

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****Criminal Appeal No.2538 of 2000**

Phool Singh Kanwar

----Appellant

**Versus**

State of Chhattisgarh

---- Respondent

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For Appellant:  
For Respondent:Smt Kiran Jain, Advocate  
Smt Smita Ghai, PL.

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**Hon'ble The Chief Justice**  
**Hon'ble Shri Justice P. Sam Koshy****Order On Board****Per Navin Sinha, Chief Justice****03/07/2015**

1. The Appellant stands convicted under Section 302 IPC to life imprisonment with fine of Rs.5,000, in the event of failure to pay which, he was required to undergo six months further rigorous imprisonment, as ordered on 18.9.2000 by the Additional Sessions Judge, Korba in Sessions Trial No.42/1998.

2. The body of the deceased Firangilal, cousin of Mahendra Kumar, PW-1 was found in the morning on 21.10.1997 at a distance of 100 meters from the house of the deceased. Exhibit P-1, First Information Report was lodged by PW-1, Mahendra Kumar stating that PW-17, Diesel Ram had told him that the previous night about 7-8 p.m, the latter had

seen the Appellant and the deceased having an altercation. PW-1, Mahendra Kumar, stated he therefore suspected that the deceased had been killed by the Appellant with a sharp cutting weapon, from the nature of the injuries.

3. The postmortem, Exhibit P-4 was conducted by Dr. P.S Sisodiya, PW-8 on 21.10.1997 about 3.30 p.m who found the following injuries:-

I) Incised wound on the occipital region extending from right temporal region behind right ear to just above left ear on the back of head transversely directed size 10"x 2" up to cranial cavity, brain material came out from cavity through the wound.

II) Incised wound 3"x1"cm bony deep obliquely directed on the occipital region beneath above wound. Scalp hair studded with blow edges of wound clear cut and regular, blood clots present on edge.

Cause of death was opined to be hemorrhage and shock due to injury on the head. Time elapsed since death was between 12-24 hours.

4. Learned Counsel for the Appellant submitted that there is no eye-witness to the assault. The case of the prosecution rests entirely on circumstantial evidence. The links in the chain of circumstances are not complete leading to the only inescapable conclusion of the Appellant being the assailant. Reading cumulatively the evidence of PW-2, Hirabai, PW-3 Kalindri Bai the wife of the deceased, PW-5, Chatram and PW-16, Jhaduram, the deceased and the Appellant were friends. No motive has been established why the Appellant may have assaulted the deceased. In a case of circumstantial evidence, motive assumes significance. The

deceased left home with the Appellant at 3.00 p.m but they parted ways in the evening and later at about 8.30 p.m the Appellant was seen alone. The deceased was not in his company. There is no evidence to suggest that at any later time, the Appellant and the deceased had met again. The prosecution has not led the evidence of the wife of the Appellant or the wife of Kamal Singh who, according to PW-16, Jhaduram, had seen the Appellant going to assault the deceased and who had tried to dissuade him. Evidently the wife of the Appellant and that of Kamal Singh had also not seen the Appellant last in the company of the deceased. The body had been found the next morning at 6.00 a.m. Considering the long time gap from the evening when they were last seen together, the possibility of the deceased having been killed by any other cannot completely be ruled out and it will not be safe to convict the Appellant on the basis of the last seen theory. Reliance was placed on 2009 CRI.L.J. 3032 (Tipparam Prabhakar v. The State of Andhra Pradesh).

5. The recovery of the sword allegedly used for the assault, on the confession of the Appellant has not been proved as PW-5, Chatram and PW-7, Shankarlal, the seizure witnesses have both stated that the police obtained signatures on several papers sitting on a platform in the house of Patetram. The same infirmity attaches to the seizure of shirt and trouser of the Appellant said to have blood stains in the FSL report, Exhibits P-20 and 21. PW-6, Ranvir Singh, the constable has stated that when he took the sword to the doctor, it was in open condition. The sword was never sealed on recovery raising serious doubts and suspicion with regard to the genuineness of the same and therefore is inadmissible in evidence. PW-8, Dr. P.S. Sisodiya, has deposed that the sword which

was given to him by PW-6, Ranvir Singh for opinion had mud and rust stains on it. The Doctor did not mention signs of any blood like stains. The evidence of PW-17, Diesel Ram cannot be considered because even though named in the First Information Report as the person who informed PW-1, Mahendra Kumar, he was neither mentioned as a charge sheet witness and neither was his statement recorded under Section 161 Cr.P.C. The Appellant stands to be seriously prejudiced if his evidence is considered as he has been denied the right to cross-examine the witness with regard to any contradictions that may have come between his police statement and deposition in Court.

6. Learned Counsel for the State opposing the appeal submitted that there is ample evidence on record that the Appellant and the deceased were last seen together. They had left the house of the deceased at 3.00 p.m and were together till late in the evening according to PW-2, Hirabai. Chatram PW-5, and PW-16, Jhaduram have both deposed that they saw the Appellant in the night carrying a sword murmuring that he would teach a lesson to the deceased. PW-16, Jhaduram further deposed that the wife of the Appellant and Kamal Singh saw the Appellant going to assault the deceased and tried to dissuade him. The weapon of assault has been recovered on the confession of the Appellant with blood stains confirmed in the FSL report as also blood has been found on his shirt and trousers during investigation. No defence has been offered how blood came on his clothes or why he was being falsely implicated. It was lastly submitted that if they were both seen together till evening and thereafter the Appellant around 8.30 p.m was seen carrying a sword murmuring that he would teach the deceased a lesson and the body was found next morning

at 6.00 a.m, all events have occurred in close proximity of time and possibility of the Appellant being the assailant cannot be completely ruled out.

7. We have considered the submissions on behalf of the parties and examined the evidence on record also.

8. The last seen theory is but a part of the principle of circumstantial evidence. The principle applied is that if the accused was seen with the deceased in very close proximity of time from death, there arises a serious presumption of the accused being the assailant. The onus shifts to the accused under Section 106 of the Evidence Act to explain the circumstances in which the death occurred because the deceased was last seen with the accused. If it is shown from evidence that there are intervening circumstances to suggest that the accused and the deceased parted company, or that the time elapsed since they were last seen together and the recovery of the body, in the facts of a case, did not rule out the possibility of the death having occurred in other circumstances, the benefit of doubt has to be given to the accused. If it cannot be said with certainty that the accused was the only assailant the hypothesis cannot be said to be compatible only with the guilt of the accused and acquittal will have to follow. In other words, the nature of evidence available in cases of last seen theory or circumstantial evidence must be compatible with the only hypothesis of the guilt of the accused ruling out any possibility of his innocence. If there is any doubt with regard to the hypothesis of guilt of the accused, the benefit has to be given to him.

In (2002) 8 SCC 45 (Bodhraj v. State of J&K) with regard to the last seen theory it was observed as follows :-

“31. 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....”

9. Motive in a case of circumstantial evidence or last seen theory becomes relevant as a corroborative factor. In the present case, the evidence of the prosecution witnesses indicates that the Appellant and the deceased were friends as deposed by PW-3, Kalindri Bai, wife of the deceased. The Appellant and the deceased left the latter's house together at 3.00 p.m. They were last seen by PW-2, Hirabai near her house in the evening, quarrelling. The witness has not stated that there was any serious dispute between them or that they were attempting to assault each other, much less that the Appellant was holding out any threats to the deceased. On the contrary, the witness asked them to stop quarrelling and go home after which both the Appellant and the deceased left for their respective homes. Therefore, according to the prosecution evidence, the deceased and the Appellant parted ways in the evening and went away to their individual houses. No evidence has come on record thereafter that the Appellant and the deceased were again seen together by anyone before the body was discovered at 6.00 a.m. The evidence of PW-5, Chatram, and PW-16, Jhaduram corroborates the evidence of PW-2, Hirabai as the two former witnesses saw the Appellant alone carrying a sword about 8.30. to 9.00 p.m when they were sitting

together at the house of PW-5. According to PW-5, Chatram, the Appellant was murmuring something while according to PW-16, Jhaduram, he was naming the deceased. The aforesaid evidence may at best raise suspicion against the Appellant but in absence of any other evidence of the two having been seen together, it cannot lead to the conclusion in a case of circumstantial evidence based on the last seen theory that the Appellant alone was the assailant. PW-16, Jhaduram deposed that the wife of the Appellant and the wife of Kamal Singh were shouting that the Appellant was going to kill the deceased but he does not say that the latter had seen the Appellant in the company of the deceased at that time. Even if the wife of the Appellant was not produced as a witness there has to be reason why the prosecution did not lead the evidence of the wife Komal Singh, if he was alone at such time or with the deceased. The prosecution evidence therefore reveals that the Appellant and the deceased had parted company in the evening and the Appellant was seen alone at night. There is no evidence on record of their having been seen thereafter together at any time later before the body of the deceased was found the next morning. The possibility of the deceased having died in other circumstances or that the assailant was another, in the facts of the case cannot be ruled out. It cannot be said that the proximity of time from evening when they were last seen together till the next morning inevitably leads to the only possibility of the Appellant being the assailant. The Appellant in his statement under section 313 Cr. P.C had denied the allegation of his being the assailant. Summarizing the principles for invocation of the last seen theory from judicial precedents it was observed in (2015) 4 SCC 393 (Ashok v. State of Maharashtra) as follows :-

“12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.”

In the case of Tippiaram (supra) relied upon by Counsel for the Appellant, the deceased and the Appellant left the house of the deceased at about 7.00 p.m. The body of the deceased was then found at 11.00 p.m. There was no eye-witness to the occurrence and the only material was circumstantial evidence.

10. PW-5, Chatram, and PW-7, Shankarlal witnesses to the memorandum, Exhibit P-8 and the seizure of the clothes of the Appellant Exhibit P-10 have stated that all the paper work with regard to the seizure was done on the platform in the house of Patetram where they signed about 9-10 papers. They denied that the confession of the Appellant was recorded in their presence. The presence of their signatures therefore loses its significance as the circumstances stand well explained. PW-7 further deposed that he was an illiterate person and he was told by the police that if he signs and goes to the Court with regard to the same, he would get money referring to the diet money given to witness. PW-6, Ranvir Singh, the constable who took the sword seized on the confession of the Appellant, Exhibit P-9, to the doctor deposed that the sword was in

open condition and he had carried it his hand. If the sword after seizure was not sealed no reliance can be placed on the same as false implication cannot be ruled out by planting of evidence. PW-8, Dr. P.S. Sisodiya, deposed that the sword brought to him was rusted with mud on it. The presence of blood on the clothes attributed to be that of the Appellant also loses its significance completely in view of the seizure list witnesses PW-5, Chatram, and PW-7, Shankarlal not supporting that the seizure was in accordance with law. In any event, the presence of blood on the clothes of the Appellant may be an incriminating factor against him but cannot be an inevitable conclusion in a case of circumstantial evidence that for the said reason, he necessarily and compulsorily was the only assailant. The fact that the Appellant may not have taken any defence in his statement under Section 313 Cr.P.C or lead any evidence in support of the same, cannot strengthen the case of the prosecution which had to be proved on its own strength.

11. The Investigating Officer was also duly put the question in cross-examination that the memorandum and the seizure papers were all signed on the platform of the house of Patetram.

12. If PW-17, Diesel Ram was mentioned in the "Merg" as the person who informed PW-1, Mahendra Kumar, there had to be an explanation why he was not made a charge sheet witness and his statement recorded under 161 Cr.P.C.

13. Learned Counsel for the Appellant has rightly submitted that his evidence cannot be looked into because the Appellant has been denied the right to cross-examine the witness vis-a-vis statements that may have been made under 161 Cr.P.C for contradictions. In any event, in cross-

examination, the witness denied having said anything to PW-1, Mahendra Kumar, on basis of which, the latter stated that he has lodged the First Information Report.

14. In conclusion, considering the entirety of the facts of the case, the nature of evidence available, the requirement of the law to prove the guilt beyond reasonable doubt compatible only with the guilt of the accused in a case of last seen theory, we do not consider it appropriate to uphold the conviction of the Appellant merely because blood may have been found on the sword which was never seized in accordance with the law or the clothes of the Appellant which also have been denied by the seizure list witnesses as having been seized in accordance with law, and the time gap between the body of the deceased being found as also the evidence available that the two had parted company in the evening and the Appellant was seen alone, with no other evidence available that they had come together subsequently.

15. The conviction of the Appellant is set aside. The appeal is allowed subject to the conditions under Section 437-A Cr.P.C.

Sd/-  
(Navin Sinha)  
**CHIEF JUSTICE**

Sd/-  
(P. Sam Koshy)  
**JUDGE**