

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.325 OF 2017**

1. Ganesh Bachhu Valvi
Age : 34 years, Occu : Labourer.

2. Sakhubai Ganesh Valvi
Aged : 31 years, Occ : Labourer
Both R/at Chambharshetpaiki,
Bhusarpada, Taluka Jawhar,
Dist. Thane.
Presently lodged in Yerwada Jail

....Appellants
(Orig. Accused Nos.1 and 2)

Versus

1. The State of Maharashtra
(Through Jawhar Police Station)

2. Manjulibai Rajaram Bambre
Cambharshet Paiki, Bhusarpada, Jawhar

....Respondents

Mr. Swapnil Ovalekar, appointed Advocate for appellants.
Ms.Prajakta P. Shinde, APP for respondent-State.

**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

**Reserved for Judgment on : 16th October 2020.
Judgment Pronounced on : 8th December 2020.**

JUDGMENT (PER N.J. JAMADAR, J.)

1. This appeal is directed against the judgment and order dated 18th February 2016 in Sessions Case No.581 of 2014 passed by the learned Additional Sessions Judge, Thane, whereby and whereunder the appellants were convicted for the offence punishable under section

302 read with 34 of the Indian Penal Code, 1860 ('the Penal Code') and sentenced to suffer imprisonment for life and pay fine of Rs.1,000/- each, with default stipulation, for having committed murder of Rajaram Bambre ('the deceased').

2. Shorn of superfluities, the prosecution case runs as under :

(a) Rajaram, the deceased was the son of Mayji Marya Bambre (P.W.2) the first informant, and husband of Manjulibai (P.W.3). The first informant was residing at Chambharshet, Bhusarpada, Taluka Jawhar, District Thane along with deceased, Manjulibai and their children. After the demise of his wife- the mother of the deceased, Mayji, the first informant, had married Themibai. Ganesh Valvi, the accused No.1, is the son of Themibai by her quondam husband. Themibai and accused No.1 resided at the field of the first informant. Sakhubai, the accused No.2, is the wife of accused No.1. The first informant used to work as a dailywage labourer at Thane. On his periodical visits to Bhusarpada, the deceased apprised the first informant that the accused No.1 raked up quarrels with him over division of property.

(b) On the night intervening 11th and 12th May

2014, the accused No.1 Ganesh came to the house of the deceased, accompanied by accused No.2-Sakhubai. The accused No.1 was heavily drunk. The accused took away the deceased by inviting him to join them for a drink. The deceased did not return home until next morning. Manjulibai (P.W.3) went to the house of the accused in search of the deceased. The accused informed her that the deceased had gone to Bhusarpada.

(c) On the same day, on being apprised by the daughters of accused that the deceased was lying in a motionless state on the hill in the field (Shetavarchi Tekadi) at Bambrepada, Manjulabai rushed to the said spot. The deceased lay thereat in a badly injured state. There were injuries on his face, chest, back and thighs. The villagers thereafter brought the deceased to Bhusarpada.

(d) Mavji, the first informant was apprised about the untoward incident on phone. The first informant thus rushed to Bhusarpada on the morning on 13th May 2014. After noticing that there were multiple injuries on the body of the deceased and on being apprised by Manjulibai (P.W.3) that the deceased was done to death by the accused, the first informant approached Jawhar Police Station and lodged report on 13th May 2014.

(e) During the course of investigation, the inquest on the body of the deceased was held. It was sent for post-mortem examination. The Investigating Officer visited the scene of occurrence and drew panchnama. The investigating officer interrogated the witnesses and recorded their statements. The Autopsy Surgeon opined that the deceased died on account of hemorrhagic shock due to splenic rupture. The accused were arrested. As the investigation revealed the complicity of the accused, charge-sheet was lodged in the court of jurisdictional magistrate.

(f) At the trial, in order to substantiate the indictment against the accused, the prosecution examined seven witnesses, including Mavji (P.W.2); the first informant, and Manjulibai (P.W.3); the wife of the deceased, Vilas Govind Bambre (P.W.5); to whom the accused No.1 allegedly apprised that the body of the deceased lay at Bambrepada and the accused No.2-Sakhubai made the extra-judicial confession, Dr.Ujwal Saurav (P.W.6), the Autopsy Surgeon and Keshav Abaji Naik (P.W.7), the investigating officer. After the closure of the prosecution evidence, the accused were examined under section 313 of the Code of Criminal Procedure, 1973 ('the Code'). The accused did not lead any

evidence in their defence which consisted of denial and false implication as the deceased suffered injuries accidentally while he was in a drunken state.

(g) After evaluation of the evidence and material on record, the learned Additional Sessions Judge was persuaded to hold that the prosecution has succeeded in establishing the guilt of the accused on the strength of circumstantial evidence which led to no other inference than that of accused Nos.1 and 2 having taken the deceased from the latter's home on the night intervening 11th and 12th May 2014, and, thereafter, caused the death of the deceased. The Accused Nos.1 and 2 were thus convicted for the offence punishable under section 302 read with 34 of the Penal Code and sentenced, as indicated above.

3. Being aggrieved by and dissatisfied with the judgment of conviction and order of sentence for the offence punishable under section 302 of the Penal Code, the accused-husband and wife, duo-have preferred this appeal.

4. We have heard Shri Swapnil Ovalekar, the learned Advocate appointed by this Court to espouse the cause of the appellants and Ms. Prajakta P. Shinde, the learned APP for State, at length. With the

assistance of the learned counsels, we have also perused the evidence and material on record.

5. Evidently, there is no ocular evidence of the commission of offence. The prosecution professed to establish the guilt of the accused by pressing into service the circumstances which incriminate the accused. The learned Additional Sessions Judge was of the view that the circumstances arrayed against the accused were cogently and fully proved and those circumstances unerringly point to the guilt of the accused and were not compatible with the innocence of the accused.

6. Before adverting to appraise the probative value of the circumstances arrayed against the accused and the justifiability of the conclusions arrived at by the learned Additional Sessions Judge, in our view, it may be apposite to note the uncontroverted facts. The relationship between the accused and the deceased is indisputable. There is not much controversy over the fact that the accused No.1 is the son of Themibai, by her previous husband. Indisputably, the deceased was the son of Mavji and husband of Manjulibai (P.W.3). The deceased was residing at Chambharshet, Bhusarpada along with his wife Manjulibai and their children. The accused were residing in the field of the first informant. Whether there was a dispute between

the deceased and the first informant, on the one side, and the accused, especially the Accused No.1-Ganesh, on the other, over the division of the property, is at the hub of the controversy. The prosecution alleged that the said dispute furnished motive for the crime.

7. Mavji Bambre, (P.W.2) the first informant endeavoured to impress upon the Court that whenever he came to Chambharshet, Bhusarpada from Thane, where he was working as a labourer, the deceased used to apprise him that Accused No.1 Ganesh raked up quarrels over the division of the property. Mavji pacified the deceased that he would resolve the dispute and they should not fight over it.

8. On the core of the circumstances of the transaction leading to the death of the deceased, Manjulibai (P.W.3) wants the Court to believe that on 11th May 2014 around 12 :00 midnight, the Accused No.1 Ganesh came to their house accompanied by Accused No.2 Sakhubai. The Accused No.1 Ganesh was heavily drunk. The Accused No.1 Ganesh told the deceased to join them for a drink saying “*Chal Bhau, aapan daru pyayla jau*”. The accused thus took away the deceased along with them to Bambrepada. As the deceased did not

return even on the next morning, Manjulibai (P.W.3) claimed to have inquired with the accused as to where the deceased was. The accused replied that the deceased had gone to Bhusarpada by bus. Thus she returned home. Later on, the two daughters of Shakubai (Accused No.2) came to her house and apprised her that the deceased lay on the ground in the field. On way to the said spot, Manjulibai (P.W.3) claimed to have gone to the house of the accused but did not find them. Manjulibai (P.W.3) affirmed that the daughters of the Accused No.1 took her to the hill in the field (Shetavarchi Tekadi). The body of the deceased lay thereat. She tried to wake him up. The deceased was motionless. There were injuries on the face, chest, back and thighs of the deceased. She noticed two stones (Articles 1 and 2) lying thereat. As she realised that the deceased died, she became unconscious. The body of the deceased was brought to Bhusarpada. Manjulibai (P.W.3) asserted that the accused killed the deceased over the property dispute.

9. Mavji Bambre (P.W.2), the first informant endeavoured to lend support to the claim of Manjulibai (P.W.3) and informed the Court that on 12th May 2014 at about 7:00 p.m., he was informed about some occurrence at his house. He returned to Bhusarpada on the

morning of 13th May 2014. Upon noticing the injuries on body of the deceased and on being apprised by Manjulibai (P.W.2), he claimed to have lodged the first information report (Exh.19).

10. Apart from the evidence of the father and the wife of the deceased, the testimony of Vilas Bambre (P.W.5) bears upon the culpability of the appellants. Vilas Bambre (P.W.5) testified to the fact that on 12th May 2014, at about 2:00 p.m., while he was at Bambrepada, the Accused No.1-Ganesh came thereat. The Accused No.1 Ganesh informed him that the deceased Rajaram was lying in a motionless state under a tree in the field of Govind Daji Bambre. Vilas Bambre (P.W.5) claimed to have rushed to the said spot and found the deceased lying thereat. The skin near the wrists and behind the knees was peeled off. The villagers brought the deceased initially to Bambrepada and thereafter people from Bhusarpada took the deceased to Bhusarpada. Vilas Bambre (P.W.5) further informed that Sakhubai (Accused No.2) had told him that as there were land disputes between them and the deceased, the Accused No.1-Ganesh would have killed the deceased.

11. As the nature of the death which the deceased met was put in contest, recourse to the medical evidence becomes imperative.

Dr.Ujwal Saurav (P.W.6) claimed to have conducted post-mortem examination of the body of the deceased at Cottage Hospital, Jawhar, Thane on 14th May 2014. On external examination, Dr. Saurav (P.W.6) found the following injuries :

“ A 10 cm. X 8 cm bruise, which was bluish-black in colour, was seen over the left hypochondria (left side below the rib). It is the part between thorax and abdomen i.e., the upper abdomen left side) region. Subcutaneous tissue was congested.....”

Dr. Ujwal Saurav (P.W.6) opined that the aforesaid injuries were antemortem.

On internal examination, Dr. Saurav found splenic rupture i.e. splenic laceration of about about 3 to 4 cm on interior surface of spleen.

12. In the opinion of Dr.Ujwal Saurav (P.W.6), the cause of death was *‘hemorrhagic shock due to spleen rupture’*. In the postmortem report (Exh.28), the Autopsy Surgeon specifically mentioned about generalised swelling over whole body, eye edematons; closed, tongue protruted, serous fluid oozing from mouth, nose and presence of maggots. Dr. Ujwal Saurav (P.W.6) further informed the Court that the rupture of spleen had taken place due to forceful assault by a blunt object on the spleen. Such an injury was sufficient to cause death in

the ordinary course of nature.

13. During the course of cross-examination of Dr.Ujwal Saurav (P.W.6), an endeavour was made to draw home the point that the deceased had sustained the injury to the spleen in an accidental fall under a drunken state. However, Dr.Ujwal Saurav (P.W.6) did not cave in to the suggestion that the injury noticed on the person of the deceased was caused as he fell on hard surface. He went on to assert that the spleen can be ruptured only on application of considerable force. It is not ruptured if one falls on a hard object in normal course.

14. Mr.Ovalekar, the learned counsel for the appellants, laying emphasis on the testimony of Dr.Ujwal Saurav (P.W.6), would urge that the prosecution cannot be said to have succeeded in establishing the fact that the deceased met a homicidal death. The Autopsy Surgeon had noted only one external injury. The claim of Manjulibai (P.W.3) and Mavji (P.W.2) that there were multiple injuries on the person of the deceased does not find support in the medical evidence.

15. It is true that Dr. Ujwal Saurav (P.W.6) noted only one external injury. However, there is material in the form of inquest panchnama

(Exh.10) and the evidence of Vilas Bambre (P.W.5) to show that the skin had peeled off near the wrists and behind the knees (popliteal fossa or kneepit). Blood was oozing from nose and mouth. The external injury to the hypochondrial region corresponded with the rupture of the spleen. Such an injury is normally not associated with an accidental fall. In the circumstances, on the strength of a hypothetical suggestion that such an injury might have been caused due to accidental fall, it would be rather hazardous to draw an inference that the injury was accidental. We are not persuaded to accede to the submission on behalf of the appellants that the nature of the death which the deceased met was in the corridor of uncertainty. This propels us to the pivotal issue of authorship of crime.

16. It is well nigh settled that when a case rests on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that, in all human probability, the crime was committed by

the accused and they should be incapable of explanation on any other hypothesis than that of the guilt of the accused and also inconsistent with his innocence.

17. In the case at hand, the prosecution relied on the following circumstances to substantiate the guilt of the accused :

- (i) Motive
- (ii) The accused visited the house of the victim on 11th May 2014 around midnight.
- (iii) The accused took away the deceased by asking him to join them for a drink.
- (iv) The victim did not return home until next morning and, on being inquired by Manjulibai (P.W.3), the wife of the deceased, the accused offered false explanation that the deceased had gone to Bhusarpada by bus.
- (v) When Manjulibai (P.W.3) went to the house of the accused again, after the daughters of the accused apprised her about the deceased lying in the field, the accused were not found at home.
- (vi) The accused No.1-Ganesh informed Vilas

Bambre (P.W.5) and other villagers that his step-brother, the deceased, was lying in a motionless state in the field under the tree.

(vii) Sakhubai-Accused No.2 made an extra-judicial confession before Vilas Bambre (P.W.5) that on account of the land dispute, accused No.1-Ganesh might have killed the deceased.

18. In addition to the aforesaid circumstances, the learned Additional Sessions Judge was of the view that the failure of accused to offer plausible explanation when the aforesaid circumstances were put to them, in their examination under section 313 of the Code, furnished an additional link in the chain of circumstances and provided the missing link. Thus, the learned Additional Sessions Judge was persuaded to return the finding of guilt.

19. We propose to evaluate each of the aforesaid circumstances on the touchstone of the governing principles.

20. No.1 - Motive :

Mavji (P.W.2), the first informant and Manjulibai (P.W.3), the wife of the deceased were in unison on the point that there was a

dispute between the accused and the deceased over the division of property and thus the accused had done the deceased to death. In the cross-examination of Mavji (P.W.2), an endeavour was made to demonstrate that the extract of forest rights over the forest land (Exh.20) does not record the name of Mavji (P.W.2). Mr. Ovalekar, the learned counsel for the appellants urged with a degree of vehemence that since the extract (Exh.20) does not indicate that the name of the first informant, as one of the holders or beneficiaries of the forest land, there was no question of any dispute between the accused and the deceased, who were step-brothers. It is true that the extract (Exh.20) does not reveal the name of the first informant either as a holder or beneficiary. However, it is pertinent to note that no endeavour was made on behalf of the accused to controvert the fact that there was a dispute between the accused and the deceased over the division of the property. On the contrary, it was suggested to Mavji (P.W.2) that the dispute was over the division of the plot and till the occurrence, the said dispute had not reached the police station. Furthermore, it was suggested to Manjulibai (P.W.3) that the disputed plot stood in the name of Mavji (P.W.2), her father-in-law, and the latter used to look after the said agricultural land. Thus, the existence of immovable property and the dispute over its division can

both be said to have been broadly established.

21. However, the evidence does not indicate that the dispute had assumed inimical proportion. An element of cordiality still subsisted between the accused and the deceased. The fact that the deceased readily accompanied the accused for a drink suggests that the relationship was not very strained. We are, thus, inclined to hold that the dispute over the division of the land had the potential to furnish a motive for the crime.

22. Nos.2, 3 and 4 : Taking away the deceased and false explanation :

The aforesaid circumstances draw support and sustenance from the testimony of Manjulibai (P.W.3). Nothing material could be elicited in the cross-examination of Manjulibai (P.W.3) to discard her claim that on the night intervening 11th and 12th May 2014, the accused had come to her house. The accused No.1-Ganesh was heavily drunk. The accused No.1-Ganesh invited the deceased to join them for a drink and thereafter they took the deceased with them. Instead, an endeavour was made in the cross-examination of Mavji (P.W.2) and Manjulibai (P.W.3) to draw home the point that in the locality where the accused and the deceased were residing, most of the inhabitants

including women, consumed liquor. This social milieu and the fact that the deceased and the accused used to consume liquor are required to be appreciated in the light of the fact that the societal mores were such that consumption of liquor was not considered a taboo. That explains the alacrity with which the deceased accepted the invitation of the accused. We do not find any justifiable reason to disbelieve the claim of Manjulibai (P.W.3) that on the night intervening 11th and 12th May 2014, the accused came to her house and took the deceased away on the pretext of consuming liquor.

23. The further claim of Manjulibai (P.W.3) that as the deceased did not return until the next morning, she went to the house of the accused and inquired with them and thereupon the accused told her that the deceased had gone to Bhusarpada by bus went completely unchallenged. This assertion of Manjulibai (P.W.3) appears nearer to the truth. Since the accused had taken away the deceased on the previous night, it was but natural for Manjulibai (P.W.3) to inquire about the deceased with the accused when the former did not return home on the following morning. As this version of Manjulibai (P.W.3) went totally unimpeached, we are persuaded to hold that the prosecution succeeded in establishing that the accused had offered an

explanation that the deceased had gone to Bhusarpada by bus which was found untrue by the events which subsequently unfolded.

24. The fifth circumstance is of Manjulibai (P.W.3) again visiting the house of the accused, on her way to Bambrepada to which the daughters of the accused were leading her, and not finding the accused thereat. On a careful evaluation of the testimony of Manjulibai (P.W.3), we do not find any reason to discard her testimony on the said aspect. In fact, Manjulibai's (P.W.3) claim that the daughters of accused took her to the place where the deceased lay and, on the way thereto, she had been to the house of the accused but did not find them, went unchallenged. This conduct of Manjulibai (P.W.3) of visiting the house of the accused on being apprised that the deceased lay on the hill in the field can again be said to be natural, if viewed in the backdrop of the fact that a short while ago she claimed to have visited the accused to inquire about the deceased and the accused had told her that the deceased had gone to Bhusarpada.

25. The said circumstance is, however, not of incriminating character. It is not the case that the accused made themselves scarce. On the contrary, Vilas Bambre (P.W.5) wants the Court to believe that

it was the Accused no.1-Ganesh who had apprised him about the deceased lying in the field. Vilas Bambre (P.W.5) further affirmed that Accused No.2-Sakhubai made extra-judicial confession. In this state of affairs, the fact that on the second visit, Manjulibai (P.W.3) did not find the accused at their home does not constitute an incriminating circumstance.

26. (vi) : Information about the place where the deceased lay, furnished by Accused No.1-Ganesh and (vii) - extra-judicial confession by Accused No.2-Sakhubai :

In our view, the last two circumstances, namely, (vi) and (vii), mentioned above, do not advance the cause of the prosecution. The circumstance that accused No.1-Ganesh allegedly informed Vilas Bambre (P.W.5) that his step-brother (the deceased) was lying in a motionless state under a tree in the field, even if taken at par, is not of much assistance to the prosecution. Evidently, the wife of the deceased Manjulibai (P.W.3) was first taken to the said spot by the daughters of the accused. Vilas Bambre (P.W.5) claimed to have been apprised by the accused No.1 Ganesh around 2:00 p.m. on 12th May 2014. The fact that the deceased lay under the tree in a badly injured condition must have spread like a wildfire, by the time the accused No.1-Ganesh informed Vilas Bambre (P.W.5) about the said

fact. Thus, the said circumstance, even if taken to have been proved, looses incriminating tendency. It is not the case that the body of the deceased lay in a concealed state and it was found at the instance of Ganesh-Accused No.1.

27. Vilas Bambre (P.W.5) wants the Court to believe that Sakhubai (Accused No.2), wife of Accused No.1-Ganesh, informed him that there were land disputes between the accused and the deceased and therefore Ganesh might have killed the deceased. On the strength of such a solitary assertion, the prosecution proposed to establish the circumstance of extra-judicial confession.

28. This circumstance is fraught with insurmountable infirmities. First and foremost, whether the statement allegedly made by Sakhubai (Accused No.2), even if taken to have been proved, amounts to a confession? It is well recognized that to constitute a confession, the accused must either admit, in terms, the commission of offence or, at any rate, substantially all the facts which constitute the offence. On a plain reading of the deposition of Vilas Bambre (P.W.5), it becomes evident that Sakhubai (Accused No.2) did not make any inculpatory statement. In the context of the charge of murder against Sakhubai (Accused No.2) as well, the aforesaid statement hardly constitutes an

admission of guilt.

29. The aforesaid exculpatory nature of the statement qua Sakhubai (Accused No.2) also robs of the said statement the relevance envisaged by section 30 of the Evidence Act. It cannot be even termed a confession of the co-accused which the Court may take into consideration against Ganesh Valvi-Accused No.1. The primary requirement of the statement of Accused No.2-Sakhubai being confessional one is not satisfied. The statement does not at all implicate Sakhubai (Accused No.2). Thus, it does not simply affect Sakhubai (Accused No.2). Resultantly, the said statement cannot be taken into consideration against the co-accused Ganesh (Accused No.1).

30. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The value of an extra-judicial confession primarily rests upon the veracity of the testimony of the person before whom it is allegedly made. In the case at hand, apart from the bald assertion of Vilas Bambre (P.W.5) that the accused No.2-Sakhubai made the aforesaid statement, there is no material to vouch for the veracity of the claim of Vilas Bambre (P.W.5). The circumstances in which the Accused No.2-Sakhubai made

the alleged statement were not deposed to. Nor any light was shed on the nature of the relationship between Sakhubai (Accused No.2) and Vilas Bambre (P.W.5). What made Sakhubai to repose the trust and confidence in Vilas Bambre (P.W.5)? Whether Vilas Bambre (P.W.5) exercised any influence and authority over Sakhubai (Accused No.2)? How Sakhubai (Accused No.2) came to meet Vilas Bambre (P.W.5) and overcome by remorse over the act? The evidence on record does not provide an answer to any of the aforesaid questions. A solitary assertion that Sakhubai (Accused No.2) made the confessional statement, without throwing light on the attendant circumstances, is bereft of any evidentiary value. As Vilas Bambre (P.W.5) turns out to be a person with whom Sakhubai (Accused No.2) had no intimate relationship, the extra-judicial confession presents itself as a weak type of evidence and it would be impermissible to place implicit reliance on it.

31. The upshot of aforesaid consideration is that the circumstances Nos. 2 to 4, enumerated above, can be said to have been established. The fact that the body of the deceased was found on 12th May 2014, the day following the night the accused had taken away the deceased constitutes a strong circumstance. This factum of the deceased having

met a homicidal death shortly after he was taken away by the accused, in the view of the learned Additional Sessions Judge warranted an explanation from the accused as the facts subsequent thereto were within the special knowledge of the accused. Since the accused did not offer any plausible explanation and there were attendant circumstance, the learned Additional Sessions Judge was persuaded to fasten the liability on the accused.

32. In the backdrop of the aforesaid proved circumstances, two aspects warrant consideration. One, the theory of “last seen and consequences which emanate therefrom”. Two, the applicability of the principle contained in section 106 of the Evidence Act.

33. It is trite that the “last seen” theory comes into play where the interval 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 offence is ruled out. A long interval between the two events, namely the deceased being seen alive in the company of the accused and the death of the deceased, on the contrary, is impregnated with the possibility of persons other than the accused

plying a role.

34. A profitable reference especially with regard to the time gap between the two events, can be made to a judgment of the Supreme Court in the case of ***State Of Goa vs. Sanjay Thakran And Anr.***¹ wherein, after adverting to the previous pronouncements, the legal position was expounded in the following words :-

“34 From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straightjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case,

1 (2007) 3 SCC 755

there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

(emphasis supplied)

35. In the case of ***Dharam Deo Yadav Vs. State of Uttar Pradesh*** ²

the legal position was further expounded in the following words :

“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

2 (2007) 3 SCC 755

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.....”

(emphasis supplied)

36. In the backdrop of the aforesaid exposition, reverting to the facts of the case, it becomes evident that there is evidence not only to demonstrate that the accused and the deceased were last seen together but also to show that the accused came to the house of the deceased and took him away on the pretext of consuming liquor in the dead of the night. The accused were not strangers to the deceased. The deceased and Accused No.1, as the evidence indicates, often consumed liquor. There was nothing to arouse suspicion so as to dissuade the deceased from accompanying the accused.

37. In view of the aforesaid facts, Mrs. Shinde, the learned APP would urge that in the absence of any plausible explanation as to how and when the deceased parted company with the accused, in view of the onus of proof envisaged by section 106 of the Evidence Act, the learned Additional Sessions Judge was wholly justified in arriving at the conclusion that the accused were the perpetrators of the offence.

38. Undoubtedly, the burden to establish the guilt of the accused

primarily rests upon the prosecution. Section 106 of the Evidence Act does not relieve the prosecution of its general or primary burden of establishing the guilt of the accused beyond reasonable doubt. A useful reference can be made to a judgment of the Supreme Court in the case of ***Sawal Das Vs. State of Bihar***³ wherein the following proposition was enunciated :-

“10 Neither an application of [Section 103](#) nor of 106 of the [Evidence Act](#) could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. ”

39. However, when the prosecution succeeds in discharging its primary burden and brings evidence on record which indicates that the facts, thereby proved, rest within the special knowledge of the accused, section 106 of the Evidence Act comes into play. In the case of ***State of Rajasthan Vs. Kashi Ram***⁴, wherein the accused-respondent was prosecuted for having committed murder of his wife and two daughters and the deceased was last seen in the company of the accused, expounding the nature and import of the provisions contained in section 106 of the Evidence Act, the Supreme Court

3 (1974) 4 SCC 193

4 (2006) 12 SCC 254

observed as under :-

*“23.....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 *Re. Naina Mohd. AIR 1960 Madras, 218.*”*

40. Two propositions emerge from the aforesaid exposition. One, if an accused is last seen with the deceased, he must offer an explanation as to how and when he parted company with the deceased. Two, the failure of the accused to offer a reasonable explanation in discharge of the said burden provides an additional link in the chain of circumstances proved against the accused.

41. As indicated above, the facts of the case at hand transgress the sphere of mere ‘last seen’ and catapult it to the case where the deceased was taken away by the accused by a positive act. There is

positive evidence of Manjulibai (P.W.3) to establish the said fact. The port-mortem report (Exh.28) records that the death had occurred within 3 to 4 hours since last meal. Manjulibai (P.W.3) claimed that the accused took away the deceased at midnight. The body of the deceased was found in the field on the next morning. Evidently, the interval between the time the deceased was taken away and the death of the deceased was not too long.

42. The crucial question which crops up for consideration is whether the proof of aforesaid two circumstances, namely the accused took away the deceased on the night intervening 11th and 12th May 2014, by offering an invitation to join them for a drink and, on being inquired, the accused offered explanation that the deceased had gone to Bhusarpada, are sufficient to sustain the guilt of the accused. In our view, the second circumstance of false explanation hinges upon the proof of the fact that the accused had done the deceased to death and, thus, being questioned, offered false explanation.

43. Is there any material to establish the nexus between the homicidal death of the deceased and accused apart from the fact that the accused had taken away the deceased on the pretext of consuming

liquor ? The circumstances in which the body of the deceased was found do not shed any light on the transactions leading to the death of the deceased. The claim of Mavji (P.W.2) and Manjulibai (P.W.3) that the deceased was assaulted by the accused is inferential. Apparently, they professed to depose to the alleged assault on the basis of the injuries noticed on the person of the deceased. The medical evidence, however, does not support the version of Mavji (P.W.2), Manjulibai (P.W.3) and Vilas Bambre (P.W.5) that there were marks of injuries on the person of the deceased. As indicated above, Dr.Ujwal Saurav (P.W.6), the Autopsy Surgeon noticed only one external injury, i.e. ‘a 10 cm. X 8 cm bruise, which was bluish-black in colour, over the left hypochondria. Even the ribs were not fractured. Had multiple blows been unleashed upon the deceased, there would have been traces of injuries on the person of the deceased. It does not appear that any lethal weapon was used. The generalised swelling over the body, oozing of serous fluid and presence of maggots manifest the onset of the process of decomposition. Indisputably, the body of the deceased was found on 12th May 2014. The post-mortem examination was conducted on the morning of 14th May 2014. More than 48 hours elapsed from the time of death resulting in manifestation of those symptoms.

44. The scene of occurrence panchnama (Exh.12) indicates that around the spot, where the body of the deceased lay, there were marks of scuffle and small and big stones lay scattered. Two of the stones were seized. It is imperative to note that the dead body was already shifted from the spot, whereat the panchnama (Exh.12) was drawn.

45. Keshav Abaji Naik (P.W.7), the investigating officer had the audacity to concede in the cross-examination that he had not sent the clothes of the deceased and accused for forensic examination. He further conceded that he had not sent the stones (Articles 1 and 2) for analysis as there were no blood stains thereon. Thus, there is next to no evidence to connect those stones (Articles 1 and 2) with the crime.

46. The situation which thus obtains is that there is no material to establish the presence of the accused at the place where the body of the deceased was found. No article which would connect the accused with the said place or the crime was seized therefrom. The fact that a solitary external injury resulting in rupture of the spleen, was noticed by Dr.Ujwal Saurav, the Autopsy Surgeon (P.W.6) rules out the possibility of the deceased having been belaboured.

47. In the aforesaid backdrop, on the basis of sole circumstance of the accused having taken away the deceased for the stated reason of drinking liquor, in our view, the guilt of the accused cannot be sustained. In the absence of any other material, it would be rather hazardous to draw an inference that the explanation offered by the accused that the deceased had gone to Bhusarpada was false. The possibility of the accused and the deceased having parted with company after consuming liquor or otherwise before the deceased met the homicidal death cannot be firmly ruled out. We are of the view that the evidence on record does not equip the Court to conclude with authority that the chain of circumstances unerringly pointing to the guilt of the accused is complete.

48. Undoubtedly, the circumstance of the deceased having been found dead after the accused had taken away the deceased gives rise to a strong suspicion. It is trite law that suspicion, however strong, cannot take the place of proof. The sole circumstance of 'last seen', or for that matter, the deceased having accompanied the accused, on its own, cannot sustain the burden of establishing the guilt of the accused beyond reasonable doubt sans requisite corroboration by other circumstances.

49. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Navaneethakrishnan Vs. State by Inspector of Police***⁵, wherein the principles were culled out as under :-

“27 The law is well settled that 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. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove.”

50. The conspectus of the aforesaid consideration is that the sole circumstance of the accused having taken away the deceased is not sturdy enough to bear the burden of the appellants conviction for the offence punishable under section 302 of the Penal Code. We are,

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therefore, persuaded to allow the appeal by setting aside the impugned judgment of conviction and sentence. Hence, the following order :

O R D E R

- (i) The appeal stands allowed.
- (ii) The impugned judgment of conviction for the offence punishable under section 302 read with 34 of the Penal Code and sentence stand set aside.
- (iii) The appellant No.1-Ganesh Bachhu Valvi and appellant No.2- Sakhubai Ganesh Valvi are acquitted of the offence punishable under section 302 read with 34 of the Penal Code.
- (iv) The appellants : Accused No.1-Ganesh Bachhu Valvi and accused No.2- Sakhubai Ganesh Valvi be released forthwith, if not required to be detained in any other case.

51. This judgment will be digitally signed by the Private Secretary of this Court. All concerned to act on the digitally signed copy of this judgment.

[N.J. JAMADAR, J.]

[SMT. SADHANA S. JADHAV, J.]