Ex.P-29. Dr. A.K. Mishra (PW-1) conducted autopsy vide Ex.P-1 and noticed following injuries: -
- i. Multiple abrasions over both lips, right lip laterally.
 - ii. Two linear abrasions, one superficial over neck of 2 to 10 c.m. and another over chin of 2 c.m. x 0.25 c.m..
 - iii. Abrasions on left leg of 2 c.m. x 2 c.m., 1 c.m. x 1 c.m. and 1 c.m. x 1 c.m.
 - iv. Abrasion on left hand.
 - v. Swelling along with abrasions over left shoulder.
 - vi. Incised wound in front of left ear cutting ear lobule of 8 c.m. x 2 c.m. x bone deep.
 - vii. Incised wound on middle of forehead vertical oblique of 6 c.m. x 1 c.m. x bone deep.
 - viii. Incised wound over right parietal region of 4 c.m. x 1 c.m. x bone deep.
 - ix. Incised wound over right lower parietal region of 2 c.m. x 1 c.m. x bone deep.
 - x. Incised wound over right occipital region of 6 c.m. x 1.5 c.m. x bone deep and cross incised wound of 5 c.m. x 1 c.m. x bone deep.
 - xi. Incised wound over middle occipital region of 7 c.m. x 2 c.m. x bone deep with cross incised wound of 5 c.m. x 0.5 c.m. x bone deep.
 - xii. Incised wound over right upper neck part of 3 c.m. x 1 c.m. x bone deep and 3 c.m. x 1 c.m. x bone deep.

- xiii. Incised wound over back of neck of 3 c.m. x 0.5 c.m. x superficial.
- xiv. Incised wound over right mandible near mid thread of 4 c.m. x 2 c.m. x punctured trachea (through & through).
- xv. Incised wound over right middle arm anterior oblique of 7 c.m. x 1 c.m. x bone deep.

Mode of death was shock and death was homicidal in nature.

7. Clothes of the deceased were sealed and seized vide Ex.P-36. Finally, FIR was recorded vide Ex.P-8.
8. During the course of investigation, statements of the witnesses were recorded under Section 161 of the CrPC. Anand Sharma (PW-12), brother of the deceased, has informed the police that the incident was informed by witnesses Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15). Statement of Anand Sharma under Section 161 of the CrPC was recorded on 5-10-2007 as Ex.D-1.
9. During the course of investigation, appellant Santosh Kumar was taken into custody, he made disclosure statement of iron knife vide Ex.P-17. Appellant Santosh Kumar produced knife from the place where the dust was kept and same was seized vide Ex.P-23. Appellant Raju Ratre was also taken into custody, he made disclosure statement of bloodstained sword vide Ex.P-18 and same was recovered at his instance vide Ex.P-24. Appellant Mithun made disclosure statement of shirt vide Ex.P-19 and same was recovered at his instance vide Ex.P-25. Towel and chappal were identified by the witnesses vide Ex.P-26. The accused persons were arrested vide Exs.P-33, P-34 & P-35. Patwari prepared spot map vide Ex.P-39. Seized articles were sent for chemical examination vide Ex.P-40 and presence of blood over knife and shirts recovered from the appellants was confirmed vide Ex.P-42.
10. After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Patan, who in turn, committed the case to the

Court of Sessions, Durg from where the 7th Additional Sessions Judge (FTC), Durg received the case on transfer for trial.

11. In order to prove the guilt of the accused persons, the prosecution has examined as many as thirteen witnesses.
12. During the course of trial, the Additional Public Prosecutor filed one application under Section 311 of the CrPC for examination of three witnesses namely Kamlesh Tiwari, Himanshu Chakravarti & Rajesh Verma on 3-12-2008 which was objected by the appellants by filing reply on 4-12-2008. After hearing the parties, the trial Court allowed the application filed under Section 311 of the CrPC vide order dated 11-12-2008 by holding that statements of the witnesses would be just and proper for just, proper and necessary decision of the case, and directed to issue summons as witnesses of the prosecution. The prosecution further filed an application on 3-2-2009 for supply of statements of Kamlesh Tiwari & Himanshu Chakravarti recorded under Section 161 of the CrPC to the appellants and finally, it was supplied to the appellants on 10-2-2009 which reflects in the order sheet. Aforesaid witnesses namely Kamlesh Tiwari (PW-14), Himanshu Chakravarti (PW-15) & Rajesh Verma (PW-16) were examined on 10-2-2009. Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) had also confronted to their statements recorded under Section 161 of the CrPC as Exs.P-43 & P-44.
13. The accused persons were examined under Section 313 of the CrPC in which they denied the circumstances appearing against them, pleaded innocence and false implication in the crime in question.
14. After providing opportunity of hearing to the parties, the trial Court has convicted & sentenced the appellants in the aforesaid manner.
15. We have heard learned counsel for the parties, perused the judgment impugned and records of the Courts below.

16. Mr. N.S. Dhurandhar and Mr. Malay Kumar Bhaduri, learned counsel for the appellants, vehemently argued that this is case of no evidence. Kamlesh Tiwari (PW-14), Himanshu Chakravarti (PW-15) & Rajesh Verma (PW-16) have not been cited as witnesses in charge sheet, even their statements were not filed by the prosecution at the time of filing charge sheet and copies were not supplied to the appellants. After examination of material witnesses virtually, after final cross-examination of last witness Anand Sharma (PW-12), all of a sudden, application under Section 311 of the CrPC was filed by the prosecution. It was surprising to the appellants and the said application was filed only with a view to fill up the lacuna. Non-citing of these witnesses for prosecution and non-filing of their statements along with the charge sheet as required under Section 173 (5) of the CrPC clearly reveal and prove that initially, the prosecution was not placing reliance upon them, they were not material witnesses otherwise they would have been cited as prosecution witnesses and their statements would have been filed and supplied at the time of filing charge sheet. The trial Court has illegally allowed the application for examination of these witnesses and committed illegality by examining these witnesses. Statements recorded under Section 161 of the CrPC have not been supplied by the prosecution to the defence. In absence of their previous statements or citing them as witnesses, their evidence cannot be considered and their evidence are required to be rejected outrightly. Learned counsel further argued that the prosecution has adopted hide and seek method and by giving surprise they have filed aforesaid application with mala fide intention. Learned counsel also argued that power of court to examine any witness under Section 540 of the Code of Criminal Procedure, 1898 i.e. Section 311 of the Code of Criminal Procedure, 1973 is not unfettered, Courts are required to exercise the judicial discretion at the time of calling witness as court witness. Learned counsel contended that although the Court can examine a witness at the instance of the prosecution or defence still when the prosecution asks the

Court to examine him because it could not examine him, though it had intended to do so, that should be no ground for the Court to exercise its discretion under Section 311 of the CrPC. Similar was the view taken by the High Court of Madras in the matter of **In re K. v. R.S. Mani**¹ in which the High Court of Madras has held that

"Although the Court can examine a witness at the instance of the prosecution or defence, still when the prosecution asks the Court to examine him because it could not examine him, though it had intended to do so, that should be no ground for the Court to exercise its discretion under this section."

17. Learned counsel for the appellants further placed reliance in the matter of **Pratap Singh and another v. State of M.P.**² in which the Supreme Court has held that the investigating officer is duty bound to show the names of independent eyewitnesses as witnesses and also record their statements under Section 161 of the CrPC even if their names do not find place in the FIR, non-recording of statement or non-citing as witness is lapse and omission on the part of the investigating officer. Non-filing of statements of eyewitnesses recorded under Section 161 of the CrPC and non-examination of eyewitnesses are lapse, and adverse inference is required to be drawn against the prosecution. Learned counsel further contended that lacuna and lapse of the prosecution by itself is sufficient for discarding their statements and the appellants are entitled for acquittal.
18. On the other hand, learned State counsel opposes the appeals and submits that although in the present case, the investigating officer has failed to cite Kamlesh Tiwari (PW-14), Himanshu Chakravarti (PW-15) & Rajesh Verma (PW-16) as prosecution witnesses, the investigating officer has also failed to

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AIR (38) 1951 Madras 707

²(2006) 2 SCC (Cri) 284

file the statements of aforesaid witnesses recorded under Section 161 of the CrPC and failed to supply copies of the same to the appellants at the time of filing charge sheet. However, before closing of prosecution case, the prosecution has realized its mistake and has filed application for examination of aforesaid witnesses. After providing opportunity of hearing to the parties, the trial Court has allowed the said application. The prosecution has also acted with clean hands and the prosecution itself has applied for supply of copies of the statements recorded under Section 161 of the CrPC, of Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) to the accused persons i.e. the appellants and same was supplied to them, they have received the same and have endorsed in the order sheet. Their statements were confronted to the witnesses and marked as Exs.P-43 & P-44. The prosecution has not acted in hide and seek manner, the prosecution has not suppressed the material witnesses, it was overlooked and the prosecution has corrected itself after providing complete opportunity to the appellants. Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) were not new witnesses, their names find place in Ex.D-1, statement of Anand Sharma (PW-12) - brother of the deceased recorded under Section 161 of the CrPC on 5-10-2008. Copy of the Ex.D-1 was supplied to the appellants, they were having definite knowledge by the document of prosecution that aforesaid witnesses were eyewitnesses and material witnesses of the prosecution. Therefore, it was not surprising to the appellants. On the basis of evidence of the prosecution and by relying upon the evidence of the prosecution, the trial Court has rightly convicted & sentenced the appellants as aforementioned.

19. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the prosecution.
20. In the present case, homicidal death of deceased Anil Sharma as a result of fatal injuries found over his body has not been substantially disputed on behalf

of the appellants. Identity of dead body, injuries found over dead body and death of deceased Anil Sharma are not under dispute. The prosecution has examined Dr. A.K. Mishra (PW-1). As per his evidence and autopsy report Ex.P-1, deceased Anil Sharma died as a result of fatal injuries sustained by him and death of Anil Sharma is homicidal in nature.

21. As regards complicity of the appellants in the crime in question, undisputedly, before 3-12-2008, the prosecution has examined Sohan Kumar Dewangan (PW-2), Chandra Shekhar Singh (PW-3), Jitendra Verma (PW-4), A.R. Khan (PW-5), Shobharam Sahu (PW-6), Digpal Thakur (PW-7), Mahendranath Singh (PW-8), Santosh Tiwari (PW-9), Ramanand (PW-10) and Toran Soni (PW-11). In examination-in-chief of Anand Sharma (PW-12) was recorded on or before 28-11-2008.
22. As per case of the prosecution, at the time of filing charge sheet, the prosecution has not cited Kamlesh Tiwari (PW-14), Himanshu Chakravarti (PW-15) & Rajesh Verma (PW-16) as prosecution witnesses. Statements of Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) were also not filed by the prosecution along with charge sheet and their copies of statements were not supplied to the appellants. Aforesaid eleven witnesses except Anand Sharma (PW-12) have not supported the facts of the case except recovery, seizure and injuries. As per charge sheet, Sohan Kumar Dewangan (PW-2) & Jitendra Verma (PW-4) were eyewitnesses. Their statements recorded under Section 161 of the CrPC as Exs.P-5 & P-7 also reveal that they had witnessed the incident, but they have not supported the case of the prosecution and the prosecution has declared them hostile. Even in their cross-examination, they have not supported the case of the prosecution. Before 3-12-2008, aforesaid three witnesses were not cited as prosecution witnesses, their statements recorded under Section 161 of the CrPC were not filed before the Court and copies of the same were also not supplied to the appellants.

23. As held by the Supreme Court in the matter of **Pratap Singh** (supra), non-citing of names of independent eyewitnesses, non-filing of their statements recorded under Section 161 of the CrPC and their non-examination are serious lapses on the part of the investigating officer. But in the present case, subsequently, they have been examined, even copies of statements recorded under Section 161 of the CrPC of Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) as Exs.P-43 & P-44 have been supplied to the appellants on 10-2-2009 i.e. in the present case at subsequent stage, the prosecution has requested for examination of these witnesses, the Court has granted permission, the witnesses were examined and statements recorded under Section 161 of the CrPC was supplied to the appellants i.e. the accused persons. Therefore, only on the ground that initially, they were not cited as witnesses and their statements were not filed, adverse inference cannot be drawn.
24. As held by the Madras High Court in **R.S. Mani's** case (supra), the Court is empowered to examine any witness even at the instance of the prosecution whom it has failed to examine, but the Courts are required to exercise the discretion judiciously.
25. In the present case, before closing of the evidence of the prosecution, the prosecution has filed application for examination of three witnesses, the Court has perused the statements of Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) recorded under Section 161 of the CrPC as Exs.P-43 & P-44 on 9-10-2007 i.e. within six days of the incident, they were not new witnesses and strangers to the case of the prosecution, inter alia, their names also reflect in the statement of Anand Sharma (PW-12) recorded under Section 161 of the CrPC vide Ex.D-1 as eyewitnesses. Definitely, the prosecution ought to have cited these witnesses as eyewitnesses and ought to have filed

their statements recorded under Section 161 of the CrPC at the time of filing charge sheet, but unfortunately, the prosecution has failed to perform its duty.

26. Vide order dated 11-12-2008, the Court has allowed the application for examination of three witnesses, filed on behalf of the prosecution on the ground that statements of Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) dated 9-10-2007 recorded under Section 161 of the CrPC, reveal that they are eyewitnesses and their evidence appears to be necessary for just decision of the case. This clearly reveals that the trial Court has held that their evidences are necessary for just decision of the case and the trial Court has considered their evidence necessary in terms of Section 311 of the CrPC. Although the trial Court has permitted them to be examined as prosecution witnesses, but the application filed on behalf of the prosecution was specifically under Section 311 of the CrPC. The order reveals that by exercising power under Section 311 of the CrPC, the trial Court has allowed the application for examination of aforesaid witnesses, but the trial Court has mentioned in order that they be summoned as prosecution witnesses. Virtually, these three witnesses were called by the Court as Court witnesses. Simply mentioning that the Court has permitted the witnesses to be summoned as Court witnesses, will not change the nature of witnesses and they would be the Court witnesses called under Section 311 of the CrPC whose statements were considered necessary for just decision of the case. The prosecution has declared Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) hostile and they have confronted to their previous statements recorded under Section 161 of the CrPC as Exs.P-43 & P-44. By confronting and contradicting their previous statements recorded under Section 161 of the CrPC, the prosecution has committed serious illegality and by permitting the prosecution for such contradiction, the trial Court has also committed serious illegality. Section 162 of the CrPC creates clear embargo on such contradiction and omission.

27. Statement recorded under Section 161 of the CrPC which has been reduced into writing if duly proved may be used by the accused and with the permission of the Court by the prosecution if such witness is called for the prosecution in such inquiry or trial.
28. In the present case, the trial Court has called these witnesses under Section 311 of the CrPC on the ground that in the opinion of the Court, evidence of the witnesses were necessary for just decision of the case. Therefore, they were not called by the prosecution. Although their statements have been reduced into writing in terms of Section 161 of the CrPC and were also duly proved, but they were not called by the prosecution, therefore, the accused or the prosecution were not entitled to contradict such statement to the witnesses in the manner provided by Section 145 of the Indian Evidence Act although in exercise of power under Section 165 of the Indian Evidence Act, the Court below was empowered to ask any question including such contradiction with their statements recorded under Section 161 of the CrPC. The bar imposed by Section 162 of the CrPC on the use of previous statement to police by witness does not operate against the powers of the Court under Section 165 of the Indian Evidence Act (please see *Raghunandan v. State of Uttar Pradesh*³). But in the present case, the Court has not asked any question relating to such statement recorded under Section 161 of the CrPC.
29. While dealing with aforesaid question, the Supreme Court in the matter of **Mrs. Shakila Khader etc. v. Nausher Gama and another**⁴ has held and observed in para 4 that only witnesses on behalf of the prosecution could be contradicted by reference to their statements made to the police, and not court witnesses or defence witnesses.
30. While dealing with use of statements recorded under Section 161 of the CrPC of the witnesses for the limited purpose of contradicting a witness in the

³AIR 1974 SC 463⁴AIR 1975 SC 1324

manner provided by Section 145 of the Evidence Act, the Constitution Bench of the Supreme Court in the matter of **Tahsildar Singh and another v. State of U.P.**⁵ has held Section 162 of the CrPC creates absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act if the witness is called by the prosecution. The Supreme Court has observed in para 17 as follows: -

.....The section was, therefore, conceived in an attempt to find a happy 'via media', namely, while it enacts an absolute bar against the statement made before a police-officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar."

31. While dealing with the question of cross-examination of defence witness on his previous statement recorded under Section 161 of the CrPC, the Supreme Court in the matter of **Laxman Kalu Nikalje v. The State of Maharashtra**⁶ has held that it is unfortunate that Indian law does not admit of cross-examination of defence witness in respect of his previous statement before the police and has observed in para 7 as follows: -

"It is unfortunate that our law does not admit of cross-examination of such a witness in respect of statements before the Police. We endorse the action of the Sessions

⁵AIR 1959 SC 1012

⁶AIR 1968 SC 1390

Judge in excluding reference to this statement in the Sessions trial."

32. In the light of aforesaid proposition of law, evidences of Kamlesh Tiwari (PW-14), Himanshu Chakravarti (PW-15) & Rajesh Verma (PW-16) are required to be considered independently. The Court is required to scrutinize their evidences minutely especially in the light of peculiar facts of the case that the prosecution has initially not cited these witnesses as prosecution witnesses and statements recorded under Section 161 of the CrPC of these witnesses were not filed and supplied at the time of filing charge sheet, therefore, initially, the accused were denied the opportunity of having their previous statements. But only on the ground that they were not cited as witnesses or their statements were not made available to the appellants or even the police has not recorded their statements, their evidence cannot be rejected outrightly. Their evidences are required to be examined minutely whether their evidence inspires confidence, it is trustworthy and free from infirmities or not.
33. As per para 6 of the evidence of Kamlesh Tiwari (PW-14), he is not relative of Anand Sharma (PW-12), brother of the deceased. His detailed evidence does not disclose any interestedness or enmity. As per para 1 of his evidence, he is friend of deceased Anil Sharma. On 3-10-2007, he was coming from Bhilai and was passing in front of Bamhnin pond, he saw deceased Anil Sharma, who used to administer game, present under banyan tree, he stopped his vehicle, he met deceased Anil Sharma at about 6.30 p.m., at that time, appellants Santosh, Raju & Mithun residents of Vishwa Bank Colony were quarreling with the deceased, he has identified these appellants in the dock identification, their quarrel took serious turn, appellant Mithun took out one long iron blade and all the appellants chased the deceased towards Vishwa Bank Colony, then he frightened and went to his village. On second day, he came to Bhilai where he met Anand Sharma (PW-12) who informed that his brother Anil Sharma has been murdered, then he informed the incident that the appellants were chasing

the deceased towards Vishwa Bank Colony and one appellant was holding long iron blade. He has further deposed that on 4-10-2007, his statement was recorded by police namely Nagwanshi.

34. Himanshu Chakravarti (PW-15) has deposed that he was passing near Bamhnin pond, he saw that Anil Sharma was fighting with other persons and there was mob, he asked Anil Sharma who told that nothing has happened, then he went away from the spot. The prosecution has declared him hostile. He has contradicted to his previous statement recorded under Section 161 of the CrPC as Ex.P-44 which is illegal *per se*. He has not stated anything relating to the appellants.
35. Last witness Rajesh Verma (PW-16) has deposed that at the time of incident he had seen the appellants and Anil Sharma and also heard altercation between them, second day he came to know about murder of Anil Sharma and then he informed to Anand Sharma, brother of deceased Anil Sharma.
36. Presence of Rajesh Verma (PW-16) on the spot does not find corroboration from any documents, though Anand Sharma (PW-12), brother of the deceased, has deposed in paras 2 & 3 of his evidence that he was informed first time by Rajesh Verma. In para 7 Anand Sharma (PW-12) has deposed that second day Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) informed him that they were having knowledge of the quarrel took place between the appellants and the deceased. Defence has cross-examined Anand Sharma (PW-12), Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15).
37. In absence of any corroboration from any document of the prosecution and the fact that Rajesh Verma (PW-16) has not been cited as witness by the prosecution, it would not be safe to rely upon his evidence. But as regards the evidence of Himanshu Chakravarti (PW-15), his evidence is only relevant to the extent that Anil Sharma was present near Bamhnin pond and was quarreling with some persons then he went ahead. As per evidence of

Kamlesh Tiwari (PW-14), he has seen the appellants and the deceased and he has also seen that they were quarrelling. As per para 3 of his evidence, the appellants chased the deceased towards Vishwa Bank Colony. Injured body of Anil Sharma was found near Vishwa Bank Colony in a paddy field. One chappal and one towel have been recovered by the prosecution near Bamhnin pond vide Ex.P-20 which also corroborates the evidence of Kamlesh Tiwari (PW-14) that initially Anil Sharma was present near Bamhnin pond, thereafter, his dead body was found near Vishwa Bank Colony. Deceased Anil Sharma had not gone towards Vishwa Bank Colony in routine, otherwise, he would not have left his towel and at least his one chappal near the place where he was initially playing game. Missing report of the deceased has been lodged by Anand Sharma (PW-12) vide Ex.P-13 on 4-10-2007 in the morning i.e. at 4.30 a.m. which discloses the names of the appellants and also discloses the fact that the deceased was present along with these appellants. Anand Sharma (PW-12) has specifically deposed in para 7 of his evidence that second day, Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) met him and told him that they used to come to market and they were having knowledge about the quarrel between the appellants and the deceased. Defence has cross-examined this witness at length. This witness has also contradicted to his previous statement Ex.D-1 relating to Rajesh Verma (PW-16). Name of Rajesh Verma did not find place in his previous statement recorded under Section 161 of the CrPC as Ex.D-1, though statement recorded under Section 161 of the CrPC of a witness cannot be used for corroboration of the case of the prosecution or cannot be used as substantive piece of evidence, but it can be safely used for the purpose of considering the evidence of Kamlesh Tiwari (PW-14) & Himanshu Chakravarti (PW-15) at least to the extent that Anand Sharma (PW-12) has informed the police on 5-10-2007 i.e. just after second day of recovery of dead body that aforesaid witnesses are also material witnesses.

38. Kamlesh Tiwari (PW-14) was not cited as witness, but his name finds place in Ex.D-1 i.e. the statement of Anand Sharma (PW-12) recorded under Section 161 of the CrPC. Kamlesh Tiwari (PW-14) has not deposed the entire incident, but has deposed that the appellants & the deceased were quarrelling, then the appellants chased the deceased towards Vishwa Bank Colony. This part of evidence supported by the evidence of Anand Sharma (PW-12) that name of Kamlesh Tiwari (PW-14) finds place in Ex.D-1 inspires confidence and is trustworthy to the extent that the deceased was seen alive last time in the company of the appellants and the appellants were quarrelling and chasing him towards Vishwa Bank Colony. Dead body of Anil Sharma was found near Vishwa Bank Colony. Evidence of Kamlesh Tiwari (PW-14) can be safely used for the purpose of last seen theory.

39. Last seen theory is also a kind of evidence, it is also a strong circumstance and if it is not properly explained when the assailants parted the company of the deceased, then same can be used as strong circumstance against the assailants. In the present case, the appellants have failed to offer any explanation that when they parted the company of the deceased.

40. While dealing with the question of last seen together, the Supreme Court in the matter of **Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai**⁷ has held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen in the company of the accused and was never seen thereafter, then it would be obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. Para 19 of the judgment reads thus:-

“19. The last circumstance relied on by the courts below pertains to the stand taken by the appellants in the trial as to parting company with Vadivelu. Here we must notice that as discussed hereinabove, the prosecution has established the

⁷ (2003) 1 SCC 534

fact that Vadivelu was seen in the company of the appellants from the morning of 5.3.1985 till at least 5 p.m. on the same day, when he was brought to his house and thereafter his dead body was found in the morning of 6.3.1985. Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Cr.P.C. they have not taken any specific stand whatsoever. In the evidence of PW-25, it is elicited that on 5.3.1985 in the afternoon when Vadivelu was produced before the said witness, he after interrogation allowed Vadivelu to go, but then it is found from his evidence that he instructed A-1 to keep a watch over Vadivelu. In such circumstances, it was incumbent upon A-1 to have explained to the court in what circumstances they parted company. He has not given any explanation in this regard. On the contrary, the prosecution has established the fact that on the very day at about 5 p.m., Vadivelu was brought to the house of PW-1 by the appellants which was seen by PW-5. This part of the evidence of PW-5 has gone unchallenged in the cross-examination and, therefore, we will have to proceed on the basis that, what is stated by PW-5 in this regard is true. If that be so, the prosecution has established the fact that on 5.3.1985 at 5 p.m. Vadivelu was still in the company of these appellants and, therefore, in the absence of any specific explanation from the appellants in this regard, and in view of the other incriminating circumstances against the appellants having been proved by the prosecution, an adverse inference will have to be drawn against these appellants as to their part in the missing of Vadivelu. At this point, it may be relevant to note that though no specific stand has been taken by the appellants as to their parting company with Vadivelu, in their statement under Section 313 Cr.P.C., it is

seen from the evidence of PWs.1 and 5 that A-1 told the said witnesses on the night intervening between 5-3-1985 and 6-3-1985 that Vadivelu had escaped from the Police Station when he was allowed to sleep in the verandah of the Police Station. This explanation given by A-1 to PW-1 which was also heard by PWs.5 and 14, clearly shows that the same is totally false and obviously was an excuse made by the appellants to conceal the true facts and, therefore, this circumstance of A-1 making a false statement to PW-1 can also be taken as a circumstance against the appellants, in establishing the appellants' guilt. This Court in more than one case has held, that if the prosecution, based on reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. See *Joseph v. State of Kerala* [2000 5 SCC 197]. Therefore, we are in agreement with the finding of the courts below that circumstance No.7 also stands established against the appellants.”

41. While dealing with same question, the Supreme Court in the matter of **Hatti Singh v. State of Haryana**⁸ has held that in case of last seen together the evidence of last seen by itself is not of much significance. It may, however, provide for a link in the chain. But unless the time gap between the deceased of having been last seen in the company of the accused persons and the murder is proximate, it is difficult to prove the guilt of the accused only on that basis.
42. While dealing with same question, the Supreme Court in the matter of **State of Goa v. Sanjay Thakran and another**⁹ has held that in case of last seen together the proof of last seen together would be relevant if the prosecution establishes that in the intervening period there was no possibility of any other

⁸ (2007) 12 SCC 471

⁹ (2007) 3 SCC 755

person meeting or approaching the deceased at the place of incident or before the commission of the crime. Para 34 of the said judgment reads 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 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.”

43. In the present case, the appellants have failed to offer explanation that when they left the company of the deceased. The deceased was seen last time in the company of the appellants between 6-7 p.m. at night, second day at 12 noon, dead body of the deceased was found inside the paddy field which was not visible i.e. time gap between last seen theory and recovery of body is short i.e. not so long. Presence of chappal & towel of the deceased near Bamhnin pond where initially, the appellants & the deceased were present and recovery of dead body near Vishwa Bank Colony support the case of the prosecution that the deceased was chased from Bamhnin pond towards Vishwa Bank Colony i.e. in the present case i.e. both the places were the places of incident.

44. In the present case, the prosecution has proved following circumstances: -

- The deceased was seen last time alive in the company of the appellants near Bamhnin pond.
- The appellants were quarrelling with the deceased near Bamhnin pond.
- The appellants chased the deceased towards Vishwa Bank Colony from Bamhnin pond.
- One chappal & towel of the deceased were found near Bamhnin pond.
- Dead body of the deceased was found near Vishwa Bank Colony inside the paddy field.
- The appellants had failed to offer any explanation when they parted the company of the deceased.
- Death of the deceased is homicidal in nature and as a result of fatal injuries.

45. If aforesaid circumstances are considered together, then the only inference would be possible that only the appellants have caused homicidal death of the deceased amounting to murder in sharing common intention and none else. It also excludes the possibility of innocence of the appellants. However, in absence of other evidence, it does not prove the fact that the appellants have concealed the evidence of criminal case or have concealed the dead body.
46. After appreciating the evidence available on record, the trial Court has convicted & sentenced the appellants under Sections 302 read with Section 34 & 201 of the IPC. While convicting & sentencing the appellants under Section 302 read with Section 34 of the IPC, the trial Court has not committed any illegality, but while convicting & sentencing the appellants under Section 201 of the IPC in absence of any clear evidence of concealing the evidence of criminal case, the trial Court has committed illegality.
47. For the foregoing reasons, the appeals are partly allowed. Conviction & sentences imposed upon the appellants under Section 201 of the IPC are hereby set aside and they are acquitted of the said charge. Conviction & sentences of the appellants under Section 302 of the IPC are hereby maintained.

JUDGE
25-2-2014

JUDGE
25-2-2014

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.556 of 2009

APPELLANT:
(In Jail)

Mithun Gendre

Versus

RESPONDENT:

State of Chhattisgarh

AND

Criminal Appeal No.766 of 2009

APPELLANTS:
(In Jail)

1. Santosh Kumar
2. Raju Ratre

Versus

RESPONDENT:

State of Chhattisgarh

HEAD NOTE

1. Witnesses called by prosecution could be contradicted by defence or with the permission of court by prosecution by reference to their statements made to police under Section 161 of the CrPC.

अभियोजन साक्षियों को उनके द्वारा द.प्र.सं. की धारा 161 के अधीन पुलिस को दिये गये कथन के परिप्रेक्ष्य में बचाव पक्ष द्वारा या न्यायालय की अनुमति से अभियोजन द्वारा खंडित किया जा सकता है।

2. Witnesses called by defence or court could not be contradicted by reference to their statements recorded under Section 161 of the CrPC.

बचाव साक्षियों या न्यायालय द्वारा आहूत साक्षियों को द.प्र.सं. की धारा 161 के तहत अभिलिखित उनके कथनों के परिप्रेक्ष्य में खंडित नहीं किया जा सकता है।