

GAHC010160492020



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

Case No.: CRL.A.(J)/82/2020

Indra Bahadur Limbu

...Appellant

-Versus-

The State of Assam

...Respondent

Advocates:

For the Appellant : Mr. A. Kalita, *Amicus Curiae*

For the respondent : Ms. B. Bhuyan, Additional Public Prosecutor, Assam

BEFORE

HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR

HON'BLE MR. JUSTICE KARDAK ETE

Date of Hearing : 02.06.2023
Date of Judgment : 20.07.2023

JUDGMENT & ORDER (CAV)

(Kardak Ete, J)

We have heard Mr. A. Kalita, learned *Amicus Curiae*, and also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam.

2. This appeal from Jail has been preferred by the appellant/convict against the judgment and order dated 13.12.2019 passed by the Additional Sessions Judge (FTC, Kokrajhar) in Sessions Case No. 29/2019 whereby the appellant has been convicted for the offence under Section 302, IPC, 1860 for committing murder and sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 5,000/- (five thousand), in default of payment of fine, to suffer further imprisonment for one year.

3. The case of the prosecution is that on 18.03.2019, one Jitendra Singh, ASI lodged an *Ejhar* before the Officer-in-Charge, Serfanguri Police Station, alleging that on 19.12.2018, the village Headman of Khalashi Village informed him over mobile phone that a 50 years old woman of his village, namely, Nepti Limbu, wife of Indra Bahadur Limbu committed suicide by hanging herself on a *Dambaru* tree in the backside of her house. On the basis of Patgaon Outpost GD Entry No. 275 dated 19.12.2018, he visited the place of occurrence, examined the witnesses nearby and seized the rope with which she hanged herself to death by preparing a Seizure List in the presence of witnesses, and got the inquest done by the Judicial Magistrate, Kokrajhar. Thereafter, the dead body was sent under the custody of UBC 157, Amrit Lal Brahma, and got the Post Mortem examined by the Superintendent of RNB Civil Hospital, Kokrajhar. Thereafter, on the basis of information given by the Village Headman of Khalashi Village, UD Case being No. 06/2018 dated 19.12.2018 was registered in Serfanguri Police Station. Accordingly, the case was investigated. On 12.03.2019, in the evening, he received the Post Mortem Examination Report from RNB Civil Hospital, Kokrajar by post and found the Doctor mention in his Report that the cause of death is due to severe haemorrhage and it is ante-mortem in nature. Accordingly, he informed that this is a case of murder and it

cannot be a case of suicide. And hence, the *Ejahaar* was lodged. Pursuant thereto, a case was registered as Serfanguri PS Case No. 13/2019 under Section 302, IPC, 1860. Thereafter, the appellant was arrested and investigation was launched.

4. On completion of the investigation, Charge sheet was filed against the convict/appellant for commission of offence under Section 302, IPC, 1860 *vide* dated 29.04.2019.

5. The case was committed by the Sub-divisional Judicial Magistrate (S), Kokrajhar to the Court of Sessions, Kokrajhar on 16.05.2019. Charge was framed on 20.06.2019 against the appellant to which the appellant pleaded not guilty and claimed for trial.

6. During the course of trial, the prosecution examined 8 (eight) witnesses. After completion of the prosecution witnesses, the appellant was examined on 04.12.2019, under Section 313 of the CrPC, 1973. Defence plea is of total denial. No evidence/witness was adduced by the accused in his defence.

7. On conclusion of the trial, after considering all the testimonies of witnesses as well as the materials on record, the learned Additional Sessions Judge (FTC, Kokrajhar) has convicted the appellant for the offence under Section 302, IPC, 1860 and sentenced him to Rigorous Imprisonment for life with a fine of Rs. 5,000/-(five thousand), in default, to suffer further imprisonment for one year on the basis of circumstantial evidence and the Last Seen Together Theory.

8. Mr. A. Kalita, learned *Amicus Curiae* submits that the guilt of the accused

could not be proved by prosecution beyond reasonable doubt as there was no eyewitness to the commission of the alleged murder by the accused. The whole prosecution case is based on circumstantial evidence/hearsay evidence and nothing more. He submits that none of the PWs are stated to have witnessed the commission of the murder. In fact, PWs- 1, 2, 3, 6 and 7, who were neighbours of the deceased had not stated anything against the accused. None of them had witnessed any commission of the crime of murder. In fact, PWs- 1 and 2 stated that they did not know anything about the case but only stated that they came to know about the death of the deceased. He submits that PW-4 in his statement stated that when he visited the place of occurrence he found that the local police had already brought down the dead body and stated that an inquest was conducted by an Executive Magistrate. In his cross examination he stated that he reached the place of occurrence at 6:30 AM and he made seizure of rope lying near the dead body. He stated that he did not see any mud on the body of the deceased and the wearing apparel of the deceased were not torn. PW-4 stated that he made the Seizure List at 9:50 AM taking signature of the two witnesses.

9. Mr. A. Kalita, learned *Amicus Curiae* submits that PW-5, the Doctor who conducted the Post Mortem stated in his report that he observed cut injuries over her face, two in number and abrasion injuries swelling around the neck. He opined that the death was due to severe haemorrhage and the death was ante-mortem in nature. In his cross-examination he had specifically stated that he did not find any scratch mark on the body of the deceased indicating the she had been dragged. He submits that PW-6, a villager stated that he saw the deceased was hanging on a tree but her feet were touching the ground. He stated that he had seen blood mark on her body. He further stated that police

team had returned at 7:00 AM in the morning from the place of occurrence. PW-7, also a villager stated that he had seen her hanging from the tree but her feet were touching the ground. He further stated that he had seen blood mark on her body.

10. Mr. A. Kalita, learned *Amicus Curiae* submits that from the above depositions of the PWs it is clear that no one has seen the offence of murder committed by the accused. All of them had only seen the body of the deceased hanging on the tree and no one had heard any noises or quarrel between the accused and the deceased. It is also clear that there was no sign of dragging the body of the deceased by the accused as no one had seen the same. The Post Mortem Report also did not reveal that any parts of the wearing apparel of the deceased were torn. Therefore, it is very much unlikely that when two adults fight and quarrel take place before the commission of murder and no one hears any noise or hue and cry at that moment before the alleged commission of murder. It is further very unlikely that an adult dead body is dragged to a distance singlehandedly and there is no sign of dragging. In fact the wearing apparels of the deceased were intact. The alleged murder of the deceased and thereafter, hanging of the body on the tree of the backyard of the house, which is precisely the prosecution story, is highly unlikely and the same is beyond reasonable doubt.

11. Mr. A. Kalita, learned *Amicus Curiae* further submits that PWs- 6 and 7 had stated that they had seen the feet of the deceased touching the ground. When the body is kept and hung for a long period of time the body weight may bring down the body a bit and that can be a probable reason of the body touching the ground. The Post Mortem Report did not provide time of death of the deceased.

12. Mr. A. Kalita, learned *Amicus Curiae* submits that so far as the police investigation is concerned it was carried out in a very callous manner. Firstly, there is contradiction in the statement of PWs- 4 and 6 as well as the timing of preparation of Seizure List is concerned. PW-4 stated that he prepared the Seizure List at place of occurrence around 9:50 AM whereas PW-6 stated in his cross-examination that police had left place of occurrence at 7:00 AM. Therefore, there is a doubt that the police had prepared the Seizure List not at the place of occurrence but somewhere else. Further, prosecution failed to examine the two Seizure List witnesses namely, Arun Limbu and Keshab Chetry. They being vital witnesses they ought to have been examined by the prosecution. Further, it is noticed that the rope seized by the police was not sent for any forensic examination. These are some vital lapses in investigation process which go deep into the root of the cause of the prosecution case.

13. Mr. A. Kalita, learned *Amicus Curiae* referring to paragraph-23 of the judgment of the Additional Sessions Judge submits that the learned Additional Sessions Judge has opined the Last Seen Theory to come to the conclusion to convict the accused for murder. However, there is no *iota* of evidence that the deceased and the accused were seen together at that night by any witness. Further, the two of them slept together by retiring to the room that night as held by the learned Additional Sessions Judge. It may be noted that there was no question put to the accused while examining him by the learned Additional Sessions Judge under 313 of CrPC. In fact, against the question where the accused wanted to adduce any evidence or if he had anything to state, the accused specifically answered that, "*I do not want adduce any evidence. I was sleeping at night. In the morning hours when I woke up, I saw my wife hanging on a tree. I informed the villagers immediately, I am*

innocent. I have not killed my wife." From the above, it cannot be concluded that the accused was sleeping with the deceased in a bolted room. He did not mention about his wife sleeping in the same room with him. In view of the fact above, without having any evidence that the accused and the deceased were sleeping together and seen together, the reliance on the Last Seen Theory is wholly incorrect. To buttress his submission, the learned *Amicus Curiae* relied on the judgment of the Hon'ble Supreme Court in the case of **Nizam and Another Versus State of Rajasthan**, reported in (2016) 1 SCC 550.

14. Mr. A. Kalita, learned *Amicus Curiae* further submits that the prosecution has totally relied on the Post Mortem Report which has only corroborative value without having any substantive value minus any evidence of witnesses. In the present case, there is no eyewitness to the alleged commission of the murder by the accused except some hearsay evidences of the suicide. Total reliance on the Post Mortem Report for holding the case to be a case of murder is totally incorrect in absence of any substantive evidence. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Balaji Gunthu Dhule Versus State of Maharashtra**, reported in (2012) 11 SCC 685 and **State of Himachal Pradesh Versus Jaichand**, reported in (2013) 10 SCC 298.

15. Mr. A. Kalita, learned *Amicus Curiae* further submits that it is found on record that the learned Additional Sessions Judge, in his judgment has specifically stated that the deceased had no children and the deceased was last seen together along with the accused. However, it is seen in a letter addressed to the Hon'ble Chief Justice, Gauhati High Court by the accused through the Superintendent, District Jail, Kokrajhar, dated 07.01.2020 that the accused has a minor son aged about 10 years and a minor daughter aged about 5 years to

look after. If this fact is correct then the presence of these minor children on the night of 19.12.2018 could not be ruled out. In that situation the commission of the alleged murder by the accused is highly improbable.

Therefore, in view of the facts and circumstances of the present case, the learned *Amicus Curiae* submits that the prosecution has miserably failed to prove its case against the appellant and the learned Additional Sessions Judge has committed grave error in holding the appellant guilty of murder under Section 302 of IPC, 1860. Therefore, prayed that the appellant be acquitted by discharging him from the charges of murder of the deceased.

16. On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor submits that in the present case the evidence of PW-1 shows that the relationship between the accused and deceased was not good as the accused used to quarrel with the deceased every night. Taking into account the evidence of PWs- 6 and 7, the accused person himself came to PWs- 6 and 7 and informed about the hanging. When PWs- 6 and 7 went to place of occurrence they found the feet of the deceased was touching the ground and there was blood mark there on the body. The accused in his 313, CrPC statement, in answer to Question No. 11 has stated that he was sleeping at night, and in the morning hours when he woke up he saw his wife was hanging on a tree. He informed the villagers immediately. Therefore, the presence of the accused person in his residence is proved from the statement made in 313, CrPC, 1973.

17. Ms. B. Bhuyan, learned Additional Public Prosecutor submits that the Magistrate who conducted the inquest and the Doctor who conducted the Post Mortem has found cut mark on the face of the deceased. According to PW-1,

the accused was an alcoholic and he used to quarrel with his wife every night. Presuming that the victim made hue and cry on the fateful day the villagers and neighbours did not come forward after hearing hue and cry as it was a regular practice, which takes place at the residence of the accused person. She submits that assuming that any third person came and injured the victim, as the accused person admittedly was at his residence on the day of occurrence he could have heard and witnessed the occurrence and could have retaliated.

18. Ms. B. Bhuyan, learned Additional Public Prosecutor submits that the defence case is not that the accused was not in his residence on the relevant day. Further, if the deceased would have committed suicide there would not have been any injury but the body of the victim was touching the ground and the doctor would not have opined the cause of death is due to severe haemorrhage and is ante-mortem in nature. Therefore, she prays that considering the materials on record, the conviction of the appellant and the sentence be upheld.

19. We have considered the submissions advanced by the learned counsels for the parties and also scrutinized the materials available on record.

20. We would examine first the deposition of the PWs recorded by the learned Trial Court.

21. PW-5, Mr. P.K. Doley, the Medical Officer who conducted Post Mortem Examination deposed that on 19.12.2018 he was posted as Medical and Health Officer at RNB Civil Hospital, Kokrajhar. On that day, on police requisition, he had conducted Post Mortem Examination of the deceased Nepti Limbu, aged

about 50 years, and in his observation he found cut injuries over the face, 2 (two) in numbers, deep cut 3" x 2" size, abrasion injuries swelling around neck. PW-5 opined that injuries were sufficient in the ordinary course of nature to cause death. He also deposed that the cause of death is due to severe haemorrhage and it is ante-mortem in nature. In cross examination, PW-5 deposed that he did not find any scratch mark on the body of deceased, Nepti Limbu indicating that she has been dragged.

22. PW-1, Smt. Himani Basumatary deposed that accused is an alcoholic and he used to quarrel with his wife every night. She only knows that the wife of deceased died. She does not know anything else.

23. PW-2, Smt. Darne Basumatary deposed that she had heard that his wife was found hanging on a tree. She does not know anything else about this case.

24. PW-3, Shri Ranil Basumatary deposed that he knows the accused. On the day of occurrence, he was recovering after a surgery. On the following morning, he came to know from villagers that wife of accused was found hanging on a tree. He does not know anything else about this case.

25. PW-4, Shri Jitendra Singh deposed that on 19.12.2018 he received an information from the *Gaonbura* of Patgaon that Nepti Limbu, wife of accused, is found hanging on a tree. After getting the information, he went to the place of occurrence along with police team and found that the local villagers had brought down the dead body. He immediately informed the Officer-in-Charge of Serfanguri Police Station and unnatural death case was initially registered as UD Case No. 06/2018. The dead body was sent for Post Mortem Examination. The

Post Mortem Report revealed that the death is due to severe haemorrhage and it is ante-mortem in nature. The inquest of the dead body was also done by Executive Magistrate. Exhibit-2 is the Inquest Report which was forwarded to him by the Executive Magistrate. On the basis of inquest and the Post Mortem Examination Report, it appeared that the death of Nepti Limbu was homicidal and accordingly, he lodged an FIR. Exhibit-1 is the FIR and Exhibit-1 (1) is his signature. Exhibit-3 is the Seizure List and Exhibit-3(1) is his signature. In cross examination PW-4 deposed that he went to the place of occurrence at around 6:30 AM in the morning. The *Gaonbura* told him that the rope lying near the dead body was the rope on which the body was hanging. The witnesses present at that time informed him that accused and his wife used to quarrel with each other and both of them were alcoholic. PW-4 has also deposed that he did not see any mud on the body of the deceased. The wearing apparel of the deceased was not torn.

26. PW-6, Shri Bhim Dhoj Limbu deposed that about four months back, accused came to their residence and informed him that his wife, Nepti Limbu, is hanging on a tree behind his residence. He went to the residence of accused and saw that Nepti Limbu is hanging on a tree but her feet was touching the ground. He had seen blood mark on her body. He immediately informed the In-Charge, Patgaon Police Station. In cross examination, PW-6 denied the suggestion that he had not stated before the Police that he had seen Nepti Limbu hanging on a tree but her feet was touching the ground. PW-6 has also denied the suggestion but he did not inform the In-Charge of Patgaon Police Outpost that Nepti Limbu had no children. PW-6 admitted that Nepti Limbu was a short tempered lady and she used to threaten the accused that she would leave his society.

27. PW-7, Shri Sanu Subba deposed that he knew the accused. About four months back, accused came to their residence and informed him that his wife Nepti Limbu is hanging on a tree behind his residence. He went to the residence of accused and saw that Nepti Limbu is hanging on a tree but her feet was touching the ground. He had seen blood mark on her body.

28. PW-8, Shri Nitu Changmai, the Investigating Officer deposed about the usual steps taken during investigation. In cross examination, PW-8 deposed that the accused was not named in the FIR. PW-4, Shri Jitendra Singh did not state before him that he received information from the *Gaonbura* of Patgaon regarding the death of Nepti Limbu. The statement of PW-4, Jitendra Singh was recorded in the Patgaon Police Outpost. PW-6, Shri Bhim Dhoj Limbu stated that he received the information on 18.12.2018. PW-7, Shri Sanu Subba stated that on 19.12.2018, she came to know about the death of Nepti Limbu and went to see her dead body. In the Seizure List, Exhibit-5, the Case Reference has not been mentioned. The Seizure List, Exhibit-5 does not mention from where ASI, Jitendra Singh found the rope. PW-8 denied the suggestion that seized articles *vide* Exhibit-5 is not connected with this case and it is a seizure in connection with some other case. PW-8 has also denied the suggestion that Nepti Limbu's death was suicidal and not homicidal. PW-8 has also denied the suggestion that he had not investigated the case properly.

29. On examination of the depositions of the PWS, the findings of the learned Trial Court are that the body of the deceased was found hanging in the backside of the house of deceased. According to the opinion of the Doctor, there were bleeding injuries that resulted in severe haemorrhage. There is no evidence of any suicidal hanging because no evidence of throttle has been

found in the Post Mortem examination. In these circumstances it is held that the death of Nepti Limbu was homicidal in nature and the possibility of committing suicide is ruled out. Accordingly, the learned Trial Court has passed the conviction entirely on circumstantial evidence.

30. The learned Trial Court was of the view that the evidence reproduced above establishes that the relationship between the accused and the deceased was not good and the accused used to quarrel with the deceased. The accused and the deceased did not have any children and therefore, on the fateful night, the only other inmate of the house of accused was the deceased. The oral evidence establishes that there was blood marks on the body of deceased and this fact is ably corroborated by the medical evidence which has revealed presence of deep cut injuries on the face of the deceased. Accordingly, the appellant has been convicted based on the circumstantial evidence applying the theory of Last Seen Together.

31. In the case of **Bodhraj Versus State of Jammu and Kashmir**, reported in (2002) 8 SCC 45, the Hon'ble Supreme Court has held that which is reproduced herein below:

“10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other persons. (See [Hukam Singh v. State of Rajasthan](#), AIR (1977) SC 1063), [Eradu and Ors. v. State of Hyderabad](#), AIR (1956) SC 316, [Earabhadrapa v. State of Karnataka](#), AIR (1983) SC 446, [State of U.P. v. Sukhbas](#) and Ors., AIR (1985) SC 1224, [Balwinder Singh v. State of Punjab](#), AIR (1987) SC 350, [Ashok Kumar Chatterjee v. State of MP](#) AIR (1989) SC 1890. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In [Bhagat Ram v. State of Punjab](#), AIR (1954) SC 621, it was laid down that where the case depends

upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

15. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

16. In Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh, AIR (1952) SC 343, wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature. the circumstances from which the conclusion of guilt is to be drawn the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words. there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

*17. A reference may be made to **alter** decision in [Sharad Birdhichand Sarda v. State of Maharashtra](#), AIR (1984) SC 1622. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:*

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established, (2) 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;

(3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude very possible hypothesis except the one to be proved, and (5) 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.

31. The last seen theory comes into play where 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 author of 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 accused and 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 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.”

32. In the case of **Nizam and Another** (Supra), the Hon’ble Supreme Court has held, which is reproduced herein below:

“14. The courts below convicted the appellants on the evidence of PWs 1 and 2 that the deceased was last seen alive with the appellants on 23-1-2001. Undoubtedly, the “last seen theory” is an important link in the chain of certainty. The “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of “last seen alive” in State of Rajasthan v. Kashi Ram, this Court held as under:

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him in Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mahamed, In re.

The above judgment was relied upon and reiterated in Kiriti Pal v. State of W.B.”

33. In the case of **Balaji Gunthu Dhule** (Supra), the Hon’ble Supreme Court has held, which is reproduced here below:

“9. The High Court has also relied upon the post-mortem report of the doctor. In our opinion, since the entire evidence of the eyewitnesses has not been accepted by the High Court, it could not have merely relied upon the post-mortem report to convict the appellant for an offence under Section 302 IPC. Further, in our view, the post-mortem report should be in corroboration with the evidence of eyewitnesses and cannot be an evidence sufficient to reach the conclusion for convicting the appellant. In view of the above we have no other alternative but to allow this appeal and set aside the judgment and order passed by the High Court convicting the appellant for an offence punishable under Section 302 IPC.”

34. In the case of **Jai Chand** (Supra), the Hon’ble Supreme Court has held, which is reproduced here below:

“21. It is true that the post-mortem report (PW-10/A) is not a substantive piece of evidence. But the evidence of such doctor cannot be insignificant. This Court in State of Haryana v. Ram Singh held as under:

“1. While it is true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The appearing on the body of the deceased person and likely use of the weapon therefore and it would then be the prosecutor’s duty and obligation to have the corroborative evidence available on record for the other prosecution witnesses.”

35. Now, we would proceed to analyze the evidence of the PWs.

36. PW-1 deposed that she only knows that the wife of the accused died and also stated that the accused is an alcoholic and he used to quarrel with the deceased every night. She does not know anything else.

37. PW-2 also deposed that she had heard that the wife of accused was found hanging on a tree and does not know anything else.

38. PW-3 deposed that on the day of occurrence, he was recovering after a surgery and he came to know from the villagers that the wife of the accused was found hanging on a tree only on the following morning except that he does not know anything else. From the above deposition, these PWs are only hearsay witnesses except the stated knowledge of the PW-1 that the accused is an alcoholic and he used to quarrel with his wife every night.

39. PW-4 had deposed that on receipt of information on 19.12.2018 from the *Gaonbura* of Patgaon Village that the body of Nepti Limbu, wife of accused, is found hanging on a tree, he went to the place of occurrence along with the police team and found that local villagers have brought down the dead body. He informed the Officer-in-Charge of Serfanguri Police Station and accordingly unnatural death case was initially registered. Thereafter, the dead body was sent for Post Mortem examination. The Post Mortem Report revealed that the death is due to severe hemorrhage and it is ante-mortem in nature. Further, the inquest of the dead body was also done by the Executive Magistrate. On the basis of the inquest and the post-mortem report, it appeared that the death of Nepti Limbu was homicidal and accordingly, he lodged an F.I.R. which was registered, as mentioned hereinabove. In his cross-examination, he deposed that he went to the place of occurrence in the morning at 6.30 a.m., the *Gaonbura* told him that the rope lying near the dead body was the rope on which the body was hanging. The witnesses present at that time informed him that the accused and his wife used to quarrel with each other and both of them were alcoholic. He deposed that he did not see any mud on the body of the deceased and the wearing apparels of the deceased was not torn. He further deposed that no signature was taken from the *Gaonbura* in the Seizure List, Exhibit-3, but the witness one Arun Limbu has stated that he has signed in the Seizure List. He denied the suggestion that Exhibit-3 was not prepared at the place of occurrence. It is seen that the rope seized by the police was not sent for any forensic examination. The seizure witness namely Arun Limbu and Keshab Chetry were not examined by the prosecution.

40. PW-5, i.e. Dr. P. K. Doley, the Medical officer who conducted the Post Mortem Examination on the deceased, had deposed that on the police

requisition, he had conducted the Post Mortem on the deceased, Nepti Limbu, and in his observation, he found cut injuries over the face, abrasion injuries swelling around the neck. He opined that the injuries were sufficient in the ordinary course of nature to cause death. He also deposed that the cause of death is severe hemorrhage and it is ante-mortem in nature. PW-5, in his cross-examination, has deposed that he did not find any scratch mark in the body of the deceased Nepti Limbu indicating that she has been dragged. On the analysis of the deposition of the PW-5, it reveals that there was a cut injuries of 2 (two) numbers, abrasion injuries swelling around the neck and the injuries are sufficient in the ordinary course of nature to cause death.

41. PW-6 had deposed that he was informed by the accused that his wife Nepti Limbu is hanging on a tree behind his residence. He went to the residence of the accused and saw that Nepti Limbu was hanging on a tree but her feet was touching the ground. He had seen blood mark on her body and thereafter he informed the In-Charge Patgaon Police Station immediately. In his cross-examination, he denied the suggestion that he had not stated before the police that he had seen Nepti Limbu hanging on a tree but her feet was touching the ground. He has also stated that Nepti Limbu was an alcoholic. He stated that she had no children and she was a short tempered lady and she used to threaten the accused that she would leave his society. He also stated that he personally does not know how Nepti Limbu died.

42. PW-7 had deposed that he was informed by the accused that his wife Nepti Limbu is hanging on a tree behind his residence and he saw that Nepti Limbu was hanging on a tree but her feet was touching the ground and he had seen blood mark on her body. PW-7 is the witness who has seen the deceased hanging on a tree and her feet was touching the ground and he had seen blood

mark on her body.

43. PW-8, the Investigating Officer, deposed that after getting the Post Mortem Report and having found sufficient materials against the accused- Shri Indra Bahadur Limbu, he submitted the Charge-Sheet against the accused for the offence under Section 302 of the Indian Penal Code. Exhibit-5 is the Seizure List prepared by him by virtue of which he had seized a piece of rope. In his cross-examination, he has stated that the accused was not named in the F.I.R. He stated that PW-4 did not state before him that he received information from the *Gaonbura* of Patgaon regarding the death of Nepti Limbu. The statement of PW-4 was recorded in the Patgaon Police Outpost. PW-6 had stated that he received the information on 18.12.2018. PW-7 stated that on 19.12.2018, he came to know about the death of Nepti Limbu and went to see her dead body. In the Seizure List, Exhibit-5, the case reference has not been mentioned. It also does not mentioned from where PW-4 has found the rope. He has denied the suggestion that the seized article is not connected with the case and it is a seizure in connection with some other case. He also denied the suggestion that Nepti Limbu death was suicidal and not homicidal. He also denied that he had not investigated the case properly. From the above deposition, it appears that the investigation has not been done properly by the police.

44. On careful scrutiny of the testimony of the prosecution witnesses, the case is based entirely on circumstantial evidence. It is seen that the learned Trial Court has based on the conviction on the theory of Last Seen Together Alive on the ground that both the deceased and the accused slept together by retiring to the room that night. The learned Trial Court also noted that the 'last seen together' in legal parlance ordinarily refers to a last seen together in the street, at a public place, or at any place frequented by the public. But in the

instant case, the 'last seen together' is much more than that as the last seen together is sleeping together inside the bolted room. However, on the scrutiny of the testimony we are of the view that such finding have not been established beyond reasonable doubt by the prosecution and the link to the guilt of the appellant is not connected, therefore, chain is not complete. No question was put to the appellant regarding retiring together to the room that night so as to enable the accused to explain. In fact, there is no evidence on record to that effect as admittedly prosecution could not establish the same during prosecution evidences.

45. The learned Trial Court has also recorded that the accused and the deceased did not have any children and therefore on the fateful night, the only inmate of the house of accused was the deceased. An oral evidence establishes that there was a blood mark on the body of the deceased and this fact is corroborated by the medical evidence which reveals presence of deep cut injury on the face of the deceased. The finding of the Trial Court that the deceased did not have any children is also contrary to the record, as pointed out by the learned *Amicus Curiae*, that the appellant in his letter dated 07.01.2020 stated that he has a minor son aged about 10 (ten) years and a minor daughter aged about 5 (five) years to look after for which the presence of these minor children on the fateful night of 19.12.2018 cannot be ruled out. There is nothing to show on the record that any attempt has been made by the prosecution to examine the children.

46. The testimonies of the PWs reveals that the relationship between the accused and the deceased was not cordial and the accused used to quarrel with the deceased every night. PWs-6 & 7, who had seen the deceased hanging and seen the feet of the deceased were touching the ground and there was a blood

mark on the body of the deceased. The accused, in his statement under Section 313 Cr.PC, has stated that he was sleeping at night and in the morning hours, when he woke up, he saw his wife hanging on the tree. He informed the villagers immediately, which may indicate presence of the accused person in his residence. However, such evidences are not enough to connect the guilt of the accused and convict him in as much as the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established. The facts so established should be consistent only with the hypothesis of the guilt of the accused. It should not be explainable on any other hypothesis except that the accused is guilty.

47. As held by the Hon'ble Supreme Court, the provision of Section 106 of Evidence Act lays down that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Thus if a person last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation to discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or

hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link, which completes the chain. However, in the present case, no question was put to the accused or examined under section 313 statements so as to enable the accused to give explanation to that effect.

48. In the present case, there is no evidence on record to show that the accused and deceased were last seen. Presumption of facts and circumstances that the accused and the deceased were at home in the fateful night and mere omission to explain by the accused in his statement under Section 313 CrPC (as no question was put to the accused, as noted above) cannot be basis for conviction of the appellant.

49. The Hon'ble Supreme Court in the case of **Ramanand @ Nandlal Bharti Vs. State of Uttar Pradesh**, reported in 2022 SCC OnLine SC 1389, has reiterated its earlier decisions and held that it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

50. It is also settled law that in a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the

established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

51. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra**, reported in (1984) 4SCC 116, the Hon'ble Supreme Court has held as under:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra(') where the following observations were made:

"Certainly, 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."

(2) 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,

(3) the circumstances should be of a conclusive nature and tendency.

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

(5) 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.”

52. As we have noted above, the Hon'ble Apex Court clearly enunciated that in a case based on circumstantial evidence, the inference of guilt can be drawn only when all the incriminating facts and circumstances are bound to be

incompatible with the innocence of the accused. The Hon'ble Supreme Court has held that when a conviction is based on circumstantial evidence, there should not be any gap in the chain of circumstances; else the accused is entitled to the benefit of doubt.

53. The Hon'ble Supreme Court reiterated in the case of **Shankar -versus- State of Maharashtra**, 2023 SCC Online SC 268, that while relying on "last seen theory" in a case based on circumstantial evidence, the evidence on the time at which the deceased was lastly seen with the accused has to be proved conclusively.

54. After careful examination and scrutiny of the testimonies/evidence and the materials available on record, we are of the view that the prosecution has miserably failed to establish link to complete the chain. Mere omission of explanation from the appellant which was not put to him would not be a ground to convict the appellant.

55. The circumstances relied upon by the prosecution, in our opinion are not proved by cogent and reliable evidences and taken cumulatively, do not form a complete chain pointing out that the murder was committed by the accused and none else.

56. The evidence of the PWs- 1, 4, 5, 6, 7 & 8, to whom we have scrutinised hereinabove, in our considered view, does not inspire confidence so as to accept for the purpose of basing the conviction on circumstantial evidence. At best it could be case of doubt or suspicion. The Hon'ble Supreme Court in the case of **Narendrasinh Keshubhai Zala -versus- State of Gujarat**, 2023 SCC Online SC 284, reiterated that it is a settled principle of law that doubt cannot replace proof. Suspicion, however great it may be, is no substitute of proof in criminal

jurisprudence.

57. From an analysis of the evidence available on record, in its entirety, we are of the opinion that prosecution has not been able to establish the guilt of appellant/convict beyond reasonable doubt. As such, giving the benefit of doubt, the conviction of the appellant Shri Indra Bahadur Limbu under Section 302 IPC and the sentence of life imprisonment by the Trial Court vide judgment and order dated 13.12.2019 is set aside and quashed and appellant Shri Indra Bahadur Limbu is hereby acquitted. Consequently, the appellant/convict namely, Shri Indra Bahadur Limbu shall be set at liberty forthwith.

58. In the result, the appeal is allowed.

59. We extend our appreciation to the learned counsels for rendering able assistance to the Court.

Send back the LCR.

JUDGE

JUDGE

Comparing Assistant