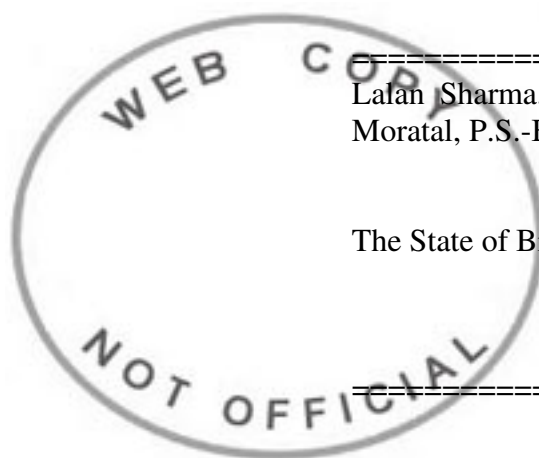




IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.953 of 2009

Arising Out of PS.Case No. 48 Year- 1997 Thana -Mufassil District- GAYA

Lalan Sharma, son of Sri Sheo Bhajan Sharma, permanent resident of Village-
Moratal, P.S.-Bodh Gaya, District-Gaya

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 822 of 2009

Arising Out of PS.Case No. 48 Year- 1997 Thana -Mufassil District- GAYA

Anandi Chaudhary, son of Late Mathura Chaudhary, resident of Village-Bhadeja,
P.S.-Mufassil, District-Gaya

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 913 of 2009

Arising Out of PS.Case No. 48 Year- 1997 Thana -Mufassil District- GAYA

Parsadi Paswan, S/O Shriratan Paswan, resident of Mohalla-Ghughari Tard, P.S.
Civil Line, District-Gaya

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

Appeals against the judgment of conviction dated 17.8.2009 and the order of
sentence dated 21.8.2009 passed by Shri Som Prakash Pandey, Additional Sessions
Judge/FTC Vth, Gaya, in Sessions Trial No.152/04/97/98, arising out of Gaya
Mufassil P.S. Case No.48/97, G.R. No.904/97

Appearance :

(In CR. APP (DB) No. 953 of 2009)

For the Appellant/s : Mr. Gaurav Govind, Advocate

For the Respondent/s : Dr. Mayanand Jha, APP

(In CR. APP (DB) No. 822 of 2009)

For the Appellant/s : Mr. Gaurav Govind, Advocate

For the Respondent/s : Dr. Mayanand Jha, APP

(In CR. APP (DB) No. 913 of 2009)

For the Appellant/s : Mr. Gaurav Govind, Advocate

For the Respondent/s : Mr. S.N. Prasad, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date: 17-07-2015

All the three appeals have been preferred against the judgment dated 17.8.2009 in Sessions Trial No.152/2004/97/98 on the file of Additional Sessions Judge, F.T.C.-Vth, Gaya. Through the said judgment, the trial court convicted the appellants for offences punishable under Sections 302/34 and 201/34 I.P.C., and sentenced them to undergo rigorous imprisonment for life, and to pay fine of Rs.10,000/- (Ten thousand) for the offence of murder and rigorous imprisonment for three years and a fine of Rs.5,000/- (Five thousand), for the one punishable under Section 201/34 I.P.C. In default of payment of fine, the appellants were directed to undergo simple imprisonment for six months under Section 201/34 I.P.C. Both the sentences have been directed to run concurrently.

2. The prosecution case commences with a Sanha (Ext.6) recorded on 28.5.1997, on the information given by one Babloo Kumar. He stated that on 24.5.1997, himself and about 24 other persons of his village were going to perform Tilak



ceremony of his aunt (Buwa) Parvati Kumari, and when they reached Village-Parewa, P.S.-Bodh Gaya, some of the persons stopped at the house of Vijay Yadav for drinking water, but two persons, namely, Kailu @ Sukhdeo Yadav and Murari Prasad, son of Hajari Raut, remained back and told them that they could proceed further, and would be coming later. It was mentioned that when the said two persons did not come till the following morning, they returned back to Village Mora Taal, at around 8 A.M., and made inquiries regarding the above two persons, but could not find their whereabouts. On inquiry, the said Vijay Yadav is alleged to have stated that two persons had left, after taking water and they had been seen off till the borderline of Parewa village by him. The villagers are said to have made searches regarding the whereabouts of the two persons, but could not locate them despite inquiries from relatives and acquaintances. F.I.R. was registered and further steps were taken. Thereafter another F.I.R. was registered on 4.6.1997, at Jharni Naala near Falgu river, Gaya, on the basis of the statement of Surendra Prasad (P.W.9), the brother-in-law of Sukhdeo Yadav @ Kailu Yadav, one of the missing persons. He stated that he was working at Bokaro in a private Company and he received information that his brother-in-law Sukhdeo Yadav @ Kailu



Yadav and co-villager Murari Raut were going to Surheri village to attend Tilak ceremony along with 20-25 persons of his village-Mora Tal on 24.5.1997 and on his way, his brother-in-law Sukhdeo Yadav and Murari Raut went missing. On receiving the said information on 4.6.1997 he is said to have come to his Sasural Mora Taal, and he came to know from the villagers that in front of Kendui village in the eastern side of Falgu river, a dead body was lying and birds were flying around it. On this information, himself and Gobardhan Rout, Bhuneshwar Yadav, Vishundahari Yadav and others are said to have gone to the river Falgu and found one dead body lying in skeletal state and a piece of underwear was also lying there; and Gobardhan identified the skeleton as that of Murari Rout. Near about 20 yards from that place, another dead body is said to have been buried in a ditch, and it was identified to be that of Sukhdeo Yadav, on the basis of the three nipples on his chest. It is further stated that the accused were in inimical terms with the deceased.

3. On the basis of the said information, a case under Sections 302, 201/34 I.P.C. was registered on 4.6.1997, as Mufassil P.S. Case No.48/97. Inquest and post-mortem were conducted and investigation was taken up. Accused Ram Prasad alias Prasadi Paswan was arrested and his confessional statement



was recorded, wherein the names of Lalan Paswan, Sidheshwar Sharma, Krishna Paswan, Anandi Choudhary and Mahendra Choudhary have been mentioned. The weapon Chhura, by which both murders were said to have been committed, was recovered from the bush near the dead body. On completion of investigation, chargesheet was filed alleging offence of murder and removal of evidence against the accused. All the accused pleaded not guilty.

4. The prosecution has in all examined 15 witnesses and exhibited some documents. Ext.1 is the signature of the informant Surendra Prasad on the Fard beyan (Ext.2). Ext.3 is the seizure list, Ext.4 is the confessional statement of Prasadi Paswan, Ext.5 is the carbon copy of the post-mortem report of Sukhdeo Yadav and Ext. 6 is the Sanha given by Babloo Yadav dated 28.5.1997. Ext.6/1 is the Sanha dated 28.5.1997 given by Ramdas Prasad, whereas Ext.7 is the report by the police officer regarding destruction of material exhibit from Malkhana.

5. The defence has also examined eight witnesses and exhibited some documents. Exts. A, B and C relate to the alibi of Lalan Sharma regarding his presence at Nalanda Gramin Bank, a certificate from the Manager, the signature of S. Choudhary, Senior Manager of Gramin Bank and Ext.C being the signature of

Lalan Sharma on the attendance register of June, 1997. On appreciation of oral and documentary evidence, the Trial court convicted and sentenced the accused. Hence these appeals.

6. Sri Gaurav Govind, learned counsel for the appellants submits that the conviction of the appellants was just on the basis of conjecture and surmises. He contends that the evidence, especially that of P.Ws.1 to 8, cannot be relied upon, since it is only after the discovery of the dead bodies, that these witnesses have come forth to propound the story of the deceased being last seen with the appellants near Bhadeja High School though the two deceased persons had disappeared on 24.5.1997. He contends that none of these witnesses have stated that they had approached the accused persons for seeking information soon after the disappearance of the missing persons, on return from Tilak ceremony. He further submits that the theory of “last seen together” attempted by P.Ws.1 and 2, is falsified in view of the statements of P.Ws. 3 and 6. He submits that the story of the deceased being last seen with the accused was developed only after the recovery of the bodies and there was no other evidence, to support it, particularly when the case of missing had been lodged by one Babloo Kumar and a Sanha entry, which was marked as Ext.6, was made on 28.5.1997 at Village Parewa

bearing Station Diary Entry No.620 NPS dated 28.5.1997.

7. Sri Mayanand Jha, learned Additional Public Prosecutor, on the other hand, submits that though there was some amount of uncertainty in the case, the prosecution was able to clear the mystery. He contends that though there is no eye witness in the case, the circumstantial evidence clearly proves that it is the accused herein, that caused the death of the two persons. He submits that the judgment of the trial court does not warrant interference.

8. There being no eye-witnesses to the occurrence, the case is totally based on circumstantial evidence. P.W.1 Prayag Yadav, in his deposition has stated that on 24.5.1997 he and some other persons were going to Surheri village, for Tilak ceremony of Ramdas's daughter and when they reached the school situated at Bhadeja village, then Sukhdeo Yadav and Murari Raut (deceased) stayed for drinking water, whereas Sidheshwar Sharma and Lalan Sharma were sitting at Bhadeja School and talking to each other, and when they reached Pasikhana, they learnt that the two persons did not come and inquired from some people at Bhadeja. He said that they were informed that Sukhdeo Yadav and Murari Raut had gone along with Sidheshwar Sharma, Lalan Sharma, Prasadi Paswan, Anandi Choudhary and Mahendra Choudhary towards south west in the



forest and when they did not reach till the next morning, the information was given to Bodh Gaya and Mofassil Police Station where Sanha was registered. After ten days thereafter, they are said to have come to know that that dead bodies of two persons were lying in SIWANA of Bhadeja village and went there and identified the dead bodies. P.W.1 further stated that the reason behind the said occurrence is that about two years back, Sidheshwar Sharma, who did not belong to the village, had taken Rs.20,000/- from Bhuneshwar Yadav for service but did not return the same, and when demanded, Bhuneshwar was assaulted by the men of Sidheshwar Sharma. Thus, this witness has carved out a story that both the deceased were last seen with the accused persons at Bhadeja school where Lalan Sharma and Sidheshwar were sitting.

9. P.Ws.2, 3, 4 and 7 have also stated that the deceased had accompanied the group for Tilak ceremony, but stopped at Bhadeja school, and met Sidheshwar Sharma, Lalan Sharma, Anandi Choudhary and Mahendra Paswan near Pasikhana. They stated that Sukhdeo and Murari had asked them to proceed and they will come after talking with Lalan Sharma, but they did not reach Surheri village. When the two persons did not reach on the next day, a search was undertaken by them, but



having not succeeded in the same, they informed the Police Station and after ten days of the alleged occurrence, the dead body of Sukhdeo Yadav and Murari Raut was found in a bush near Jharni Nala, outside Falgu river. Thus, these witnesses too propounded the story of last seen together, but failed to explain why no inquiry was made by them from the accused soon after their return from Surheri village.

10. P.W.5 Gobardhan Raut is the brother of deceased Murari Raut. He stated that he too formed part of the group of persons, who had gone to attend the Tilak ceremony. However, he stated that when they reached near Parewa village, Vijay Yadav stated that Sukhdeo and Murari had gone earlier but did not reach Surheri village. In his cross-examination, he stated that he could not search for his brother on the same night due to darkness.

11. P.W.6 Chand Muni Devi is the wife of deceased Sukhdeo Yadav. She is a hearsay witness and stated that she heard from other persons who had accompanied her husband and Murari Raut to village Surheri, that her husband stayed back behind to drink water and they saw that Lalan Sharma and Sidheshwar Sharma were talking with them, at a distance from Pasikhana. She further stated that when her husband did not return on the next day, she started searching for him, with other family



members, but ten days after he was missing, the dead body of her husband was found near Jhareni Nala outside Falgu river. She identified her husband's body by presence of three nipples on his chest. Her version, being purely hearsay, becomes relevant only to the extent that she informed her brother Surendra Prasad (P.W.9), who resided at Bokaro, by telephone and when he came from there, she narrated the event which led to the lodging of the F.I.R. She has reiterated that whatever statement she gave before the police at the first instance was also narrated by her in the court.

12. P.W. 8 Vijay Yadav also stated that he had seen Sukhdeo Yadav along with Bhuneshwar Yadav, Bishnudhari Yadav and Babloo Yadav, who had reached his house and had gone away after drinking water to village Surheri for Tilak ceremony of the daughter of Ramdas Raut. He stated that he knows Sukhdeo Yadav very well as his Sasural is in village Mora Taal and he had resided in that village for three years.

13. P.W.9 Surendra Prasad is the informant of the case and brother-in-law of deceased Sukhdeo Yadav. It was on his version that the F.I.R. was registered on 4.6.1997. He stated that he was informed telephonically by his sister that her husband had gone to attend Tilak ceremony but did not come back and after he



reached the place, he made inquiries and learnt that Sukhdeo Yadav went to village Surheri along with Bishundhari, Bhuneshwar, Mukesh Yadav, and Ramdas Raut and on the same day i.e., 4.6.1997 the dead body was found at the eastern side of Falgu river. He and his sister (P.W.6) identified the dead body by three nipples on his chest. He further stated that the reason behind the occurrence is that Bhuneshwar had given Rs.20,000/- to Sidheshwar Sharma and Lalan Sharma through Sukhdeo Yadav for getting service of Peon, but they did not provide service and when money was demanded by them, they became angry and thereafter accused persons, namely, Lalan Sharma, Sidheshwar Sharma, Prasadi Paswan, Krishna Paswan assaulted Bhuneshwar Yadav, for which Bodh Gaya P.S. Case No.36/95 was registered and that Sukhdeo Yadav was doing Pariva of that case. This witness has identified the signature on Fard beyan, which was marked as Ext.1.

14. P.W.10 is the I.O. of the case and has admitted recording of F.I.R. from P.W.9. He stated that he prepared the inquest report of both the dead bodies, arrested accused Prasadi Paswan and recorded his confessional statement. He further stated that he recovered Chhura by which murder is alleged to have been committed; on the basis of the statement made by accused Prasadi

Paswan and the seizure list (Ext.3) was prepared by him. The confessional statement is marked as Ext.4., which was also signed by him.

15. P.Ws 12 and 15 are formal witnesses whereas P.Ws.13 and 14 are seizure list witnesses, who had denied having made statement before the police and also the signature on the seizure list.

16. Ext.5 is the carbon copy of the signature of one Dr. Kapildeo Prasad, which has been identified by P.W.11 Dr. Arvind Prasad, who has stated in his evidence that though the post-mortem of Sukhdeo Yadav was conducted by Dr. Kapildeo Prasad, he can identify signature of that Doctor. Ext.6 is the Sanha entry made on the basis of the information given by Babloo Kumar on 28.5.1997 and P.W.3 is an attesting witness to it.

17. A perusal of Ext.6, station diary entry dated 28.5.1997 (Annexure 1) reveals that the occurrence was just otherwise. It was stated in Ext.6 that when all the persons belonging to the group which had gone for Tilak ceremony reached village Parewa, P.S. Bodh Gaya, they stopped at the house of Vijay Yadav for drinking water, whereafter at around 5 P.M. they left the place but Sukhdeo Yadav and Murari Prasad



stayed back, asking others to proceed further and that they would follow. Thereafter, the party proceeded toward Surheri, but they did not find the two persons even after the Tilak ceremony, and then they made inquiries and came to know that they did not reach village Surheri at all. On their return from Surheri, they inquired from Vijay Yadav, who stated that soon thereafter Sukhdeo Yadav and Murari had left and he had seen them off upto the village Parewa. It is also stated in Ext.6 that they have not been found till date and efforts are being made to locate them, after making inquiries from friends and relatives. It is important to note that Babloo Kumar was not examined as a witness.

18. The version contained in Ext.6 is at total variance from the depositions of the other witnesses. There is absolutely no reference of the deceased persons sitting at Bhadeja School, nor there is any reference of the deceased being last seen, in the company of the accused persons. Ext.6, however, suggests that the deceased stayed back at the house of Vijay Yadav(P.W.8).

19. What is indeed strange is that the police have not acted and responded on Ext.6 nor the prosecution has proceeded on the basis of the contents thereof. The Fard beyan, which was recorded from P.W.9, has been made the basis for the prosecution. None of the witnesses have explained as to why they



did not make inquiries regarding the whereabouts of deceased persons from the accused appellants, though they categorically stated that the deceased was last seen with the accused persons at Bhadeja village. Nonetheless, what is patent from Ext.6 is that it squarely contradicts the story of last seen together. Further, when Ext.6 was already made and it being the earliest report available with the police, there was absolutely no need to register another F.I.R. on 4.6.1997, i.e., ten days after the alleged date of occurrence, particularly when it was just a hearsay statement of the informant, i.e., P.W.9.

20. The version presented by P.W.3 with regard to the motive, hardly bears probability, as it could not be proved that the appellant Lalan Sharma had taken Rs.20,000/- from Bhuneshwar Yadav. Further, there was nothing on the record to show that deceased Sukhdeo and Murari were helping Bhuneshwar Yadav (P.W.3). In the said case instituted against the appellants, the deceased Sukhdeo Yadav and Murari Raut have not been named as witnesses, which goes to disapprove the story of P.W.3. P.W.3 is a witness to the Sanha entry (Ext.6) which presents a version altogether different from the “last seen together” theory propounded and developed by him. Therefore, his evidence is totally unreliable.



21. The Trial court believed the circumstantial evidence of P.Ws. 1 to 9, and concluded the theory of the deceased being last seen in the company of the accused appellant was proved beyond reasonable doubt. It has also come to the conclusion that the plea of alibi advanced by the appellant Lalan Sharma is without any basis. It has proceeded on the assumption that the confessional statement made by Prasadi Paswan leading to the recovery of the alleged Chhura was an objective piece of evidence and the chain of circumstances leading to the murder was complete and unbroken. The plea advanced by the defence has been discarded altogether. Non-production of valid piece of evidence purported to have been seized, have been given a go-by. What is absolutely strange is that the trial court has totally ignored Ext.6, which is the very first version made by one of the members of Tilak party Babloo Kumar; and there is no discussion whatsoever regarding the same. Thus, it has proceeded on circumstantial evidence and has convicted the appellants on the basis of the last seen together, theory.

22. It is a well settled principle of law that the last seen together theory, in a case of murder is a very weak circumstance, and there must be strong corroboration to the same. In the absence of any corroboration, the last seen together theory



can be said to have been frustrated. It can be acted upon only in the light of Section 114 and 133 of the Evidence Act. For that purpose, the following ingredients, namely, (1) that the circumstances from which the inference of guilt is to be drawn have been fully established by unimpeachable evidence and without a shred of doubt; (2) that the circumstances are of determinative tendency, unerringly pointed towards the guilt of the accused; (3) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that the guilt is sought to be proved against him; must be proved to exist.

23. The presence of the accused at the place of the offence or his being seen last with the deceased is the most relevant consideration. This sometimes constitutes the piece of circumstantial evidence.

24. The said last seen theory has been explained by the Supreme Court in **Ramreddy Rajesh Khanna Reddy v. State of A.P. [(2006) 10 SCC 172]**. In paragraph 27 and 28 of the said judgment, the Supreme Court has held as follows:

“27. 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 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. Even in such a case the courts should look for some corroboration.”

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“28. *In State of U.P. v. Satish [(2005)3 SCC 114 : 2005 SCC (Cri) 642, this Court observed :*

“22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It 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 and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW 2.”

In **S.K. Yusuf v. State of West Bengal [(2011) 11 SCC 754];AIR 2011 S.C. 2283**, the Supreme Court in paragraph 21 has reiterated the above, which is quoted hereunder:

“21. 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 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. Even in such a case the courts should look for some corroboration.”

25. The last seen theory does not by itself lead to the inference about the commission of crime. In the absence of other links it is not safe to convict solely on last seen theory [See (2005) 12 SCC 438 **Jaswant Gir v. State of Punjab**]. As such, the benefit of doubt can be given to the appellants.

26. In the instant case, there is no cogent evidence to prove the ingredient of last seen theory. On the contrary, the story advanced, vide Ext.6, belies the circumstantial evidence propounded by the P.Ws. whose testimony surfaced only after the body was recovered, i.e., ten days whereas the Sanha entry, made at the earliest point of time, does not speak of such association of the date of occurrence. The testimony of P.W. 3 becomes questionable as he was an attesting witness of Ext.6, the Sanha entry. It is not known what prevented him from naming the appellants at the time of filing of Sanha.

27. We strongly feel that the last seen theory as propounded and used to the detriment of the appellants cannot be

sustained, as Ext.6 entry does not at all speak of the deceased being last seen with the accused persons/appellants and there being no further corroborating material to support the story of last seen, the conviction and sentence ordered against the appellants must inevitably fail.

28. The appeals are, thus, allowed and the conviction and sentence against the appellants are set aside. Since the appellants are on bail bonds, their bail bonds shall stand discharged.

(L. Narasimha Reddy,CJ)

(Anjana Mishra, J)

PNM/ A.F.R.

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