

GAHC010160472020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/80/2020

Sunil Murari,
Dibrugarh, Assam.

.....Appellant.

Versus

The State of Assam,
Represented by the P.P. Assam.

.....Respondent.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Ms. B. Sarma Amicus Curiae.

For the respondent : Ms. S. Jahan Additional PP, Assam.

Date of hearing : 21.07.2023

Date of judgment : 21.08.2023

JUDGMENT AND ORDER (CAV)

(Malasri Nandi, J)

Heard Ms. B. Sarma, learned Amicus Curiae. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State.

2. This appeal has been preferred by the sole appellant challenging the impugned judgment and order dated 07.12.2019 passed by the learned Sessions Judge, Dibrugarh, in connection with POCSO Case No. 39/2015, whereby the appellant was convicted under Section 302 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1,000/-, in default of payment of fine

to undergo rigorous imprisonment for 1 month. The appellant was also convicted under Section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 1,000/-, in default of payment of fine to undergo rigorous imprisonment for 1 month. The appellant was also convicted under Section 366 IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo rigorous imprisonment for 1 month. All the sentences were directed to run concurrently.

3. The brief facts of the case is that the informant lodged an FIR on 02.01.2015 before the Officer-in-Charge, Duliajan Police Station stating *inter alia* that on 01.01.2015 his six year old daughter went missing, when she was watching the sports events organized by the local people on the occasion of New Year at No.1 Bardubi Gaon (Gojal Basti). Though he searched for his daughter at night with the help of local people, but she could not be traced out. On the next morning, Biki Tanti, S/o Bijoy Tanti informed him that his daughter was lying on the floor of the rear verandah of an abandoned premise. On receipt of the information he went there with the local people and found the dead body of his daughter. It also appears from the FIR that said Biki Tanti had seen his daughter with the appellant in the evening of 01.01.2015. Accordingly, he suspected that the appellant killed his daughter after raping her.

4. On receipt of the complaint, a case was registered, vide Duliajan P.S. Case No. 05/2015 under Section 302 IPC read with Section 4 of the POCSO Act and investigation was initiated. During the course of investigation, the Investigating Officer visited the place of occurrence, recorded statements of the witnesses, seized the wearing apparels of the victim and the accused/appellant and sent the said seized articles for chemical examination to Forensic Science Laboratory (FSL). Inquest was conducted on the dead body of the deceased and thereafter the dead

body was sent for Post Mortem Examination. After completion of the investigation, charge-sheet was submitted against the appellant under Section 302 IPC and Section 4 of the POCSO Act.

5. On appearance of the accused/appellant before the Court of Sessions, charge was framed under Section 302/366 IPC and Section 4 of the POCSO Act, which was read over and explained to the accused/appellant, to which he pleaded not guilty and claimed to be tried.

6. To substantiate the case of the prosecution, 13 (thirteen) prosecution witnesses were examined and marked some documents before the Trial Court as material exhibits. On the other hand, the accused/appellant did not choose to adduce any evidence in support of his case. After completion of the trial, the statement of the accused/appellant was recorded under Section 313 Cr.P.C wherein the incriminating materials found in the evidence of the witnesses were put to him, to which he denied the same and pleaded his innocence. After hearing the arguments advanced by the learned counsel for the parties, the learned Trial Court convicted the accused/appellant as aforesaid.

7. PW-1 is the informant, who is the father of the deceased. He deposed in his evidence that at the time of incident, the age of his daughter was 6 years. His wife died long years back. On the date of occurrence, in the afternoon, after coming back home from his work, he found his daughter missing. He searched for her at the nearby possible places, but she could not be traced out. Failing to find his daughter he asked Biki Tanti, son of his younger brother about his missing daughter and Biki told him that he had seen the accused/appellant taking his daughter away, by giving her a packet of biscuit. On the said night he could not find his daughter. On the next morning at about 11:00 a.m. while he was trying to find his daughter at the nearby places, he saw a gathering near a vacant katcha

house situated near his residence. Upon approaching, the people who had gathered near the said house told him that a dead body of a child was lying inside the said vacant house. Accordingly, he went there and found his daughter lying dead and her face was tied with a cloth and a piece of biscuit was stuck on her face. The neighbouring people informed the matter to police and accordingly police arrived at the spot. The witness also stated that during investigation police brought sniffer dog and the dog led the police party to the house of the accused/appellant and then the police arrested the accused/appellant. PW-1 also stated that during interrogation, the accused/appellant confessed before the police that he had killed his daughter after committing rape on her. Thereafter he lodged the FIR vide Exbt.-1.

In his cross-examination, PW-1 replied that he did not see the occurrence. Out of suspicion he lodged the ejahar against the accused/appellant as he had confessed before him and the police that he had killed his daughter, after raping her.

8. PW-2 & PW-3, are two minor boys. According to PW-2, on the date of incident, he and Suraj (PW-3) were playing in his house. The victim girl was also with them. Then the accused/appellant came there and took the victim along with him by asking her to play at his house. Victim girl did not return back home on that day. As the victim was missing on the said night, the villagers along with her father searched for the victim. On the next day, PW-2 along with PW-3 found the deceased lying dead in a vacant house situated near the house of the complainant. Thereafter PW-2 & PW-3 informed the matter to their elders. Police was also informed. Police brought a sniffer dog and the dog led the police party to the house of the accused/appellant and thereafter police arrested the accused/appellant, for causing the death of the deceased.

In his cross-examination, PW-2 replied that he had not stated anything before the police whatever he had stated before the Court. He did not know as to how the deceased died.

9. PW-3 also supported the evidence of PW-2 by stating that on the date of occurrence, he along with Biki (PW-2) and victim girl were playing near their house and at that time accused/appellant came there with Marie Gold biscuit and asked the victim girl to go to his house for having food. Accordingly, the victim girl went with the accused/appellant. He saw the deceased going with the accused/appellant somewhere. On the said date, the victim girl did not return back. On the next morning, PW-3 along with PW-2 searched for the victim girl and ultimately found her dead body in the rear verandah of a deserted house. The victim was lying dead. Thereafter PW-3 & PW-2 informed the matter to their parents and family members. Police came to the place of occurrence.

In his cross-examination, PW-3 replied that he had not stated anything before the police whatever he had stated before the Court. He did not know as to how the deceased died.

10. PW-4 is the neighbour of the informant. From his deposition it reveals that on 02.01.2015, at about 1:30 p.m. when he came to his house he saw a crowd of people in front of his house. Police was also present there. He came to know that in the veranda of a dilapidated house situated nearby, the dead body of the deceased was found and he identified the dead body to be the daughter of the complainant. Police brought a sniffer dog to the place of occurrence and the said dog went to the house of the accused/appellant, but at that time the accused/appellant was not in his house. He heard from Biki Tanti and Suraj Tanti that the accused/appellant took the victim girl along with him by giving her biscuits from the place she was playing with them.

In his cross-examination, PW-4 admitted that whatever he had stated in his examination-in-chief, he had not stated the same before the police, because police did not ask him anything about it.

11. PW-5 is the witness to the Inquest on the dead body of the deceased. According to PW-5, Biki Tanti and his friend found the dead body of the deceased in a dilapidated house situated near the house of the complainant. The daughter of the complainant went missing since 01.01.2015. On receipt of the information, he went to the place of occurrence and police also arrived there. Police conducted Inquest over the dead body of the deceased and he put his signature on the Inquest Report vide Exbt.2(2).

12. PW-6 stated that he did not know how the alleged incident had happened.

13. PW-7 deposed before the Court that on receipt of the information regarding the death of the victim girl, he along with one Boro Patra came to the spot and found the dead body of a minor girl lying on the floor and the mouth of the dead body was wrapped with cloth. He came to know that two minors saw the accused/appellant taking the deceased with him by giving her biscuits. After a while police came there. Police also brought a sniffer dog. The sniffer dog went to the house of the accused/appellant. Then the police apprehended the accused/appellant. PW-7 also stated that the accused/appellant confessed before them that he took the victim to the abandoned house of Rajmoni Hatiboruah and raped her. As the victim shouted, he put a cloth on her mouth and killed her by strangulation. When the accused/appellant confessed before Aasish Ghasi, Barun Patra, several other villagers were also present besides the police.

In his cross-examination, PW-7 replied that he did not know how the incident occurred. He put his signature in Exbt.3, i.e. Extra Judicial Confession of the accused/appellant made before them recorded by the Executive Magistrate.

14. PW-8 and PW-9 also deposed in the same manner, which is to the effect that on receipt of the information regarding death of the victim, they came to the spot and found the dead body of the deceased lying in an abandoned house near the house of the informant. According to them, on being asked the accused/appellant confessed that on the previous day evening at around 5:30 p.m. the accused/appellant met with the victim girl on the road and he told that he would take her to his house and gave her biscuits. Then police took him to the police station and next day police also brought him to the place of occurrence and he showed the place where he committed the crime. Then the accused/appellant made an Extra Judicial Confessional Statement before the Executive Magistrate. At that time PW-8 and PW-9 were present and they also put their signatures in the Extra Judicial Confessional Statement made by the accused/appellant vide Exbt.-3.

Both the PW-8 & PW-9 replied in their cross-examination that they were not present when the incident occurred and they have no personal knowledge how the occurrence took place.

15. PW-10 is the Medical Officer, who deposed in his evidence that on 03.01.2015 he was working as Professor and Head of the Department of Forensic Medicine, Assam Medical College, Dibrugarh. On that day, he performed the Post Mortem Examination on the body of a female child, aged about 6 years on police requisition and on being identified by the father of the deceased. On examination of the dead body, he found the followings –

“External Appearance : An average built female dead body of dark brown complexion wearing a yellow green frock in top covered with a blanket. Face was congested, dried grass and mud particles present all over the body and clothes. Rigor mortise passed of from whole body and the limbs. Post mortem hypostasis hypothesis present on back.

Injuries:-

- “1. Contusion 4 cm x 3 cm present over the both eyelids of the left eye;*
- 2. Abrasion 2 cm x 0.5 cm present over the left angle of mouth, 3 in number and 2 cm left of the mid line in a horizontal plain;*
- 3. Contusion 1 cm x 0.5 cm present over inner aspect of upper limb in the middle;*
- 4. Contusion 2 cm x 1 cm present over the right side of the face, 1 cm below the right eye and 3 cm right to the mid line;*
- 5. Abrasion 2 cm x 1 cm present over the left side of neck, 2 cm left of mid line and 4 cm above the sternal notch. Four ascresentric abrasion of size 0.5 cm x 0.1 cm present on left side of the neck placed in a vertical plane;*
- 6. Abrasion (cratch) 5 cm long present on back of right shoulder;*
- 7. Abrasion of size 1 cm x 0.3 cm present over back of abdomen over the 9th thorasic vertebrae in the midline;*
- 8. Abrasion size 0.5 cm x 0.5 cm present over back of pelvis in the midline;*
- 9. Contusion 2 cm x 1 cm present over mid point of right inguinal area;*
- 10. Contusion 2 cm x 0.5 cm present over the mid point of left inguinal area;*
- 11. Vulva and perineum found blood stain. One laceration (TRO) of the posterior fornix, perineum of size 2 cm x 1 cm x 2 cm up to the posterior vaginal wall with hymen tear at 6 O'clock position;*

Neck: No ligature mark detected externally. On dissection, fracture of the hyoid bone present over the right cornue bone with surrounding area. All internal organs were found congested.

Vaginal swab and nail scrapings were packed, sealed and handed over to the escorting police constable for analysis for DFSL at Kahilipara.

Organs of generation: Injuries: External injuries are described under injury No. 11.

Uterus healthy. Vaginal swab smear taken from posterior vaginal fornix shows presence of intex spermatozoa.

The Doctor opined that death was due to asphyxia as a result of smothering and manual strangulation. All the injuries were ante mortem and caused by blunt weapon and homicidal in nature. Evidence of recent forceful sexual intercourse was present.

16. PW-11 is the Investigating Officer. In his deposition, he stated that on 02.01.2015 he was serving as an Attached officer at Duliajan Police Station. On that day, one Nalinikanta Sharma informed over phone to the police station at about 1:15 p.m. that a dead body of a small girl aged about 5/6 years has been lying near their house at No.1 Duliajan Gaon. On receipt of the information, a General Diary Entry was recorded vide Duliajan P.S. G.D.E. No.54/2015 dated 02.01.2015 and he was endorsed to investigate the case. This witness also proved General Diary Entry, vide Exbt.-6. During investigation, he visited the place of occurrence and prepared the sketch map, vide Exbt.-7. Thereafter the Circle Officer, Tengakhat Circle was informed and he conducted the inquest over the dead body. He recorded the statements of the witnesses. Subsequently, the father of the victim girl lodged the FIR. He recorded the statement of the informant at the police station. He seized the wearing apparels of the deceased, vide Exbt.-4 Seizure List. He also seized undergarments of the accused/appellant, vide Exbt.-2 Seizure List. Thereafter he arrested the accused/appellant and forwarded him to judicial custody. He collected the Post Mortem Report and sent the seized materials for FSL examination. Thereafter, he also collected the FSL Report. Finding sufficient *prima facie* material against the accused/appellant, he submitted the charge-sheet against the accused/appellant under Section 302 IPC read with Section 4 of the POCSO Act, vide Exbt.-8. This witness also proved the seized articles before the Court vide material Exbts.-1 to 5.

17. PW-12 is the Executive Magistrate who conducted the inquest over the dead

body of the deceased. According to PW-12, during conducting of inquest, blood was noticed on the face and nose of the victim. Injuries were also noticed on the private parts with traces of blood.

18. PW-13 is the Scientific Officer, who examined the seized articles sent for forensic chemical examination. This witness proved one airtight EDTA vial contains nail scrapping from right hand marked as 'B' (Sero No.3443/B, one EDTA vial (airtight) contains nail scrapping from left hand marked as 'C' (Sero No.3443/C), one black coloured underwear contains stain of suspected blood and semen marked as 'D' (Sero No.3443/D and one multicoloured frock contains stain of suspected blood and semen marked as 'F' (Sero No.3443/F. According to PW-13, Sero No.3443/B, Sero No.3443/C, Sero No.3443/D & Sero No.3443/F gave positive test for human blood and semen.

In his cross-examination, PW-13 replied that he had not determined the age of the human semen and blood and he had not determined the blood group. He had not matched human semen and blood with another sample as there was no such requirement.

19. On perusal of the evidence on record and the other materials before the Trial Court, the learned Trial Court upon scrutiny of the evidence on record concluded that the case of the prosecution was proved beyond reasonable doubt against the accused/appellant and recorded the conviction and sentenced him as aforesaid.

20. Assailing the impugned judgment on various grounds, the learned Amicus Curiae Ms. B. Sarma has submitted that the prosecution case is based on circumstantial evidence, but the chain of circumstances is not complete, so as to prove the guilt of the accused/appellant. Even the evidence of last seen has not been proved in a proper manner. There was no motive for the accused/appellant to do away with the deceased. Prosecution case does not find any support from the

medical evidence as well, which falsifies the involvement of the accused/appellant in the case. The evidence of PW-2 & PW-3 are not trustworthy, as they did not say anything about the appellant taking away of the victim before the Investigating Officer in their statements recorded under Section 161 Cr.P.C, which according to the learned Amicus Curiae is fatal to the prosecution case.

21. The learned Amicus Curiae also pointed out that the FIR has also been submitted belatedly and no plausible explanation has been offered by the prosecution in respect thereof. The investigation of the case is also faulty which affects the prosecution case in material aspects. It is further submitted that the conclusion arrived at by the learned Trial Court is perverse and based on no credible evidence. On the aforesaid grounds, the learned Amicus Curiae prays that the accused/appellant be acquitted on benefit of doubt.

22. In response, Ms. S. Jahan, the learned Additional P.P. has vehemently opposed the present appeal on the ground that last seen evidence is trustworthy and a reliable piece of evidence. PW-2 & PW-3 have no reason to depose falsely before the Court intending false implication of the accused/appellant. The motive of incident has also been proved by cogent evidence that the accused/appellant took away the victim by giving a packet of biscuits and after committing rape on her and killed her by strangulation.

23. It is further submitted by the learned Additional Public Prosecutor that medical evidence also supported the ocular evidence that on examination of the dead body of the deceased, the Doctor found injury on her private parts and Doctor opined that the victim died due to asphyxia from strangulation.

24. According to the learned Additional Public Prosecutor, all the links make a complete chain of circumstances and are sufficient to prove the guilt of the accused/appellant. There is no material fault or discrepancy in the investigation.

It also appears from the evidence that as the informant was busy searching for his daughter, he could manage to lodge the FIR only after getting the dead body of his daughter and that was the reason for not lodging the FIR on the date when the victim girl went missing.

25. The learned Additional Public Prosecutor further submits that as the prosecution has proved the case against the accused/appellant beyond all reasonable doubt, the conviction recorded by the learned Trial Court does not need any interference by this Court.

26. The principles governing the case based on circumstantial evidence is well settled. Admittedly, the present case is based on circumstantial evidence and no direct evidence lies on record to indicate the involvement of the accused/appellant in the alleged crime. What the prosecution is under obligation to prove, in a case based on circumstantial evidence, has been settled in umpteen number of cases by the Hon'ble Apex Court, which are as follows –

27. In the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***, reported in ***(1984) 4 SCC 116***, the Apex Court laid down the following five golden principles, i.e. the panchsheel of the proof of a case based on circumstantial evidence:

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". It is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(ii) The facts so established should be consistent only with the hypothesis of the

guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) the circumstances should be of a conclusive nature and tendency,

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

28. In the case of ***G. Parshwanath vs. State of Karnataka***, reported in ***(2010) 8 SCC 593***, the Apex Court has held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in the chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.

29. Recently in the case of ***Raju vs. State of Rajasthan***, reported in ***(2022) (121) ACC 954***, the aforesaid legal position has been reiterated by the Apex Court.

30. Applying the aforesaid proposition of law in the present case, we are under an obligation to see whether the circumstances form a chain which is so complete, that there is no escape from the conclusion that within all normal and human probabilities, the crime was committed by the accused/appellant only and none else and the aforesaid conclusion must be free from any other hypothesis than that of the guilt of the accused/appellant.

31. The first circumstance, which is relied upon by the prosecution is the last seen theory. It has been submitted that the deceased was seen for the last time in the company of the accused/appellant and thereafter her dead body was recovered. According to PW-2 and PW-3, they along with the victim girl were playing in the afternoon near their house. The victim was their neighbour. While they were playing, the accused/appellant came there and asked the victim girl to accompany him to his house. Both the PW-2 & PW-3 stated that they had seen the victim going with the accused/appellant. On the said date, the victim did not return back home. Though they searched for the victim, she could not be traced out and on the next morning her dead body was recovered.

32. It is true that PW-2 & PW-3 did not state anything before the Investigating Officer while their statements were recorded under Section 161 Cr.P.C and which was confirmed by the Investigating Officer when his evidence was recorded before the learned Trial Court. But according to Investigating Officer, PW-2 & PW-3 stated before him that they were playing on the previous date and at that time, at about 3:30 – 4:00 p.m., they saw the accused/appellant taking the victim with him towards his house and the next day, they saw that the victim's dead body in one house. The learned Additional Public Prosecutor has pointed out that the taking away of the victim by the accused/appellant has been proved in the case which can be taken into consideration. It is also stated that the victim was last seen with the accused/appellant at about 3:30 – 4:00 p.m. and the dead body was recovered on the next morning. The defence failed to prove that during the said period any other person had any access to the victim girl. According to the learned Additional Public Prosecutor, the plea of last seen together theory is proved against the present accused/appellant beyond all reasonable doubt.

33. In the case of ***Dharam Deo Yadav vs. State of UP***, reported in **(2014) 5 SCC 509**, the Apex Court has held that "normally the last seen theory comes into play when the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will 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. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, as in the present case, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence".

34. As the evidence of Medical Officer (PW-10) is to the effect that the time of death was between 36-48 hours, prior to Post Mortem Examination, it can be said that soon after the deceased was last seen in the company of the accused/appellant, her homicidal death occurred.

35. The legal position in respect of the last seen theory has also been explained by the Hon'ble Apex Court such as *State of Goa vs. Pandurang Mohite*, reported in *AIR 2009 SC 1066*, *State of U.P. vs. Satish*, reported in *(2005) 3 SCC 114*, *Rohtash Kumar vs. State of Haryana*, reported in *(2013) (82) ACC 401*, *Ashok vs. State of Maharashtra*, reported in *(2015) 4 SCC 393* and *Niranjan Panja. vs. State of West Bengal*, reported in *(2010) 6 SCC 525*.

36. If we summarize the legal theory regarding last seen as it emerges from

the observations made in the aforesaid judgments, we find it would be difficult in some cases to positively establish that the deceased was last seen with the accused/appellant 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/appellant and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases where prosecution depends upon the theory of last seen together. Further, it is always necessary that the prosecution should establish time of death. In the case in hand, the death of the deceased happened on 01.01.2015 at night as can be inferred from medical evidence. Apart from the above, the evidence of PW-2 and PW-3 leads us to the conclusion that the prosecution has been able to establish the theory of "last seen together" as there was a close proximity between the point of time of them being seen together and the finding of the dead body.

37. It is true that the doctrine of established 'last seen together' shifts the burden of proof on accused/appellant requiring him to explain how the incident had occurred. Failure on the part of the accused/appellant to furnish any explanation in this regard would give rise to a very strong presumption against him. In an established last seen case, the prosecution is exempted to prove the exact happening of incident, as accused/appellant himself would have special knowledge of incident and thus would have the burden of proof as per Section 106 Evidence Act, although the initial burden of proof is on prosecution to adduce sufficient evidence pointing towards the guilt of the accused/appellant.

38. It cannot be gainsaid that when the entire case of the prosecution hinges on the circumstantial evidence, the entire chain of circumstances has to be

completely proved which unerringly would lead to the guilt of the accused/appellant and none else. So far as the evidence on record in the present case is concerned, it is not disputed that on 01.01.2015 at around 3:30 – 4:00 p.m., the accused/appellant had taken the victim from the place where she was playing with PW-2 & PW-3. On the next morning the dead body of the victim was found lying in a dilapidated katcha house located near the house of the complainant. It transpires that the death of the deceased had taken place during night hours on 01.01.2015 and the accused/appellant was last seen with the deceased on the previous evening. Thus, it was the accused/appellant alone who knew as to what happened after the victim was taken away by him.

39. It may be noted that once the theory of "last seen together" was established by the prosecution, the accused was expected to offer some explanation as to when and under what circumstances he had parted the company of the deceased. It is true that the burden to prove the guilt of the accused is always on the prosecution. However, in view of Section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden of proving that fact is upon him. Of course, Section 106 is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless it is also an equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within his special knowledge, in view of Section 106 of the Evidence Act, such failure on the part of the accused may be used against the accused, as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non- furnishing of the explanation by the accused would be a very crucial fact, when the theory of

"last seen together" as propounded by the prosecution was proved against him, as it lends credence to the circumstantial evidence which points unwaveringly to the guilt of the accused.

40. In the case of ***Rajender vs. State (NCT of Delhi)***, reported in **(2019) 10 SCC 623**, it was observed as under :

"12.2.4. Having observed so, it is crucial to note that the reasonableness of the explanation offered by the accused as to how and when he/she parted company with the deceased has a bearing on the effect of the last seen in a case. Section 106 of the Evidence Act, 1872 provides that the burden of proof for any fact that is especially within the knowledge of a person lies upon such person. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. In other words, he must furnish an explanation that appears to the court to be probable and satisfactory, and if he fails to offer such an explanation on the basis of facts within his special knowledge, the burden cast upon him under Section 106 is not discharged. Particularly in cases resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, such failure by itself can provide an additional link in the chain of circumstances proved against him. This, however, does not mean that Section 106 shifts the burden of proof of a criminal trial on the accused. Such burden always rests on the prosecution. Section 106 only lays down the rule that when the accused does not throw any light upon facts which are especially within his/her knowledge and which cannot support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce an explanation as an additional link which completes the chain of incriminating circumstances."

41. In the case of ***Satpal vs. State of Haryana***, reported in **(2018) 6 SCC 610**, it was observed as under :

"6. We have considered the respective submissions and the evidence on record. There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

42. In view of the aforesaid legal position, it is discernible that though the last seen theory as propounded by the prosecution in a case based on circumstantial evidence may be a weak kind of evidence by itself to base conviction solely on such theory, but when the said theory is proved coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused does owe an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of

recovery of weapon etc. forming a chain of circumstances is established, the conviction could be based on such evidence.

43. So far as the facts in the instant case are concerned, it was duly proved that the death of the deceased was homicidal. It was also proved that prior to her death, she was sexually abused as the Medical Officer proved that on examination of the victim, he found injuries on her private parts. It was also not disputed that the accused/appellant had taken the deceased with him on the previous evening. Thereafter, on the next day morning, the dead body of the deceased was found lying in a dilapidated katcha house adjacent to the house of the complainant. The time gap between the period when the deceased was last seen with the accused/appellant and the recovery of the corpse of the deceased being quite proximate, the non-explanation of the accused/appellant with regard to the circumstances under which and when the accused/appellant had departed the company of the deceased was a very crucial circumstance proved against him. The evidence of the Scientific Officer who examined the wearing apparels of the deceased and the accused/appellant also supported the fact that he noticed human blood and semen on the wearing apparels of the victim girl and the undergarments of the accused/appellant. When the statement of the accused/appellant was recorded under Section 313 Cr.P.C, he did not say anything as to when he had parted from the deceased and there is no explanation from his side as to how the incident occurred.

44. Regarding extra judicial confession, it appears from the record that extra judicial confession of the accused/appellant was recorded by the Executive Magistrate (PW-12), as per the evidence of PW-7, PW-8 and PW-9. However, PW-12 did not say that he recorded any extra judicial confessional statement

made by the accused/appellant before him. However, as per cross-examination of PW-8, it appears that the extra judicial confessional statement was written by one police officer, whose name he did not know. However, PW-9 stated that the accused/appellant confessed his guilt before him, Niranjana, Aasish and Bijoy before arrival of the police. PW-7 & PW-8 stated that the police was also present along with other villagers when the accused/appellant confessed his guilt. PW-7 and PW-8 also stated that they put their signature in the appellant's extra judicial confessional statement (Exbt.-3) which had been made before the Executive Magistrate, in the Police Station. In view of the contradictory statements regarding extra judicial confession made by the accused/appellant, we are of the view that such type of extra judicial confession has no such value in the eye of law. However, the prosecution has proved the guilt of the appellant through last seen theory and other circumstances as discussed above.

45. The entire oral as well as documentary evidence having been considered threadbare by the Sessions Court, resulting in holding the accused/appellant guilty of the charged offence, we do not find any ground to interfere with the judgment recorded by the learned Trial Court.

46. In the result, the appeal stands dismissed. Send back the LCR.

47. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable to her should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant