

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 765 of 2000**

Tukaram @ Tuku S/o Shri Mehtar Sahu, Occu. Cultivation, R/o village Atra, Police Station Churiya, District Rajnandgaon (C.G.)

---- Appellant

Versus

State of Madhya Pradesh (now Chhattisgarh), through Station House Officer, Police Station Churiya, District Rajnandgaon (C.G.)

---- Respondent

For Appellant	:	Shri Shashi Kumar Kushwaha, Advocate
For Respondent-State	:	Shri Ashok Swarnkar, Panel lawyer

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

C A V JUDGEMENT**Per P. Sam Koshy, Judge****22/01/2016**

1. The present Appeal has been preferred challenging the order dated 20.01.2000 passed by the Additional Sessions Judge, Rajnandgaon in Sessions Trial No. 116 of 1998 whereby the Appellant has been convicted under Sections 302 and 201 of IPC and sentenced to undergo life imprisonment with fine of Rs. 5000/- u/s 302 and rigorous imprisonment for three years with fine of Rs.2000/- u/s 201 IPC with default stipulations.

2. Brief facts of the case leading to the filing of the Appeal as per the prosecution are that on 13.06.1998, PW-2 Firo Bai received an information that the dead body of her husband Chaitram (hereinafter referred as 'the deceased') was found hanging on a tree in village Buchatola Khar. As per the prosecution, previous night i.e. 12.06.1998 when the deceased was having dinner at his house, the Appellant who is also his brother-in-law came and the two then left together. PW-2 Firo Bai wife of the deceased objected but the deceased replied

that there is a village meeting which he must attend and that the other villagers namely Balwant, Bhaggulal, Gajru, Durdeshi, Banchore etc. are also attending the meeting. Despite objection by PW-2 that those persons belonged to a different group, the deceased said that previous disputes having been resolved he would go for the meeting and return by morning. The next day, the deceased was found dead hanging on a tree. The matter was reported to the Police, inquest was made and the dead body sent for postmortem, conducted by PW-18 Dr. S. K. Ahuja who gave a report marked Exhibit P-27.

3. As per the statements received during the course of investigation the deceased was found to be in the company of the Appellant and some other persons. Since there was an old enmity between the Appellant and the deceased, the Appellant along with other accused persons is said to have assaulted him and thereafter hung the body of the deceased from a tree to give the impression of the deceased having committed suicide. On the basis of suspicion and memorandum statements of the accused persons the Police submitted charge sheet making 10 persons accused in the case including the Appellant.

4. The trial Court after recording evidence and hearing the parties has acquitted 9 accused persons for lack of sufficient evidence. Only the Appellant was found guilty of having committed the offence and convicted.

5. Counsel for the Appellant assailing the impugned judgment submitted that the prosecution has not proved its case beyond all reasonable doubt both by leading ocular evidence as well as from the medical evidence to substantiate the guilt of the Appellant alone. According to the counsel for the appellant, there are large number of contradictions and omissions in the evidence of the prosecution which gives rise to great element of doubt. It was contended that if there is a slightest doubt in the prosecution story, the benefit of the same ought to have been given to the Appellant. It was also contended that since the

prosecution had proceeded against 10 accused persons, there is no iota of evidence to show that it was the Appellant alone who had assaulted and killed the deceased. It was also argued that the prosecution has not conclusively been able to prove the death of the deceased to be homicidal rather from the medical evidence it appears to be a case of suicide by hanging and that there was more than one reason for the deceased to commit suicide. It was submitted that the other 9 accused persons have been acquitted of the charges mainly on the ground of doubting their presence at the time of commission of the offence and also the fact that their identity has not been properly established and proved firstly in the course of investigation and secondly during the trial. It was submitted that it is the same set of evidence against the Appellant also yet the Court below has not considered the case of the Appellant in parity with the other co-accused persons and has convicted the Appellant. It was further contended that from the version of the prosecution story, the identification of the Appellant for establishing last seen theory also is doubtful for the reason that one of the prosecution witnesses has stated that the Appellant was recognized in the torchlight which cannot be accepted for the reason that the torch light was being shown towards the road and it would have been impossible to recognize the Appellant who was allegedly riding the bicycle to be the person in company of the deceased. Likewise, unless the medical evidence conclusively establishes a homicidal death, the Appellant cannot be convicted for the said offence. It was contended that the conviction of the Appellant is based on circumstantial evidence and in a case of circumstantial evidence, the prosecution has to establish the connection of the entire chain of events in such a manner wherein the only conclusion which can be derived is that the accused alone had committed the offence. According to the Appellant, this inter-connection of the chain of events is also missing in the present case as except for the last seen theory there is no other circumstances whatsoever and therefore, the conviction of the Appellant solely based upon the last seen theory

shall not be proper in the facts of the case. The prosecution story also leads to a great element of doubt for the reason that there was no motive on the part of the Appellant to kill the deceased particularly when the Appellant was the brother-in-law of the deceased. Hence, the conviction relying upon circumstantial evidence that too of last seen theory becomes more weak and cannot be sustained.

6. The State counsel, on the other hand, opposing the Appeal submitted that it is a case where the prosecution in fact has been able to establish its case beyond all reasonable doubt conclusively against the present Appellant. It was contended that though there was no eye witness to the incident yet the evidence which has come during the course of investigation particularly more than one witness stating to have seen the deceased with the present Appellant and the time of death of the deceased matching the period when the witnesses had last seen the deceased in company of the Appellant makes the circumstances against the Appellant of committing the offence. It was contended that the Appellant has not been able to give any plausible explanation of his not being along with the deceased at the time of offence. It was argued that the Appellant has also not given any justification in his statement under Section 313 Cr.P.C to substantiate his case while taking defence except for a bald statement of his not being present in the village on the date of incident without giving any evidence by which it could be established his presence elsewhere. State counsel further argued that there are more than one witness who have seen the Appellant in company of the deceased at different intervals in the evening which has not been rebutted or disproved by the defence. It was submitted that in fact, the Appellant also had a motive because of an old fight between them for eliminating the deceased. Drawing attention to the medical evidence State counsel submitted that the manner in which the body was found reveals that it was not possible for the deceased himself to have committed suicide when one

of his feet was touching the ground and the other leg was slightly above the ground. This suggests that it could not have been a case of suicide. It can therefore safely be inferred that the deceased was first murdered and then hanged to give it a picture of suicide. State counsel drawing attention to the finding given by the trial Court in paragraph 64 of the judgment submitted that the Court below has minutely considered the evidences which have come on record and given a finding of various circumstantial links inter connected leading to the only conclusion of the Appellant alone to have committed the offence. Referring to the medical evidence counsel for the State submitted that in fact there is no scope of any doubt regarding the cause of death being homicidal and that the circumstances and the medical evidence also show it to be a case of strangulation than that of suicide as the symptoms available on the body of the deceased as per the textbook opinion also were to be a case of strangulation and not suicide by hanging. Under these circumstances, the State Counsel prayed for rejection of the Appeal.

7. We have considered the respective submissions and perused the evidence on record. The present is a case of circumstantial evidence, relying upon the last seen theory. It is therefore for the prosecution to establish a prima facie case that the deceased was with the Appellant in close proximity of time before death. The longer the time gap, the greater the possibility of intervening circumstances. If there is any doubt about the accused being in the company of the deceased in proximity of time to death or the possibility exists that they may have parted company or there existing intervening circumstances, benefit of doubt will have to be given to the accused. Once the prosecution discharges this initial onus, the burden of proof will shift to the accused under Section 106 of the Evidence Act. If the accused rebuts the presumption and raises reasonable doubts about the prosecution case he cannot be convicted and acquittal will have to follow. The evidentiary value of the last seen theory as a part of

circumstantial evidence was considered in (2012) 6 SCC 403 (Sahadevan v. State of Tamil Nadu) observing as follows :-

“28. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and the deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt.”

8. That the last seen theory cannot be applied merely because the deceased may have been last seen with the accused but that it had to be considered along with other relevant circumstances and evidence including proximity of time was considered in (2014) 5 SCC 509 (Dharam Deo Yadav v. State of U.P.) holding as follows :-

“19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the 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.”

9. Appropriately, reference may also be made to (2015) 4 SCC 393 (Ashok v. State of Maharashtra) on the principles for application of the last seen theory in its application 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.”

10. The deceased left home with the Appellant who was related to him at 8:00 pm on 12.06.1998. PW-10, Vijay Kumar saw them together at 9:00 pm going on a bicycle talking amongst themselves. The deceased had told his wife before leaving that all previous enmity between them had come to an end. The incident with regard to theft of wood because of which relations had soured was two years old and is considered too distant in time to constitute motive. The Appellant had then come to the shop of PW-12, Sukhdev Ram at about 10:00 p.m. accompanied by the acquitted accused Banchore and Manohar. The deceased was not with the Appellant. A doubt legitimately arises that the deceased may have parted company. The prosecution has not led any evidence with regard to what may have happened between 9:00 pm to 10:00 pm. The Trial Judge has arrived at an erroneous presumption without any material that the deceased may have been killed between this time period. PW-13, Pardeshi also confirmed that the Appellant had come with two others to the shop of PW-12, Sukhdev Ram. The witness also did not state regarding the presence of the deceased. The witness further stated that the Appellant and others were seen gambling at the house of Ramadhar at about mid night when he was returning after watching TV. The body of the deceased was found hanging from a tree the next morning at 11:30 am and Merg, Exhibit P-1 was lodged. Formal FIR was registered by the police on basis of the same on 16.6.1998, Exhibit P-33.

11. The evidence of PW-12, Sukhdev Ram has been corroborated by PW-13, Pardesi that the Appellant came to the shop of the former at 10:00 pm. He was accompanied by the acquitted accused Banchore and Manohar. The latter have been given the benefit of doubt. The post mortem was done on 14.6.1998

at 7:00 pm opining that death may have taken place between 36 to 48 hours earlier. The Trial Judge without any material arrived at the conclusion that the deceased had been killed between 9:00 to 10:00 pm. calculated from 8:00 pm on 12.6.1998 to the time of post mortem, the period of 36 hours stands explained and therefore the Appellant was the assailant. This conclusion in our opinion is based on surmises and conjectures and cannot be the basis for conviction. The deceased was with the Appellant till 9:00 pm. The time period expired since post mortem was a wide expanse from 36 to 48 hours. The time gap from 9:00 pm to recovery of the body at 11:30 am in the morning on 13.6.1998 is considered too long a time gap to hold the Appellant guilty on basis of the last seen theory. The prosecution cannot be said to have established that the Appellant was with the deceased in close proximity of time to infer the last seen theory. If the time gap when the accused was last seen with the deceased and the recovery of the body is large, it shall be unsafe to rely upon the last seen theory.

12. If the last seen theory has no application to the facts of the case for holding the Appellant to be guilty there remains nothing to distinguish him from the other appellants acquitted of the charge. But since Learned Counsel for the State has impressed upon us that the Appellant had killed the deceased and then hung the body to give it the colour of suicide we consider it appropriate to deal with the issue also. To sustain a conviction for culpable homicide amounting to murder, the prosecution has to establish that the death was homicidal in nature. If the post mortem report does not conclusively establish a homicidal death or if on the evidence placed by the prosecution a serious doubt arises whether death was homicidal or suicidal, the benefit of doubt has to be given to the accused. The medical evidence lacks clarity to conclude whether it was a case of strangulation or suicide by hanging. The post mortem shows eyes were closed, the tongue was protruding caught between the teeth, the face was swollen and congested, bloody froth was coming out of the nose and mouth, the

neck was swollen and there was a ligature mark round the middle part of neck around the thyroid cartilage. Ecchymosed marks were seen on sub-cutaneous tissue under the mark. Death was opined due to strangulation resulting in blockage of air passage due to fracture of larynx and trachea. There was discharge of faecal matter. PW-18, Dr. S.K. Ahuja who conducted the post mortem, opined that asphyxia was also possible due to strangulation but did not conclusively state that it was a case of death by strangulation. He also acknowledged that in case of strangulation it was not necessary for the thyroid cartilage to break. It was also stated that in case of hanging it was not necessary for the larynx and trachea to break. The Doctor further opined that in case of discharge of faecal matter it would be a case of hanging. Ultimately the witness opined that hanging could be ruled out. There can be no text book signs of whether it was a case of strangulation or hanging and ultimately the Court will have to arrive at its own conclusions based on the entirety of evidence in a particular case.

13. The post mortem report would have to be analysed independently by the Court. The opinion of the Doctor is merely a view and cannot override the post mortem report. In the facts of the present case, the post mortem report leaves no doubt that the corpse displayed all signs of hanging. Merely because one leg may have been partially on the ground and the other slightly above cannot lead to a conclusion of death by strangulation and then hanging of the body to hide the murder. The post mortem report leaves no doubt that death occurred after the deceased hung himself. It is not the case of the prosecution that the deceased was hanged by the Appellant. Rather the case of the prosecution is that the deceased was strangled to death, belied by the post mortem report, and then hung from the tree to give it the look of a suicide. No marks or signs of strangulation, much less finger or nail marks have been found around the neck to suggest killing by strangulation. The conclusion of the Trial Judge ignoring the

post mortem report relying on the opinion of the Doctor during his deposition that suicide could be ruled out and that it was a case of death by throttling is therefore clearly unsustainable. In any event even if it were to be a case of strangulation and the body hung to give the colour of suicide there is no evidence to hold that it was the deceased who had strangled the deceased.

14. The other nine accused persons have been acquitted holding that they were not present at the place of occurrence. The Appellant alone has been found guilty holding that he killed the deceased and hung it to give the colour of a suicide. If the deceased had been killed by the Appellant alone, it was not possible for him to hang a corpse all alone. A corpse will be heavier than a live human being and for a listless body to be roped in and pulled up by one man all alone is near impossible. Those who were with the Appellant the fateful night have all been acquitted. The prosecution has not been able to establish that the Appellant was last seen with the deceased in proximity of time. The post mortem report contains all signs of death by committing suicide. The conclusion that the deceased was killed by the Appellant and the body hung is completely based on surmise and conjecture unsupported by any evidence. The deceased was suffering from stomach ailment and was also under debts. The possibility that he may have committed suicide for the said reasons cannot be completely ruled out, the benefit of which doubt has to be given to the Appellant.

15. The conviction is therefore held to be unsustainable. The appeal is allowed. The Appellant is acquitted subject to the conditions laid down in 437A Cr.P.C. to be complied with by the Appellant.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE