

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Appeal No.732 of 2012

(Arising out of judgment dated 28.6.2012 in Sessions Trial No.17/2010 of the learned Second Additional Sessions Judge, Raigarh)

Tuchi @ Budhram @ Mohan Pando S/o Late Martu Pando, aged about 52 years, Occupation Agriculturist, R/o Sitapur, District Ambikapur (CG)
 ---- Appellant
 (In Jail)

Versus

State of Chhattisgarh, through Station House Officer, Police Station Dharamjaigarh, District Raigarh (CG)

---- Respondent

For Appellant: Mr. Govind Deewngan, Advocate.

For State/Respondent: Mr.Dhiraj Wankhede, G.A. with Mrs.M.Asha, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Ram Prasanna Sharma,

Judgment On Board

Sanjay K. Agrawal, J

18/11/2017

1. Sole appellant Tuchi @ Budhram @ Mohan Pando has filed this appeal under Section 374 (2) of the CrPC questioning the judgment of conviction recorded for offence under Section 302 of the IPC and sentence awarded i.e. life imprisonment and fine of ₹ 2,000/-, and default sentence of RI for six months.
2. The prosecution case as unfolded during the course of trial is as under: -
3. It is the case of the prosecution that on 5.5.2007 before 4 P.M. at khamhar road between village Bansjhor and Jhulabar, Dharamjaigarh, District Raigarh the appellant murdered Basanti

Bhagat (since deceased) by throttling. It is case of the prosecution, in brief, is that in the month of May, 2007 on Thursday the appellant visited the house of Chamra Ram Bhagat along with Pradeep Kujur (PW-4) claiming to be Mohan Beck, resident of Putukachar and further claiming to be Vaidya and treated his daughter deceased Basanti Bhagat who was at that time suffering from lower back-pain and gave her amulet (tabiz) and asked her to come to Dharamjaigarh and thereafter, on the next day morning the accused/appellant returned to Dharamjaigarh with said witness Pradeep Kujur, thereafter deceased Basanti Bhagat also came to Dharamjaigarh from her village Sisinga, the appellant met with her at bus stand and took her to khamhar road via post office, she was last seen along with the appellant by Vakil Bhagat (PW-5) and Smt. Balmati (PW-6). When whereabouts of Basanti Bhagat was not known, her father Chamra Ram Bhagat deputed Lekh Ram (PW-1) and Bajar Sai (PW-17), on the way they met with Pradeep Kujur (PW-4) and thereafter dead body of Basanti Bhagat was noticed near khamhar road. Merg intimation was lodged vide Ex.P/8 on 5.5.2007 at 10 p.m. by Mangal Sai (PW-12) at Police Station Dharamjaigarh and thereafter inquest was conducted vide Ex.P/6 on 6.5.2007. Dead body of deceased Basanti Bhagat was sent for postmortem to Government Hospital, Dharamjaigarh, where Dr.B.L. Bhagat (PW-14) conducted postmortem vide Ex.P/3 on 6.5.2007 and opined that cause of death was due to asphyxia as a result of throttling. F.I.R. Ex.P/14 was lodged on 9.5.2007 by M.S. Parmeshwar (PW-18) at Police Station Dharamjaigarh for offence

under Section 302 of the IPC naming the present appellant as a sole accused. The jurisdictional police completed the investigation and filed the charge-sheet. The appellant abjured guilt and entered into defence.

4. In order to bring home the offence, the prosecution examined as many as 18 witnesses and exhibited 16 documents Exs.P-1 to P-16. Statement of the accused under Section 313 of the CrPC was recorded in which he denied guilt. However, he examined none in his defence.
5. The trial Court after appreciating oral and documentary evidence on record convicted the appellant for offence under Section 302 of the IPC. The trial Court rested its conviction mainly on the basis of testimony of Vakil Bhagat (PW-5) and Smt. Balmati (PW-6) who are witnesses of last seen together.
6. Mr. Govind Dewangan, learned counsel appearing for the appellant, would submit that the prosecution has failed to bring home the offence beyond reasonable doubt and theory of last seen together is not proved. Even otherwise, merely on the basis of last seen together, no conviction can be recorded unless the chain of circumstances is complete to reach to a conclusion that it is only and only the accused / appellant who has caused the murder of the deceased. Therefore, the judgment of conviction recorded and sentence awarded deserves to be set aside.
7. Mr. Dhiraj Wankhede, learned Government Advocate appearing for the State/ respondent would support the impugned judgment.

8. We have heard learned counsel for the parties, considered their rival submissions made herein-above and gone through the record with utmost circumspection.
9. Dr.B.L. Bhagat (PW-14) conducted postmortem on 6.5.2007 vide his report Ex.P-3 in which he found that death is on account of asphyxia due to throttling. Learned trial Judge has recorded that death is homicidal in nature, which has not been seriously disputed by the appellant in this appeal and we also found that death of deceased Basanti Bhagat is homicidal in nature and thereby affirm the finding recorded by the learned trial Court.
10. This would bring us to the next question as to whether it is the appellant who has caused the murder of deceased Basanti Bhagat.
11. The case of the prosecution is based on circumstantial evidence i.e. the piece of evidence and that is last seen together. The deceased was last seen together with the appellant as per prosecution case.
12. In order to prove that circumstance, it would be appropriate to notice the testimony of Vakil Bhagat (PW-5). He has stated in his evidence that on the fateful day he and one Sumatibai had visited Dharamjaigarh bank for withdrawing some amount being a member of Maa Mariyam Samiti Samooh and while Sumatibai had gone inside the Bank to meet with Bank Manager he was standing outside the bank, then he saw that Basanti was going with the appellant and thereafter he came to know that Basanti was murdered. He has stated in his statement that he has full

apprehension that Basanti was murdered by the appellant. Smt. Balmati (PW-6) has stated in her evidence that on the fateful day he along with Vakil Bhagat (PW-5) and Sumati Bai had visited Dharamjaigarh Bank for withdrawing some amount and she had also seen the deceased with the appellant and when on being asked by her mother she informed that she has seen Basanti with the appellant and she has an apprehension that the appellant has caused death of deceased Basanti.

13. It is important to notice here that Sumti Bai who accompanied Vakil Bhagat (PW-5) has not been examined by the prosecution and Vakil Bhagat (PW-5) has not stated that he has visited the bank with Smt.Balmati. Vakil Bhagat (PW-5) has not named in his evidence before the Court that he was also accompanied by Smt.Balmati (PW-6), whereas Smt.Balmati has stated that she was accompanied Vakil Bhagat and Sumati Bai and as such, presence of Smt.Balmati at the bank side where they alleged to have seen the appellant with deceased Basanti together becomes doubtful particularly when Vakil Bhagat (PW-5) in his 161 CrPC statement has clearly stated that Sumati Bai was also accompanied them, as such, presence of Smt. Balmati becomes doubtful at the bank side from where they alleged to have seen the deceased with the appellant. Apart from this, Guruwari (PW-13), mother of deceased Basanti, has also been examined. She has stated that the appellant had come to her house for treatment of her daughter Basanti for her lower back pain and on the next day, the appellant and Pradeep Kujur left her house. She has also stated that when

her daughter was missing she inquired from Balmati (PW-6) and Vakil Bhagat (PW-5) where they have stated that they had seen Basanti with one man, they have also stated about body description of the appellant and she has an apprehension that her daughter was murdered by the appellant and Vakil Bhagat (PW-5) and Smt.Balmati (PW-6) did not name the appellant.

14. The question is whether the chain of circumstances are proved to connect and convict the appellant for offence under Section 302 of the IPC.
15. It is well settled law that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.
16. The principle of circumstantial evidence has been reiterated by the Supreme Court in number of cases. [In the case of Bodhraj v. State of J&K](#),¹ the Supreme Court has quoted a number of judgments and held as under:-

“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 person. ([See Hukam](#)

¹ (2002) 8 SCC 45

[Singh v. State of Rajasthan](#)², [Eradu v. State of Hyderabad](#)³, [Earabhadrapa v. State of Karnataka](#)⁴, [State of U.P. v. Sukhbasi](#)⁵, [Balwinder Singh v. State of Punjab](#)⁶ and [Ashok Kumar Chatterjee v. State of M.P.](#)⁷)

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](#)⁸ 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 home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in [C. Chenga Reddy v. State of A.P.](#)⁹, wherein it has been observed thus: (SCC pp. 206-07, para 21)

'21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.' "

17. In the case of [Trimukh Maroti Kirkan v. State of Maharashtra](#)¹⁰,

the Supreme Court held as under: (SCC p. 689, para 12)

"12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken

2 (1977) 2 SCC 99

3 AIR 1956 SC 316

4 (1983) 2 SCC 330

5 1985 Supp SCC 79

6 (1987) 1 SCC 1

7 1989 Supp (1) SCC 560

8 AIR 1954 SC 621

9 (1996) 10 SCC 193

10 (2006) 10 SCC 681

cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

18. The same principles were reiterated by the Supreme Court in the matters of [Sunil Clifford Daniel v. State of Punjab](#)¹¹, [Sampath Kumar v. Inspector of Police](#)¹², and [Mohd. Arif v. State \(NCT of Delhi\)](#)¹³ and a number of other decisions.

19. Likewise, it is also well settled and the consistent view of the Supreme Court 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.

20. The Supreme Court in the matter of [State of Karnataka v. M.V. Mahesh](#)¹⁴ has held as under: -

“3. ... Merely being seen last together is no enough. What has to be established in a case of this nature is definite evidence to indicate that Beena had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence of the *corpus delicti* it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the court.”

21. The Supreme Court in the matter of [Arjun Marik v. State of Bihar](#)¹⁵ has held that where the appellant was alleged to have gone to the house of one Sitaram in the evening of 19-7-1985 and had

11 (2012) 11 SCC 205

12 (2012) 4 SCC 124

13 (2011) 13 SCC 621

14 (2003) 3 SCC 353

15 1994 Supp (2) SCC 372

stayed in the night at the house of deceased Sitaram and even if it was accepted that they were there, it would, at best, amount to be the evidence of the appellants having been last seen together with the deceased. The Supreme Court held as under: -

“31. ... it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction, on that basis alone, can be founded.”

22. So far as the last seen aspect is concerned, it is necessary to take note of the two decisions of the Supreme Court. First one is State of U.P. v. Satish¹⁶ in which it was noted as follows: - (SCC p. 123, para 22)

“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.”

23. Second decision of the Supreme Court in respect of last seen aspect is Ramreddy Rajesh Khanna Reddy v. State of A.P.¹⁷ In which was noted 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

¹⁶ (2005) 3 SCC 114

¹⁷ (2006) 10 SCC 172

alive and 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.”

24. In the matter of **State of Rajasthan v. Kashi Ram**¹⁸, the Supreme

Court while dealing with last seen theory 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 categoric 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 *Naina Mohd., Re.*¹⁹”

25. The Supreme Court in **Bodhraj** (supra), held that: (SCC p.63, para

31)

“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

¹⁸ (2006) 12 SCC 254

¹⁹ AIR 1960 Mad 218 : 1960 Cri LJ 620

the crime becomes impossible.”

26. Reiterating the above ratio, the Supreme Court in the matter of

Krishnan v. State of T.N.²⁰, held that: (SCC p. 285, para 23)

“23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.”

27. Relying upon the afore-cited two cases namely **Bodhraj** (supra)

and **Krishnan** (supra), the Supreme Court while considering the

“last seen together” theory in the matter of **State of Karnataka v.**

Chand Basha²¹ held as under: -

“14. The prosecution story relies upon the “last seen together” theory, which resulted into the death of Ganesh. This Court has time and again laid down the ingredients to be made out by the prosecution to prove the “last seen together” theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established. Yet, the prosecution has failed to prove the evidence which establishes the “last seen together” theory beyond reasonable doubt to prove the guilt of the accused. The prosecution merely proved the motive which could have compelled the accused, and that the accused went to the bar with one other person, but the identity of that other person is not clearly established at all. The post-mortem report fails to specify any approximate time of death and in light of the recovery of the dead body on 20-1-2001, after 4 days, which is not a small gap since the deceased disappeared on 16-1-2001, it is not appropriate to convict the accused when his role is not firmly

²⁰ (2014) 12 SCC 279

²¹ (2016) 1 SCC 501

established.”

28. In the matter of Rambraksh alias Jalim v. State of Chhattisgarh²² the Supreme Court relying upon the aforesaid judgments (supra) has held that normally, last seen theory comes into play where time gap, between the point of time when accused and deceased were seen last alive and when deceased is found dead, is so small that possibility of any person other than accused being the perpetrator of crime, becomes impossible. The Supreme Court held as under:-

“12. 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. Normally, last seen theory comes into play where 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. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.”

29. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the Court below was right in applying the “last seen theory”, as the prosecution has contended that the the accused was seen last together with the deceased. Evidence of last seen together is shaky and inconclusive as stated by the appellant.

30. In the case in hand, Vakil Bhagat (PW-5) and Smt.Balmati (PW-6) are said to be witnesses of last seen. However, Vakil Bhagat (PW-5) did not state the date and time on which he has seen the

deceased with the appellant. He has only said that three years prior from the date of examination he and Sumati Bai had gone to Dharamjaigarh Bank for withdrawal of some amount and Sumti Bai had gone inside the bank to meet with Bank Manager, whereas he was standing outside the bank and saw the appellant with the deceased and thereafter he came to know that Basanti was murdered. Smt. Balmati (PW-6) has also stated that she has also seen the deceased with the accused together on the fateful day. She also did not state the time and place of the incident, but her presence on the spot is doubtful as she has not stated whether Sumti Bai was also present on the said date, whereas Vakil Bhagat (PW-5) has stated about presence of Sumati Bai only while making statement under Section 161 CrPC before the police and has not stated presence of Smt.Balmati (PW-6).

31. Apart from this, it is evident on record that Vakil Bhagat (PW-5) and Smt.Balmati (PW-6) are not known to the accused prior to the date of incident, which is apparent from the statement of Guruwari (PW-13) as on being asked they have only informed the body description of the accused/appellant, therefore, the prosecution has failed to established the theory of “last seen together”. Therefore, the principles of law laid down in **Satish's** case (supra), **Ramreddy Rajesh Khanna Reddy** (supra) and **Chand Basha's** case (supra) are even not at all established, as the prosecution witnesses have failed to establish the theory of “last seen together” beyond doubt and as such, the prosecution has failed to establish close proximity between last seen evidence and death of the deceased. Apart from

this, no other evidence has been brought on record to establish the guilt of the accused / appellant.

32. Therefore, in the light of aforesaid finding so recorded, we are unable to accept that theory of “last seen together” is one of the incriminating circumstances against the appellant/accused to base the conviction of the accused for the alleged offence. We are satisfied that the prosecution has failed to bring sufficient and adequate evidence to bring home the offence under Section 302 of the IPC against the appellant / accused herein.

33. Thus, for the foregoing reasons, it is held that the prosecution has not been able to establish beyond reasonable doubt that the accused/appellant has caused the death of deceased Basanti Bhagat on 5.5.2007 as well as the other circumstance namely last seen together. The theory of last seen together is not consistent with the hypothesis of the guilt of the accused/appellant. There is no other piece of evidence. Thus, the accused is entitled for benefit of doubt.

34. For the reasons aforementioned, the impugned judgment of the trial Court convicting the accused/appellant for offence under Section 302 of the IPC and sentencing him for life imprisonment cannot be sustained and the same is accordingly set aside. The appeal filed by the appellant is allowed. He is acquitted of the charges. He is in custody. He be released forthwith, unless required in any other case.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Ram Prasanna Sharma)
Judge