

R-57, 58, 62 & 63

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: August 10, 2009

+ **CRL.A. 362/2001**

ARVIND @CHHOTU Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 236/2003

RAM KISHAN Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE (NCT OF DELHI) Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 366/2001

MAHESHWARI @MAHENDER Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE Respondent
Through: Mr. Pawan Sharma, Advocate

CRL.A. 490/2001

VIJAY KUMAR Appellant
Through: Mr. Sumeet Verma, Advocate

versus

STATE (NCT OF DELHI) Respondent
Through: Mr. Pawan Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (ORAL)

1. The above captioned four appeals are being disposed of by a common judgment and order; not for the reason all appeals arise out of a common judgment, but on account of the fact that issue of law which arise for consideration in the appeals is the same.
2. In Crl.A.No.362/2001 and Crl.A.No.236/2003, the impugned judgment and order is dated 9.10.2000. The impugned judgment and order in Crl.A.No.366/2001 and Crl.A.No.490/2001 is dated 15.7.2000.
3. On the solitary evidence, of being last seen in the company of the deceased, the appellants have been convicted.
4. Strictly speaking, there cannot be a precedent at a criminal trial for the reason each case unfolds facts distinct and peculiar. But, it does happen sometimes, as in the instant appeals, that an issue of law arises in commonality.
5. In para 24 of the impugned judgment and order

dated 9.10.2000, which has been challenged in Crl.A.No.362/2001 and Crl.A.No.236/2003, after noting a decision cited by the defence and two decisions cited by the prosecution, on the issue whether being last seen in the company of the deceased is sufficient to convict an accused, the learned Trial judge has observed: *“moreover the latest trend of judicial pronouncement is to convict a person on the basis of last seen evidence”*.

6. Judicial trends are subject matter of academic debates with reference to the underlying shifts in jurisprudence over a period of time. Indeed, such a study is of academic interest and helps to understand the evolutionary history of the growth of law. But, in a Court, reference has to be made to past precedents and with reference thereto it has to be culled out whether a particular judicial interpretation stands overruled or not. To decide cases with reference to the trend of judicial pronouncements would not be a correct approach, for the reason judicial pronouncements are not akin to academic research work.

7. We begin with the facts of the four appeals.

8. As noted hereinabove, convictions have been sustained in all the four appeals; vide two decisions, on the basis of the solitary circumstance that the deceased was last

seen in the company of the accused.

9. The facts pertaining to Crl.A.No.362/2001 and Crl.A.No.236/2003 are; we refer to the testimony of Banne Khan PW-1: on the intervening night of 17th and 18th June, 1998 Banne Khan and his brother Ibban Khan were sleeping at a spot on a footpath which they had given a number, being Thokar No.12, Kishan Kunj, Laxmi Nagar, Delhi. Banne Khan and his brother Ibban Khan were engaged in the business of repairing and giving on hire rickshaws. Thokar No.12 was all in all for them. It was their residence. It was their kitchen. It was their work place. As per Banne Khan, at around 2:00 AM in the middle of the night the accused i.e. the appellants in Crl.A.No.362/2001 and Crl.A.No.236/2003, along with one Mukesh (Proclaimed offender) came to Thokar No.12 and awoke his brother Ibban Khan and had a talk. Banne Khan awoke from his slumber, being disturbed by the talk. Thereafter, the three persons and his brother walked away. He went back to sleep. He got up in the morning and did not notice his elder brother sleeping on the cot next to his. It did not bother him as he thought that probably his brother had gone to answer the call of nature. After sometime, people gathered at Thokar No.12 and he went to see as to what had happened. He got down from the Pushta and saw a dead body

which was of his brother.

10. It may be noted at the outset that as per Banne Khan he and his brother were sleeping at Thokar No.12. The accused awoke his brother at Thokar No.12. He saw them walk towards Thokar No.12. He saw people gathered at Thokar No.12.

11. It may sound a little strange as to what is Banne Khan speaking about. Everything happened at Thokar No.12. If that be so, where was the occasion of Banne Khan not witnessing the assault on his brother?

12. The answer is to be found, if we have a look at the rough site plan Ex.PW-13/B prepared by the investigating officer who came to the spot on receipt of information that a dead body had been found, as also the site plan to scale, Ex.PW-12/A. The two site plans, not very happily prepared, show that Thokar No.12 is at some distance from the place at which the dead body of Ibban Khan was found.

13. It appears that Banne Khan has intended to say that after the accused awoke his brother he saw them walk away from Thokar No.12.

14. Unfortunately, the two plans have not been prepared with the graphic description which is required to be conveyed by a site plan. A stretch of road spanning over 80

meters has been given the legend "Thokar No.12", Yamuna Pushta, Shakar Pur. The fact of the matter is that Thokar No.12 is a spot not exceeding 3 meters by 5 meters, being a spot on the pavement usurped by Banne Khan and Ibban Khan to carry on their business as also reside.

15. The result is that we are unable to gather as to where is the exact spot where Banne Khan was sleeping along with Ibban Khan. We are also not able to ascertain the exact distance from the said spot and the spot where the dead body of Ibban Khan was noticed the next morning.

16. Be that as it may, the only evidence on record is, as aforesaid, that deceased Banne Khan who was sleeping on a footpath was seen in the company of the accused at 2:00 AM in the middle of the night and thereafter at around 6:00 AM in the morning of 18.6.1998 the body of Ibban Khan was seen in the open area just adjacent to the footpath on which the deceased and the accused were last seen together at around 2:00 AM in the middle of the night.

17. The facts pertaining to Crl.A.No.366/2001 and Crl.A.No.490/2001 are; we may note the same through the testimony of Smt.Rajni PW-4: that the deceased Raj Kumar, husband of Smt.Rajni was in the company of Vijay, Maheshwari and Ram Charan (declared proclaimed offender) at the

residence of Raj Kumar in the evening at about 5:00 or 6:00 PM of 3.11.1996 and all left the house of the deceased and that the deceased never returned. She i.e. Rajni searched for her husband in the night on 3.11.1996 and on the next day in the morning i.e. on 4.11.1996, when she resumed the search for her husband saw his dead body near Lal Mandir.

18. We may note that the other witness of the prosecution, Narender Sharma PW-3, has turned hostile and has not supported the case of the prosecution. He has resiled from his statement recorded under Section 161 Cr.P.C. by the investigating officer. We may note that the suggestions put to PW-3 by the learned Public Prosecutor are that he had told the police that he had seen the deceased in the company of the accused at around 8:00 PM on 3.11.1996.

19. As per the site plan Ex.PW-15/A, the dead body of Raj Kumar was found just adjacent to the gate of Lal Mandir on an open space abutting the main public street which bisects Block No.GH-13, Paschim Vihar and Lal Mandir. Needless to state, the Mandir and thoroughfare are accessible to all. The site plan and the evidence gives us no clue as to the distance between the house of the deceased and the spot where his dead body was found. We may also note that the post-mortem report Ex.PW-2/A shows that the stomach content of Raj Kumar

was smelling of alcohol. Further, the stomach content showed partly digested food. As per the post-mortem report, the probable time of death of Raj Kumar was 36 hours prior to the time when post-mortem was conducted. As recorded in the report, the post-mortem was conducted at 11:00 AM on 5.11.1996. Thus, the probable time of death of the deceased would be anywhere between 11:00 PM to the midnight of the intervening night of 3rd and 4th November, 1996.

20. With reference to the facts of all four criminal appeals it may be noted at the outset that the common features are that the deceased was last seen in the company of the accused a few hours prior to the dead body being noted.

21. In Crl.A.No.362/2001 and Crl.A.No.236/2003 the time lag of the deceased being last seen alive in the company of the accused and the dead body being noted, is about 4 hours. In Crl.A.No.366/2001 and Crl.A.No.490/2001 the time lag of the deceased being last seen alive in the company of the accused and the dead body being seen is about 12 hours. But, the post-mortem report pertaining to deceased shows the probable time of death being between 11:00 in the night and 12:00 midnight. Thus, the time gap of the deceased being last seen alive and dying would be about 5 to 6 hours.

22. Whereas learned counsel for the appellants urges

that in the decision reported as 2006 (3) SCALE 452 Ramreddy Rajeshkhanna Reddy & Anr. Vs. State of Andhra Pradesh, vide para 28, no conviction can be sustained on the sole circumstance of the deceased being last seen alive in the company of the accused and that the Courts should look for some corroboration. Learned counsel urges that all prior decisions have explained the last seen theory by stating that it comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Counsel urges that in Ramreddy's case (supra), for the first time, it was added that even in such cases the Courts should look for some corroboration. Learned counsel urges that the said decision has been followed with approval in the decisions reported as 2009 (3) SCALE 327 Vithal Eknath Adlinge Vs. State of Maharashtra, 2008 (9) SCALE 319 Venkatesan Vs. State of Tamilnadu, 2007 (3) SCALE 740 State of Goa Vs. Sanjay Thakran & Anr. and in the latest pronouncement reported as 2009 (8) SCALE 743 State of Uttar Pradesh Vs. Shyam Behari & Anr.

23. Mr.Pawan Sharma, learned counsel for the State draws our attention to certain decision of the Supreme Court

wherein it has been held that on the application of the last seen theory being the sole incriminating circumstance, conviction of the accused can be sustained.

24. During course of arguments in the appeals, learned counsel have referred to various authorities and rather than listing out the same as the authorities relied upon by learned counsel for the appellants and as authorities relied upon by learned counsel for the State, we propose to cull out the legal norms in the judicial pronouncements referred to by learned counsel for the parties.

25. The last seen theory relates to evidence which is not direct evidence i.e. is circumstantial evidence. It is settled law that to sustain a conviction on circumstantial evidence, the chain of circumstances has to be so complete that the finger of accusation unerringly points towards the guilt of the accused and rules out the innocence.

26. The foundation of the last seen theory is based on principles of probability and cause and connection.

27. Where a fact has occurred with a series of acts, preceding or accompanying it, it can safely be presumed that the fact was possible as a direct cause of the preceding or accompanying acts, unless there exists a fact which breaks the chain upon which the inference depends.

28. As observed in the decisions reported as (2002) 6 SCC 715 Mohibur Rahman Vs. State of Assam, there may be cases where a single circumstance is of a kind that a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the deceased suffered death or should own the responsibility for homicide.

29. Thus, at the heart of the matter of a circumstantial evidence is the principle: of a rational mind being persuaded to reach an irresistible conclusion qua the guilt of the accused.

30. It is the quality of evidence and not the number which matters. A criminal trial is not a race at which the winner is determined with reference to the length run by the prosecution or the defence. It is also not a number game where the number of circumstances would determine the guilt or otherwise.

31. We can do no better other than to refer to an illustration, aptly illustrated in the decision reported as 2000 (8) SCC 382 State of W.B. Vs. Mir Mohammad Omar & Ors.

32. Debating on the issue whether the sole evidence of an accused being last seen in the company of the deceased would be sufficient to sustain a conviction, the Supreme Court held that the presumption of fact is an inference as to the

existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position.

33. The legislative foundation to the said rule of inference was located in Section 114 of the Evidence Act which empowers the Court to presume the existence of any fact which is likely to have happened. In that process, the Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. The illustration by the Court succeeds the aforementioned legal principles culled out by the Court in para 33 of the decision. The hypothetical illustration highlighted by the Courts is of a boy being kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappearing with the prey. The question posed is: what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere.

35. The answer is provided: in such a case, the only inference of reasonable certainty is that the boy was killed by

the kidnappers unless the kidnappers explain otherwise.

36. Would it make any difference if the dead body of the kidnapped boy is found after 10 days. To our mind, with reference to the hypothetical case posed by the Supreme Court, it would make no difference. The reason is that, if a person has no lawful reason to be in the company of another person, as in the case of kidnapping, whatever may be the length of time between the incident of kidnapping and the victim being found dead, unless the kidnapper explains the time and place where he parted company with the prey, the kidnapper must own the guilt.

37. There is another legal principle on which aforesaid inference can be founded. Section 106 of the Evidence Act embodies the legal principle that where a fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The philosophy behind Section 106 of the Evidence Act is that a knowledge of a person rests in his brain or his mind. It can never be accessed or exposed by the opposite party; at a criminal trial, the opposite party being the prosecution. The only rider which needs to be noted, on the applicability of Section 106 of the Evidence Act is, at a criminal trial, that the prosecution must reach the stage by leading cogent and clinching evidence where further deadlock can be

broken only by accessing the knowledge of the accused and only when the silence of the accused or not giving an explanation by the accused would attract the adverse inference against him.

38. It is settled law that in the evaluation of evidence, circumstances surrounding a fact play a very important role. Indeed, denuding circumstance in which a fact occurred would render the evidence fairly sterile and incapable of any meaningful appreciation.

39. The various judicial pronouncements which have been referred to by learned counsel for the parties show, far from there being any divergence in the judicial opinion, a common signature tune. The common golden thread running down and spanning; infusing life, in the various judicial pronouncements is the circumstance surrounding a fact kept in view by the Court while evaluating evidence pertaining to the deceased and the accused being last seen alive followed by the dead body of the deceased being recovered. Indeed, with reference to the circumstances surrounding the fact of being seen last it has been held that on the facts and circumstances of a particular case the sole evidence of the deceased and the accused being last seen alive was sufficient wherefrom the finger of guilt could unerringly be pointed

against the accused, who rendered no satisfactory explanation as to when the accused and the deceased parted company. In cases where the circumstances were such that it could not be held that there was a possibility of an outsider intervening, it was held that in the absence of any further evidence, the highly suspicious conduct of being last seen alive remained a mere suspicion and did not attain the status of proof.

40. Let us visit the authorities cited by learned counsel.

41. At the forefront is the decision reported as AIR 1955 SC 801 Deonandan Mishra vs. The State of Bihar. The same has been relied upon by learned counsel for the appellants. In para 9 of the decision it has been held that in a case of circumstantial evidence the various links in the chain of evidence have to be clearly established and the chain must be complete so as to rule out a reasonable likelihood of the innocence of the accused.

42. Pertaining to the applicability of the last-seen theory, the evidence was, of the deceased and the accused being seen as travelers in a train on Chakand Railway Station at around 11:00 PM – 11:30 PM on the intervening night of 3rd and 4th September 1953 and the dead body of the deceased being found near a graveyard at the outskirts of the city of Gaya in the morning of 4th September 1953. The relationship

of the accused and the deceased was that of husband and wife. The exact distance between Chakand Railway Station where the deceased and her husband were seen in the train and Gaya is not known, for the reason the same does not find any mention in the decision. The train in question commenced its journey from Patna and the destination was Gaya.

43. In the absence of any satisfactory explanation given by the husband, the Supreme Court held that an inference of guilt could be drawn against the accused.

44. We note that the Supreme Court held that a fairly strong motive was emerging. We note that it has not been categorically held that motive was established. We also note that there was a simple injury on the hand and knees of the accused which were not explained. But, the central focus of the decision has been the relationship of the accused and the deceased; the two being husband and wife and that the two were passengers in a train which was proceeding towards Gaya and were last seen in the company of each other at Chakand Railway Station and the dead body of the deceased being noticed at Gaya.

45. The decision guides us that a long distance between the place where the accused and the deceased are last seen alive and the place where the deceased is found

dead, has to be evaluated with reference to the relationship of the accused and the deceased and the connection between the two spots. The normal course of human conduct referable in Section 106 of the Evidence Act guides the Court that where a husband and a wife commence their journey they are presumed to remain together till they reach their destination. If midway, either spouse goes missing, the other must explain. If no satisfactory explanation is forthcoming, the said spouse against whom the finger of accusation is raised must admit to the guilt.

46. The next authority cited is 1993 SCC (Cri) 520 Anant Bhujangrao Kulkarni vs. State of Maharashtra. The said decision has been relied upon by Mr.Sumeet Verma, learned counsel for the appellants. Learned counsel drew our attention to para 12 of the decision and urged that the only circumstance which was established at the end of the trial, as noted by the Supreme Court, was of the deceased being last seen alive in the company of the appellant at 6:00 PM on 13.10.1975 and the dead body being found the next morning i.e. on 14.10.1975. It was held that said evidence was insufficient to hold that the appellant was guilty.

47. A perusal of the decision shows that the prosecution was predicating its case on two incriminating

circumstances; being, the deceased being last seen alive with the accused at 5:30 PM on 13.10.1975 and the dead body being noted in the early hours of the morning of 14.10.1975 and the fact that the dead body of the deceased was found in a ladni adjacent to a ladni occupied by the accused.

48. Pertaining to the ladni in which the dead body was found and the ladni in which the accused resided, it was noted by the Supreme Court that there was a huge complex called Wada, consisting of various ladnis, one of which was the residence of the accused. The fact that the dead body of the deceased was found in the other ladni adjacent to the ladni occupied by the accused was specifically noted in para 7 of the decision.

49. It is apparent that what has weighed with the Supreme Court is the circumstance relatable to the place where the dead body was found. The place was not linked, being in the possession of the accused and there was no evidence that the accused was seen at the place where the deceased was found dead. Meaning thereby, anybody could have accessed the ladni where the deceased was killed; it being evident that somebody had accessed the ladni by the very factum of the deceased being killed in the ladni.

50. We may note that in said case, as noted in para 3 of

the decision, the accused explained having parted company with the deceased after 6:00 PM and having heard the deceased shouting 'melo – melo' from near the ladni opposite his house i.e. ladni in which the dead body of the deceased was ultimately found.

51. The principle applied by the Supreme Court is evident. The place where the dead body of the deceased was noted and the time lag between the time of last seen and dead body noted did not rule out that a third person could not possibly be involved.

52. The third decision to which our attention was drawn is reported as (2000) 8 SCC 382 State of West Bengal vs. Mir Mohammad Omar & Ors. Learned counsel for the State referred to the same.

53. Pertaining to the evidence against the abductors who had abducted Mahesh, a young businessman from Calcutta and against whom eye-witnesses had deposed of having taken along with them Mahesh, who was subsequently killed; the Supreme Court held that since the abductors had not rendered any explanation as to when they parted company with Mahesh, they must admit to their guilt. In para 34 of the decision it was held as under:-

“34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they

took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.”

51. For record, we may note that in the preceding paragraphs being No.31 to 36 of our decision, we have referred to the hypothetical illustration in the decision in Mir Mohammad Omar's case.

52. The fourth decision relied upon by both counsel is reported as (2002) 6 SCC 715 Mohibur Rahman & Anr. vs. State of Assam.

53. The deceased was named Rahul. The accused were Taijuddin and Mohibur Rahman. Through the testimony of PW-6, was the evidence that the accused and Rahul were last seen at 5:00 PM at a bus stand on 24.1.1991. The body of Rahul was found at a distance of 30 km to 40 km from the bus stand where all were seen together. The dead body was noted on 6.2.1991 i.e. after 13 days of the deceased and the accused seen last alive.

54. Obviously, where a dead body is recovered after 13 days of a person seen last alive it becomes very difficult to pinpoint even the exact day of death. None was proved.

55. Against Taijuddin there was further evidence that after 2 or 3 days of disappearance of Rahul, Taijuddin had met Batibu Begum, the mother of the deceased and one Badnel Ali the cousin of the deceased and had falsely told them that Rahul had eloped with his sister-in-law named Baliyan Begum. Further, Taijuddin had pointed out the place where the dead body of Rahul, cut into 2 pieces was lying buried.

56. Under the circumstances, acquitting Mohibur Rahman and convicting Taijuddin, the Supreme Court held that qua Mohibur Rahman the strongly suspicious evidence of being last seen in the company of the deceased could not be equated with proof but the strongly suspicious circumstance of being last seen alive with the deceased against Taijuddin coupled with an attempt made by him to mislead the relations of Rahul and his knowledge of the place where the dead body of Rahul was found were sufficient circumstances where from his guilt could be inferred.

57. What is relevant to be culled out is that the circumstance of the deceased last seen with the accused and the circumstance of the place where the dead body was found i.e. both being public places accessible to all and the distance between the place where the deceased was last seen alive and the dead body was recovered as also the circumstance of the

proximity of the time of death with the time of last seen alive being broken, were held to be circumstances to be kept in mind.

58. The fifth decision referred to is reported as (2002) 8 SCC 45 Bodhraj @Bodha & Ors. vs. State of Jammu & Kashmir.

59. Explaining the last-seen theory, in para 31 it was observed as under:-

“31. The 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 author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.”

60. The circumstances of the facts of last seen alive; pertaining to the place, the time and the distance between the place where the deceased was last seen alive and the dead body was found and the time-gap of the two events needs to be noted.

61. A-1 and A-2 had business and financial dealings with the deceased and on the fateful day i.e. 3.8.1994 were

last seen in the company of each other till as late as 4:00 – 4:30 PM. The deceased and the accused left the business premises of Gian Singh PW-1 who was a property dealer. Gian Singh was informed that all the three wanted to purchase some property and left the business premises of Gian Singh. The deceased being killed was reported to the police the same day i.e. on 3.8.1994 at 9:00 PM. The place where the dead body was recovered was close to the spot where the deceased and the accused were last seen together. The place was near a canal adjoining fields. We eschew reference to the other incriminating evidence against the accused. With reference to the last-seen theory, the observations of the Court, in para 31, contents whereof have been noted herein above in para 59 by us, requires it to be noted that the proximity of the place where the dead body of the deceased was found and the spot where the deceased was last seen alive in the company of the accused was an important factor considered by the Court as also the fact that the time-gap of last seen alive and the police being reported about the deceased dying was about 3:30 hours. We may add that though the place where the deceased was killed was an open area but was not a public thoroughfare. The place was a field i.e. an open area around a canal. The evidence of PW-1 that the deceased and the accused told him

that they were interest in purchasing land was a circumstance of importance for the reason the place where the deceased was found killed was an open land and probablized the accused leading him to the spot under the garb of showing a vacant land which could be purchased by the deceased.

62. The decision, once again, highlights the backdrop evidence pertaining to circumstance which a rational mind has to keep in view, while drawing inferences applying the last-seen theory.

63. The sixth decision to which our attention was drawn is reported as (2003) 7 SCC 37 Babu S/o Raveendran vs. Babu S/o Bahuleyan & Anr.

64. The solitary circumstance was of the accused and the deceased being seen alive in the company of each other followed by the dead body of the deceased being recovered. The time when the two were last seen was 8:30 PM. The date was 3.2.1993. That the deceased had died was noticed by PW-6 at 2:30 AM i.e. after about 6 hours of the deceased and the accused being seen last alive. The relationship of the deceased and the accused was of husband and wife. The place of death was their matrimonial house. The place where they were last seen alive was the matrimonial house. The place where the dead body was found was the same

matrimonial house. There being no evidence of an intruder, in para 18, it was held that in such a situation, the circumstance leading to the death of the deceased stand shifted, to be explained by the accused, for it is only he who is to be expected to know the manner and the circumstances under which his wife died.

65. The decision highlights the importance of the circumstance of relationship between the parties to be considered while evaluating the evidence of last seen. The decision highlights the circumstance of the place being not accessible by the public at large. The decision highlights that where a wife is killed in her matrimonial house and it stands proved that sometimes before she died the husband was present in the house; the time being night time when husbands are expected to be in their house, inferences of guilt can be drawn against the husband who renders no explanation as to when and how his wife died.

66. The seventh decision to which our attention has been drawn is reported as 2003 (8) SCC 93 Amit @Ammu vs. State of Maharashtra.

67. The victim and the accused were unrelated but were known to each other. The deceased, a young girl, and the accused, a young boy, were last seen together by PW-1

and PW-11 in the afternoon (exact time is not noted in the decision). The deceased, evidenced by the post-mortem report, died between 3:00 PM and 4:00 PM the same day. The dead body was recovered the next day. The girl was raped. The place where the deceased was last seen in the company of the accused was just next to the place where the deceased was found dead. The place was a grazing area having a dilapidated building. The deceased and the accused were seen just near the dilapidated building in the grazing area. The dead body was recovered from within the dilapidated building.

68. There was no other evidence which incriminated the accused.

69. In para 9 of the decision, it was observed as under:-

“9. The learned counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in *Mohibur Rahman vs. State of Assam* for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of a death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid

squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW-1 and PW-11. No explanation has been offered in the statement by the appellant recorded under Section 313 Cr.P.C. His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of Session and affirmed by the High Court.”

70. The decision highlights the importance of the circumstances relating to the nature of the place where the deceased and the accused were last seen as also the proximity of the place where they were seen and the place where the deceased died.

71. The ^{8th} decision referred to is reported as (2005) 3 SCC 114 State of U.P. vs. Satish.

72. The facts of the case are fairly akin to the preceding decision. It also relates to the rape of a girl followed by her murder. The testimony of PW-3 and PW-5 established that on 16.8.2001 they had seen the deceased and the accused on a bicycle which was paddled by the accused with the deceased sitting on the handle bar thereof, between 1.00 PM to 2.00 PM. There was evidence of PW-2 of having seen the accused at the same place in a perplexed state around 2.00 PM. The dead

body was recovered the next day at 6.00 AM. The post-mortem was conducted at 2.00 PM on 17.8.2001 and the opinion of the doctor was that the girl had died within the preceding 24 hours; wherefrom a conclusion could be drawn that the girl was murdered any time between 1.00 PM to 2.00 PM on 16.8.2001.

73. Reversing the decision of the High Court which had held that merely because two people had seen the deceased and the accused and a third had seen the accused near the place where the girl was found murdered was not sufficient to sustain the conviction, the Supreme Court held that the proximity of the place and the time was fatal and with reference thereto, the circumstance as noted hereinabove of last seen was sufficient to draw the inference of guilt.

74. The decision highlights the importance of relevancy of circumstance under which two people are seen together and the circumstance of one of them dying. The circumstance of the proximity of place also stands highlighted. As in the preceding decision, the instant decision shows that in a given set of circumstances the solitary evidence of last-seen alive can form the basis to sustain a conviction.

75. The 9th and the 10th decisions cited, are reported at seriatim being AIR 2006 SC 1708 Deepak Chandrakant Pail vs.

State of Maharashtra and AIR 2006 SC 1712 State of U.P. vs. Desh Raj.

76. The former pertains to the application of the theory of last-seen with reference to the testimony of A-1 and A-2 of having seen the accused in the company of the deceased at 10.00 PM on 29.12.1998. A-2 had come to the house of deceased and persuaded him to go to the house of A-1. The deceased and A-2 were seen leaving the house of the deceased by his family members. The deceased never returned and his dead body was found the next day. The place where the deceased was found was behind the house of A-1. There was no evidence of A-1 being seen in the company of the deceased. The circumstance of A-2 taking the deceased from the house of the deceased telling him that A-1 was calling him and the circumstance of 'A' being killed behind the house of A-1 were specifically noted by the court. We note that there is evidence against A-1 of having a quarrel with the deceased a few days prior to the incident.

77. Pertaining to the theory of last-seen, the decision afore-noted highlights the importance of the backdrop circumstance under which the accused and the deceased were seen. The circumstance relating to the time of departure, the testimony of departure, the place where the dead body was

found, being just next to the destination etc. etc. was highlighted.

78. The conviction of the accused was sustained.

79. The second decision has facts akin to the two but one preceding decision. It relates to the unfortunate rape followed by the murder of a young girl. The place of death was an open field having 'ber' bushes. The young girl was seen in the company of the accused at around 5.00 or 5.30 PM on 21.2.1979. Her dead body was found the next day. There was also evidence that at 7.30 PM on 21.2.1979, PW-7 had seen the deceased alone around the field in question.

80. It was held that therefrom, on the application of the last-seen theory, an inference of guilt against the accused could be drawn.

81. We note that there was further evidence of scratch marks on the face of the appellant which was used as additional evidence to draw an inference of guilt.

82. The decision highlights the importance of taking judicial notice of the circumstance relatable to the proximity of the place where the accused and the deceased were last seen and the place where the dead body of the deceased was found as also the short interval of time between the two; ruling out the possibility of any third person being with the deceased.

83. The 11th decision referred to is reported as 2006 (3) SCALE 452 Ramreddy Rajeshkhanna Reddy & Anr. vs. State of Andhra Pradesh.

84. The last-seen evidence pertains to the accused and the deceased being last seen together at 10.30 in the night of 14.6.1998. The evidence was that the accused had come to the house of the deceased and requested him to accompany him to repair his jeep i.e. the jeep of the accused. The deceased did not return home. The dead body was noted at 5.30 AM the following day. The place where the dead body was found was a public street abutting the house of PW-4.

85. Reversing a finding of conviction affirmed by the High Court, the Supreme Court held that applying the last-seen theory in the facts and circumstances of the said case it could not be said that the evidence unerringly pointed only towards the guilt of the accused and ruled out his innocence. In para 28 of the decision, the Supreme Court observed as under:-

“28. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and 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. Even in such a case courts should look for some corroboration.”

86. The submission of learned counsel for the appellants is that instant decision, for the first time,

categorically holds that pertaining to last-seen evidence being the solitary evidence, the court should look for some corroboration.

87. It is true, that with reference to the last-seen theory, the concluding sentence of para 28 of the decision does record that even in such cases (last-seen theory) court should look for some corroboration. But, it has to be noted that the preceding decisions hereinbefore referred to by us which have sustained conviction on the last-seen theory, have not been noted in the said decision.

88. The last sentence of para 28 in Ramreddy's case (supra) has to be understood with reference to the circumstances of last-seen evidence led in the said case as also the observations of the court in para 14 pertaining to a taint in the testimony of PW-2.

89. Eschewing reference to the taint found in the testimony of PW-1, with reference to the applicability of the last-seen theory, suffice would it be to state that the circumstance of two people being last seen; the reason of their departure and the place where the deceased is found dead assumes importance. Indeed, in Ramreddy's case (supra) the same assumed importance, in that, the likely possibility of a third person intervening could not be ruled out.

90. As against a case of a husband and wife leaving together and expected to either reach their destination together or return back together, two friends on a common mission would not be expected to return back together. As in Ramreddy's case (supra), where two friends leave to repair a vehicle there is every possibility that after some time they parted company and somebody else accessed the deceased and killed him, in a case of husband and wife same is inapplicable. As in Ramreddy's case, where the place the deceased is found killed is a public street, it assumes importance to consider where any person on the public street could have done so. The timings in Ramreddy's case are of importance. The deceased and the accused left the house of the deceased at around 10.30 in the night. The place where the deceased died was a public street.

91. The 12th decision referred to is reported as 2006 (12) SCALE Vikramjit Singh @ Vicky vs. State of Punjab.

92. The decision was cited by the learned counsel for the appellants to bring home the point that the decision in Ramreddy's case (supra), which according to the learned counsel held for the first time that the court must look to corroboration in cases of last-seen theory being applicable was followed.

93. We have already dealt with the decision in Ramreddy's case and hence need not deal extensively with the instant decision, save and except to note that the appeal of Vikramjit Singh was allowed notwithstanding the fact that the relationship between the appellant therein and the deceased was of husband and wife, for the reason, Vikramjit Singh had himself sustained injuries and had explained the circumstance of how his wife was killed.

94. The 13th decision referred to is reported as 2007 (3) SCALE 740 State of Goa vs. Sanjay Thakran and Anr. The theory of last-seen was sought to be applied in the said case.

95. This Bench had an occasion to consider Sanjay Thakran's case (supra). Our decision is dated 21.7.2009, disposing of CrI.A.No.225/2001 Babuddin vs. State. In paras 28 and 29 of our decision afore-noted we had observed as under:-

“28. Friends sit around and loiter around. In their youth they do so even late in the night. Parting company, each goes to his house. Anything may happen to anyone of them on the way. Interestingly, in Sanjay Thakran's case (supra) a somewhat similar situation had arisen. The accused, a married couple as also the deceased, also a married couple, were known to each other. Accused No.1 and deceased No.1 were seen walking towards a beach and 2¼ hours thereafter the dead body of deceased No.1 was found at the beach. Accused No.2 and deceased No.2 were seen walking on the road and thereafter nobody saw deceased No.2 till her dead body was found with a gap of 8½ hours of her being last seen

alive with accused No.2. We may note that accused No.1 was the husband of accused No.2. Deceased No.1 was the husband of deceased No.2.

29. Though not so expressly said in so many words, while upholding the acquittal of the accused, it is apparent that what has weighed with the Lordships of the Supreme Court is the fact if two friends go to a beach there is no presumption that both of them would stay together at the beach. There is every possibility of a third party being the assailant. Similarly, where two friends are seen walking on a street, there is every possibility of the two parting company, and somebody else being the assailant. In this context the issue of time gap becomes relevant. The issue of the place where the two were last seen alive becomes relevant.”

96. The 14th decision referred to is reported as 2008 (9) SCALE 319 Venkatesan vs. State of Tamil Nadu. The solitary circumstance attracting last-seen theory was a subject matter of consideration in the said appeal.

97. The purpose of citing said decision of learned counsel for the appellants was to bring home the point that Ramreddy's case (supra) was affirmed in said decision and hence the last sentence in para 28 in Ramreddy's case stood reiterated.

98. We have explained the decision in Ramreddy's case in paras 86 to 90 hereinabove and hence we make no further comments, save and except to note that in Venkatesan's case (supra), the evidence of the deceased and the accused being last seen pertain to the night of 19.4.1988 and the dead body

of the deceased being found on 22.4.1988. The exact time when the deceased died could not be ascertained. There was no proximity of the place where the deceased and the accused were last seen alive and the place where the dead body was found.

99. The 15th decision referred to is reported as 2009 (3) SCALE 327 Vithal Eknath Adlinge vs. State of Maharashtra.

100. We need not extensively deal with said decision for the reason, apart from last-seen evidence there was evidence of the accused absconding. There was further evidence, which according to us is fairly incriminating, being that, the room in which the deceased was killed happened to be the abode of the accused. Be that as it may, the decision highlights the importance of a circumstance relatable to the last seen evidence. The facts of the said case show the circumstance of the place where the two were last seen, being near the house, and the circumstance of the place where the dead body was recovered i.e. being the house of the accused, were of great importance.

101. The last decision cited is reported as 2009 (8) SCALE 743 State of Uttar Pradesh vs. Shyam Behari & Anr.

102. Acquitting the accused the High Court had noted that the evidence pertaining to the last seen was that the

deceased had been seen with the accused on 13.8.1979. There being no proximity between the place where the accused and the deceased were last seen vis-à-vis the place where the dead body was found nor there being any proximity of time and there being no other evidence of connectivity between the two, the Supreme Court affirmed the decision of the High Court.

103. We may summarize the legal position as under:-

(i) Last-seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last-seen theory has to be applied.

(ii) It is not necessary that in each and every case corroboration by further evidence is required.

(iii) The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last-seen.

(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility

of a third person being the offender is reasonably ruled out, on the solitary circumstance of last-seen, a conviction can be sustained.

(v) Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.

(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.

(vii) The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the

night would require said three factors to be kept in mind while applying the last-seen theory.

The above circumstances are illustrative and not exhaustive. At the foundation of the last-seen theory, principles of probability and cause and connection, wherefrom a reasonable and a logical mind would unhesitatingly point the finger of guilt at the accused, whenever attracted, would make applicable the theory of last-seen evidence and standing alone would be sufficient to sustain a conviction.

104. Reverting to the facts of the appeals, pertaining to Crl.Appeal No.362/2001 and Crl.Appeal No.236/2003, the testimony of Banney Khan shows that he and his brother, the deceased Ibban Khan, used to sleep on a footpath. On the intervening night of 17th and 18th June 1998, both brothers slept on the footpath. The accused and his brother spoke to each other in the middle of the night at 2:00 AM. His brother and the accused, after the talk, walked away. Banney Khan went back to sleep. Not noticing his brother in the morning, he thought that his brother had gone to answer the call of the nature. He found his brother dead, at a spot, a little away in the early hours of the morning of 18th June 1998.

105. The rough site plan Ex.PW-13/B and the site plan to

scale Ex.PW-12/A show the entire area as an open area. Everyone can access the area. There is no evidence that Ibban Khan did not come back to sleep on his bed. There is no evidence that Ibban Khan came back to sleep on his bed. The testimony of Banney Khan shows that the brothers used to defecate in the open. The possibility of Ibban Khan coming back and going to defecate in the morning and on the way being assaulted by somebody cannot be ruled out. Unfortunately, the MLC of the deceased throws no light, wherefrom, the probable time of the death of Ibban Khan can be determined.

106. Thus, the circumstance relatable to the place, where the deceased was last seen in the company of the accused as also the circumstance of the place where the dead body was found does not rule out anything happening involving a third person. Thus, howsoever suspicious may be the evidence of last seen, the same has not attained the status of proof. In the absence of there being any other evidence against the appellants of Crl.Appeal No.362/2001 and Crl.Appeal No.236/2003 we hold that the said appellants are entitled to the benefit of doubt.

107. Crl.Appeal No.362/2001 and Crl.Appeal No.236/2003 are allowed. Impugned judgment and order

dated 9.10.2000 is set aside. Appellants Arvind @Chhotu and Ram Kishan are acquitted of the charge of having murdered Ibban Khan.

108. The said appellants are on bail. The bail bonds and surety bonds furnished by them are discharged.

109. Pertaining to Crl.Appeal No.366/2001 and Crl.Appeal No.490/2001 filed by the appellant Maheshwari and Vijay Kumar, the evidence of Rajni PW-4, the wife of the deceased Raj Kumar, shows that she saw her husband leave his house in the company of the appellants in the evening between 5:00 PM to 6:00 PM on 3.11.1996. The post-mortem report Ex.PW-2/A of Raj Kumar probablizes that he died any time between 11:00 PM to midnight of the intervening night of 3rd and 4th November 1996. The place where Raj Kumar died is an open space abutting the main public street which bisects block No.GH-13 Paschim Vihar and Lal Mandir. The place is an open space accessible to all. There is no evidence that the deceased was seen in the company of the accused at the place where his dead body was noted. The post-mortem report of the deceased shows liquor in his stomach. Obviously, the deceased had spent meaningful time somewhere, being merry in drinking. The possibility of a third person accessing the deceased Raj Kumar and killing him cannot be ruled out.

110. There being no other incriminating evidence against appellants Maheshwari and Vijay Kumar, we hold that the theory of last-seen evidence, on being applied to the facts of the said two appeals, not ruling out the intervention of a third party requires said appellants to be acquitted of the charge framed against them of having murdered Raj Kumar.

111. Crl.Appeal No.366/2001 and Crl.Appeal No.490/2001 are allowed. Impugned judgment and order dated 15.7.2000 convicting Maheshwari and Vijay Kumar is set aside. The two are acquitted from the charge of having murdered Raj Kumar.

112. Both the appellants are on bail. Their bail bonds and surety bonds are discharged.

(PRADEEP NANDRAJOG)
JUDGE

(INDERMEET KAUR)
JUDGE

AUGUST 10, 2009
mm/dk/rk