

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 857 of 2008**Judgment reserved on 10.10.2017Judgment delivered on 08.11.2017

1. Rampal S/o Tanua aged about 32 years, R/o Gram Chandra-Medha, PS Pratappur, District Sarguja, CG

---- Appellant**Versus**

1. State of Chhattisgarh through Police Station Pratappur, District Sarguja, CG.

---- Respondent

For Appellant	:	Shri Sandeep Shrivastava, Advocate
For Respondent/State	:	Shri Vivek Sharma, GA

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri R.P. Sharma****Judgment on Board by Pritinker Diwaker, J**

This appeal has been filed against the judgment of conviction and order of sentence dated 31.10.2006 passed by Additional Sessions Judge (FTC) Surajpur, in Sessions Trial No. 43/2006 convicting the accused/appellant under Section 302 IPC and sentencing him to undergo imprisonment for life and pay fine of Rs. 1,00/-, plus default stipulation.

2. Name of the deceased in the present case is Lakhiya alias Sukhmen Bai with whom the accused/appellant is said to have a dispute previously. As per the case of prosecution, grand-son of the deceased was assaulted by the accused/appellant for which the report was lodged against him by the deceased. Further case of the prosecution is that on 7.12.2005 at 10 AM the accused/appellant

went to the house of the deceased, took her somewhere along, committed her murder by throttling and threw her body behind the house of Jhagru Yadav (PW-6) i.e. 37 feet away from her house. On 8.12.2005 body of the deceased was seen by Jhagru Yadav and at his instance *merg* Ex. P-10 was recorded followed by registration of FIR Ex. P-11 against the accused/appellant. In the FIR it is alleged that earlier also the accused/appellant had threatened the deceased of being killed on account of the report lodged by her against him and that on the fateful day he took her along on the pretext of compromise having been arrived at between Matku and himself. FIR further states that when the deceased did not return till evening, search for her was made and the body was found on the next day. Inquest Ex. P-7 was made on 8.12.2005 and dead-body was sent for postmortem examination which was conducted by Dr. Maheshwar Singh (PW-11) who gave his report Ex. P-7. On that day itself the memorandum of the accused/appellant Ex. P-8 was recorded where he has stated that about one and a half month prior to the date of incident, he beat Matku for which report was lodged against him by the deceased and since then he was determined to do away with her. Memorandum further discloses that on the date of incident he took the deceased with him, offered liquor to her and then killed her by pressing her neck and threw her body near his house. However, no recovery has been made on the basis of his memorandum statement. After investigation, charge-sheet was filed by the police under Section 302 IPC followed by framing of charge by the Court below accordingly.

3. In order to prove the complicity of the accused/appellant in the crime in question, the prosecution has examined 12 witnesses.

Statement of the accused/appellant under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case.

4. After hearing the parties, the Court below has convicted and sentenced the accused/appellant as mentioned above.

5. Counsel for the accused/appellant submits as under:

(i) That conviction of the accused/appellant is based on the evidence of last seen but since such evidence is not conclusive in nature, he deserves acquittal.

(ii) That the evidence of last seen is a weak type of evidence and unless and until it receives corroboration from the other sources as to the involvement of the accused/appellant in the crime alleged, he cannot be held guilty based thereon.

(iii) That as the deceased was last seen in the company of accused/appellant on 7.12.2005 at 10 AM whereas the dead-body was found on the second day, considering this long time gap in between it cannot be said that it is he who has committed her murder.

(iv) That as the house of the accused/appellant was locked and he was also not found therein, possibility of some third person committing her murder cannot be ruled out.

(v) Reliance is placed on the decisions of the Apex Court in the matters of **Bodh Raj alias Bodha and others v. State of Jammu and Kashmir 2002 Cr.L.J 4664; Rambraksh @ Jalim v. State of Chhattisgarh (2016 Cr.L.R SC 503 & Kanhaiya Lal v. State of Rajasthan {2014 (suppl.) Cr.L.R. SC 744}**

6. State counsel however supports the judgment impugned and

submits that the findings recorded by the Court below convicting the accused/appellant under Section 302 IPC are based on due appreciation of the evidence on record and there is no infirmity in the same. He submits that though conviction is based on the evidence of last seen but having been corroborated by the witnesses such evidence becomes conclusive in nature and no fault can be attributed to the same. He further submits that after being last seen in the company of the accused/appellant, the deceased was not seen alive by anyone and that as he has not offered any satisfactory explanation as to when she parted his company, mere plane denial on his part would not be of any help to him. According to the State counsel, as the things were within the special knowledge of the accused/appellant as to how long she remained in his company and when they got separated, as per the requirement of Section 106 of the Evidence Act he was under obligation to offer proper and specific explanation but since there is complete failure on his part to do so, it can be taken as an additional link of evidence against him. Referring to the postmortem report Ex. P-7 where the duration of death has been stated to be 20-30 hours before such examination which was conducted on 8.12.2005 at 4.30 PM, State counsel submits that the deceased was killed on 7.12.2005 in between 10.30 AM to 8.30 PM. Reliance is placed on the decisions of the Supreme Court in the matter of **State of Rajasthan v. Kashi Ram (2006) 12 SCC 254**; in the matter of **Joseph S/o Kooveli Poulo v. State of Kerala - AIR 2000 SC 1608**; in the matter of **Dharam Deo Yadav v. State of UP (2014) 5 SCC 509** and in the matter of **Jamnadas v. State of MP 2016 (IV) MPJR (SC) 1**.

7. Heard counsel for the parties and perused the material available on record.

8. Moharmania (PW-1) - a hearsay witness has stated in paragraph No.3 of her evidence that previously there was a dispute between Matku - the grand son of the deceased and the accused/appellant. Hirmania (PW-2) - the sister-in-law of the deceased has not supported the case of the prosecution and has been declared hostile. Phool Kunwar (PW-3) - another sister-in-law of the deceased has stated that on the date of incident at about 10 AM the accused/appellant had taken the deceased to his house. She is also stated to have seen both of them on the way. According to her, when she woke up in the next morning and came out of the house, she saw body of the deceased lying behind her house. This witness has stated that there was injury on the neck and left eye of the deceased. In her cross-examination it has come that during search of the deceased, the house of the deceased was found locked and therefore she did not go inside. Ram Ratan (PW-4) - the son-in-law of the deceased is a hearsay witness. He is also the witness to inquest Ex. P-4. Dharampal Prasad Kushwaha (PW-5) is the Patwari who prepared spot map Ex. P-5. Jhagru (PW-6) - the brother-in-law of the deceased has stated that on the date of incident accused/appellant had come to the house of the deceased and took her with him at 10 AM. According to him, extensive search was made but ultimately her body was found in the next morning lying behind his house. In cross examination, this witness remained firm to what has been stated by him in the examination-in-chief. Charku (PW-7) - the brother-in-law of the deceased has stated that on the date of incident at about 10 AM the accused and the

deceased left the house together, but what happened thereafter, he was not aware. In cross-examination he has stated that on the date of incident accused and the deceased had consumed liquor and he had heard the conversation between the two. Basant Gupta (PW-8) is the investigating officer who has duly supported the case of the prosecution. Sarju Ram (PW-9) is the witness to inquest Ex. P-4. R.K. Mishra (PW-10) is the witness who assisted in the investigation. Dr. Maheshwar Singh (PW-11) is the witness who conducted postmortem examination on the body of the deceased and gave his report Ex. P-7 stating that he noticed multiple bruises and nail abrasions over neck, and the cause of death was suffocation (asphyxia) due to throttling. Time passed after the death has been opined as 20-30 hours and the mode thereof as opined is homicidal. Smt. Bhanmati (PW-12) - the daughter of the deceased is the witness to last seen. She has stated that previously the accused/appellant had beaten Matku for which a report was lodged against him and since then he was threatening the deceased to be killed. On the date of incident at about 10 AM the accused/appellant is stated to have come to the house of the deceased and thereafter he took her with him. She is also said to have seen both of them going together and thereafter the deceased did not return alive. According to her, the house of the accused/appellant was locked and on the next day the body of the deceased was found lying behind her house. She has admitted that the deceased used to consume liquor.

9. In the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, question No. 3 put to him was that he took the deceased along with him but he has denied the

same. Likewise, question Nos. 4, 14, 66, 91 to the same effect were also denied by him. As regards question No. 94 that as per the statement of PW-12 during search of the deceased lock was found in his house, he answered the same saying " I do not know".

10. Entire record inclusive of judgment under assail has been taken note of. There are four witnesses namely Phool Kunwar (PW-3), Jhagru (PW-6), Charku (PW-7) and Smt. Bhanmati (PW-12) to fact that the deceased was last seen alive in the company of the accused. Perusal of the evidence of PW-3 goes to show that on 7.12.2005 at 10 AM the accused/appellant had taken the deceased to his house; they were also seen together on the way and in the following morning her dead-body was found behind her house. Exactly the same thing has been stated by PW-6. PW-7 also states that on the fateful day at about 10 AM accused and the deceased left the house together, but has expressed his ignorance as to what happened subsequently. PW-12 - the daughter of the deceased has also made similar statement that on the date of incident at about 10 AM the accused had come to the house of the deceased and taken her along but thereafter she was not seen alive. These witnesses have thus stated that after being seen in the company of the accused on 7.12.2005 in between 10 and 10.30 AM, deceased was not seen alive either alone or in the company of anybody else, and eventually on 8.12.2005 in the morning her deadbody was seen behind the house of Jhagru PW-6. True it is that the some time gap between the deceased being seen alive and dead is there but in the absence of any evidence that she was seen doing something or going somewhere either alone or accompanied, burden lies on the accused to prove as to what happened to her or how she met

her untimely end. However, except going on complete denial mode, the accused has not offered any explanation much less the satisfactory explanation as to what happened to the deceased and when did she part with him and being so, as per the requirement of Section 106 of the Evidence Act he was under the obligation to offer proper explanation but since no explanation has been offered by him, it can be taken as an additional link of evidence against him. Even on questions being put to him at the time of recording the statement under Section 313, Cr.P.C., the appellant, instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him and connecting him with the crime in question, exhibited an adamant attitude of blunt and outright denial thereof. Such incriminating links of facts could, if at all, have been explained by the appellant only, and by none else as the things were within his personal and exclusive knowledge. Dealing with the cases where in spite of being last seen with the deceased the accused keeps himself in the complete denial mode or offers a false and ambiguous explanation, it has been unequivocally cautioned by the Apex Court that if and when the accused does not throw 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. Relevant portion of some of the judicial pronouncements holding the field are reproduced as under:

11. **State of Rajasthan v. Kashi Ram (2006) 12 SCC 254**

16. The most important circumstance that the respondent was last seen with the deceased on February 3, 1998 whereafter he had disappeared and his house was

found locked and that he had offered no explanation whatsoever, was disposed of by the High Court in one short paragraph observing that there was nothing unusual if the accused was seen in the company of his own family members in his house. On such reasoning, the High Court held that the circumstantial evidence relied upon by the prosecution was not strong enough to sustain the conviction of the respondent. Accordingly, the High Court allowed the appeals preferred by the respondent and declined the death reference made by the trial court for confirmation of the sentence of death.

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 by 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 *Re. Naina Mohd.* AIR 1960 Madras, 218.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

31. We are aware of the fact that we are dealing with an appeal against acquittal, but having appreciated the evidence on record we have come to the conclusion that the High Court has completely given a go bye to the most important incriminating circumstance which appeared against the accused respondent. In the facts and circumstances of the case the most incriminating circumstance about the respondent being seen with his wife on February 3, 1998 and disappearing thereafter, and his failure to offer any explanation when arrested, has been completely ignored by the High Court by simply recording the finding that there was nothing unusual in the husband being found with the wife in his house. The High Court failed to appreciate the other co-related circumstances namely - his disappearance thereafter locking of the house, and his failure to offer a satisfactory explanation in defence. Thus, the High Court has ignored important clinching evidence which proved the case of the prosecution. Therefore, interference with the judgment of the High Court is warranted."

12. **Joseph S/o Kooveli Poulo v. State of Kerala - AIR 2000 SC 1608**

"14.The incriminating circumstances enumerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on

record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313, Cr.P.C., the appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him, and connecting him with the crime by his adamant attitude of total denial of everything those circumstances were brought to his notice by the Court not only lost the opportunity but stood self condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else they being personally and exclusively within his knowledge. Of late, Courts have, from the falsity of the defence plea and false answers given to Court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see State of Maharashtra Vs. Suresh - 2000(1) SCC 471). That missing link to connect the appellant-accused, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy. For all the reasons stated supra, we have no hesitation to agree with the findings of the Division Bench of the High Court holding the appellant guilty of offences under Section 302 for committing the murder of Gracy and for robbing her of her jewellery worn by her - MOs 1 to 3, under Section 392. The deceased meekly went with the accused from the Convent on account of the misrepresentation made that her mother was seriously ill and hospitalised apparently reposing faith and confidence in him in view of his close relationship - being the husband of her own sister, but the appellant seems to have not only betrayed the confidence reposed in him but also took advantage of

the loneliness of the hapless women. The quantum of punishment imposed is commensurate with the gravity of the charges held proved and calls for no interference in our hands, despite the fact that we are not agreeing with the High Court in respect of the findings relating to the charge under Section 376.”

13. **Dharam Deo Yadav v. State of UP (2014) 5 SCC 509**

“15. We have no eye-witness version in the instant case and the entire case rests upon the circumstantial evidence. Circumstantial evidence is evidence of relevant facts from which, one can, by process of reasoning, infer about the existence of facts in issue or factum probandum. In Hanumant, son of Govind Nargundkar v. State of Madhya Pradesh AIR 1952 SC 343, this Court held as follows:

“10...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 in the first instance, be fully established and all the facts so established should be consistent only with the hypotheses of the guilt of the accused. Again, the circumstances would be of a conclusive nature and tendency and they should be such as to exclude 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.”

Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt

of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, accused may be convicted on the basis of such circumstantial evidence.

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 possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in *Sahadevan Alias Sagadeven v. State* represented by Inspector of Police, Chennai (2003) 1 SCC 534. In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all

deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused."

Following the decision of Apex Court rendered in the matter of *Kuldeep Singh and others v. State of Rajasthan*, (2000) 5 SCC 7 it has been held in the matter of **Jamnadas v. State of MP** (supra) that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found to be untrue, then the same offers an additional link in the chain of circumstances, to complete the chain.

14. True it is that the accused has a right of silence and no adverse adverse inference can be drawn therefrom, but it is equally true that offering a false explanation while giving answers to the questions put to him at the time of recording of his statement under Section 313 of the Code of Criminal Procedure can be taken as an additional link in the chain of circumstances, to complete the chain. Furthermore, the deceased was seen last in the company of accused on 7.12.2005 at 10 AM and in the early morning of 8.12.2008 the dead-body was seen lying behind the house of PW-6, and thus the time-gap coming in between cannot be said to be too long to think about the possibility of someone else behind this mysterious killing. In addition to this, the record also goes to show that prior to the incident the deceased had lodged a report against the accused for assaulting her grand-son and for that he had once threatened her of being killed. Therefore, the motive can also be attributed to the accused for eliminating the deceased. Though not of much significance, it has come in his memorandum also that on account of lodgment of report by the deceased against him, he was

determined to remove her from the worldly existence. Arduous effort on the part of the counsel for the accused guided by the authorities of the Apex Court to press the point not touching the core issue, could not impress upon us.

15. Consequently, the aforesaid discussion on fact and law has thus convinced this Court that the prosecution has collected enough material to unerringly point to the guilt of the accused. So also the Court below has been justified in appreciating the evidence of the witnesses and then arriving at the conclusion holding the accused/appellant guilty for committing the murder of the deceased. Appeal being without any substance is liable to be dismissed and it is dismissed as such. Bail bonds furnished by the accused stand cancelled and he is directed to be arrested and sent to prison for completing the remaining part of the sentence.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(R.P. Sharma)

Judge