

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.296 of 2013

(Arising out of judgment dated 2-1-2013 in Sessions Trial No.247/2011 of the learned Sessions Judge, Raipur)

Prabhu @ Prabhu Das Tandon @ Ramu, S/o Anuj Tondan, aged about 42 years, R/o Village Bhatgaon, Police Station Mana Camp, District Raipur (C.G.)

---- Appellant
(In Jail)

Versus

State of Chhattisgarh, through Police Station Mana Camp, District Raipur (C.G.)

---- Respondent

For Appellant: Mrs. Ranjana Jaiswal, Advocate.
For State/Respondent: Mr. Vinod Kumar Tekam, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Sanjay Agrawal

Judgment On Board

Sanjay K Agrawal, J

07/10/2017

1. Sole appellant Prabhu 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 ₹ 1,000/-, and default sentence of RI for one month.
2. The prosecution case as unfolded during the course of trial is as under: -
3. It is the case of the prosecution that deceased Salma, though not married to the accused, was residing with the accused as his wife

and on 17-5-2011 at 1.30 p.m. her dead body was found at Village Mana. Morgue intimation Ex.P-10 on 17-5-2011 at 2 p.m. was registered at the instance of Yashwant Gandharv (PW-12), Village Kotwar, and thereafter, on 21-5-2011, Ex.P-11 FIR was registered at 9.05 p.m. by S.K. Pradhan (PW-9), Assistant Sub Inspector, for offence under Sections 302 and 201 of the IPC against accused appellant Prabhu. Inquest Ex.P-1 was conducted on 17-5-2011 and postmortem was conducted on 18-5-2011 by Dr. S.N. Manjhi (PW-8) and his report is Ex.P-8. Cause of death was recorded as shock due to haemorrhage and ultimately, the jurisdictional police completed the investigation and charge-sheeted the appellant for offence under Sections 302 and 201 of the IPC. The appellant abjured guilt and entered into defence.

4. In order to bring home the offence, the prosecution examined as many as 14 witnesses and exhibited 14 documents Exs.P-1 to P-14. 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 and acquitted him of the offence under Section 201 of the IPC. The trial Court rested its conviction mainly on the basis of testimony of Smt. Rahmat Bi (PW-2) and Smt. Rani Netam (PW-7) which has been challenged by way of this appeal.
6. Mrs. Ranjana Jaiswal, 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. Vinod Tekam, learned Panel Lawyer 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. S.N. Manjhi (PW-8) conducted postmortem of the deceased on 18-5-2011 vide his report Ex.P-8 in which he found that death is on account of shock due to haemorrhage. 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 Salma 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 Salma.
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 Smt. Rahmat Bi (PW-2) who is elder sister of the deceased. She has stated that the deceased was her younger sister and the deceased and the accused, both, were living together as husband and wife though not married and the appellant used to misbehave with the deceased frequently. The son of deceased Salma from her first husband was languishing in jail for which the accused promised her to get a counsel engaged for releasing her son from jail. In para 5 of her statement, she has stated that she met with Smt. Rani Netam (PW-7) in the market who informed her that on the date of incident, the deceased and the accused, both, were seen together and they had gone together from the place where the deceased used to work.
13. Smt. Rani Netam (PW-7), who is friend of the deceased, in para 2 of her statement has stated that one day afternoon, the accused / appellant came to the deceased and took her with him for engaging a counsel and for releasing her son on bail and thereafter, they did not return back and dead body of Salma was found at Village Mana.
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 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

1 (2002) 8 SCC 45

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

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 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

9 (1996) 10 SCC 193

10 (2006) 10 SCC 681

11 (2012) 11 SCC 205

12 (2012) 4 SCC 124

13 (2011) 13 SCC 621

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.**

Mahesh¹⁴ 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**

Bihar¹⁵ 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 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. Satish**¹⁶ in which it was noted as follows: - (SCC p. 123,

14 (2003) 3 SCC 353

15 1994 Supp (2) SCC 372

16 (2005) 3 SCC 114

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 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 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

17 (2006) 10 SCC 172

18 (2006) 12 SCC 254

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 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)

19 AIR 1960 Mad 218 : 1960 Cri LJ 620

20 (2014) 12 SCC 279

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 established.”

28. 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.

29. In the case in hand, Smt. Rani Netam (PW-7) is the only prosecution witness who has stated that she has seen the accused and the deceased on a particular date. She did not state the date on which she had seen the accused and the deceased together.

²¹ (2016) 1 SCC 501

She only states, one day afternoon she had seen the accused stating to the deceased that “we have to go to counsel” and thereafter, both have gone together and thereafter, the dead body of the deceased was recovered. No date and time has been mentioned by the said witness on which the accused had taken deceased Salma along with him, which was necessary to establish 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 state clearly the date on which the accused and the deceased were seen last together and thereafter, the dead body of the deceased was found, as in this case, the dead body of the deceased was found on 17-5-2011 at Village Mana 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.

30. 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.

31. 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 Salma on 17-5-2011 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.

32. 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 in custody. He be released forthwith, unless required in any other case.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sanjay Agrawal)
Judge