

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRR No. 1507 of 2017 (O&M)

Reserved on : 14.1.2020

Date of decision : 27.1.2020

Gagandeep Singh alias Johny

.... Petitioner

versus

State of Punjab

... Respondent

**Coram: Hon'ble Mr. Justice Rajiv Sharma
Hon'ble Mr. Justice Harinder Singh Sidhu**

Present Mr. S. S. Dhaliwal, Advocate (Legal aid counsel)
for the petitioner in CRR No. 1507 of 2017.
Mr. D. S. Kahlon, Advocate, for the complainant.
Mr. H. S. Grewal, Additional Advocate General, Punjab.

Rajiv Sharma, J.

1. This criminal revision is instituted against the judgment dated 24.3.2017 rendered by learned Additional Sessions Judge, Amritsar, in Criminal Appeal No. 12 of 2016, upholding the judgment and order dated 22.8.2016 passed by the Principal Magistrate, Juvenile Justice Board, Amritsar in FIR No. 87 of 13.6.2012.

2. The case of the prosecution in a nutshell is that complainant Sunil Kumar lodged a report to the effect that on 12.6.2012 at about 11.00 a.m. his elder son Karan @ Sushant aged about 11 years was playing in the street outside his house. He did not come back to his house. His mother Komal thought that he might have gone along with other children to their house. At about 1.45 P.M., the complainant received a call on his mobile phone no. 98550-17279 from mobile no. 81467-26215. The caller told the

complainant that his son was in his custody and if he disclosed this fact to the police, he would kill his son Karan and also kill him (complainant). The complainant discussed the matter with his wife and other family members. The complainant did not inform the police. They kept on searching for their son. Later on he along with his wife Komal informed Inspector Manjit Singh. His statement was recorded. IO inspected the spot. On 16.6.2012, Sanjeev Kumar brother of the complainant received a ransom call on his mobile no. 98153-18061 from mobile no. 96466-91879. The caller demanded a sum of ₹ 1 crore. On 20.6.2012, the police party met Sarwan Singh. He got recorded his statement that he was an agriculturist and while he was going towards his fields, he saw some birds flying over something on the way. On going near that place, he found a dead body of an unidentified person lying there. The body was sent for post-mortem examination. The cause of death was fracture of Hyoid bone and thyroid cartilage, which was found ante-mortem and sufficient to cause death in ordinary course of nature. On 21.6.2012, statement of Vijay Kumar was recorded to the effect that on 12.6.2012 at about 9.00 P.M. he was heading towards Chabal Road for some personal work. When he reached near Fatahpur, he saw juvenile Gagandeep Singh @ Joti and Kulwinder Singh @ Kinder going on a motorcycle. He saw a boy sitting in between the two. Vijay Kumar asked Gagandeep Singh and Kulwinder Singh about the boy. They told that he was their son. They told him that he was being taken for treatment as he was suffering from fever. On the next day i.e. on 13.6.2012, he went out of station for personal work. On return, he came to know about the kidnapping. Police recorded the statement of Tarsem Kumar son of Mohan Lal. According to him, he saw a boy being taken away by Prince.

They were going towards Khazana Gate. He was sure that Karan had been kidnapped by Prince. Police recorded the statement of Gauri son of Ramesh Kumar to the effect that on 16.6.2012, he saw two clean shaven persons talking on mobile phone and demanding a sum of ₹ 1 crore. On 21.6.2012, the police arrested accused Harpreet Singh and Sukhchain Singh. On search of accused Harpreet Singh one mobile phone make Samsung was recovered. On search of accused Sukhchain Singh, from the pocket of his shirt, one mobile phone make Samsung dual sim was recovered. Accused Kulwinder Singh was also arrested. Petitioner Gagandeep Singh was also taken into custody. Accused Sarabjit Kaur was also arrested. Inquest papers were prepared. Shirt was also taken into custody. The silver chain was also got recovered by petitioner Gagandeep Singh. The police arrested accused Prince on secret information. Accused Sarabjit Kaur got recovered one *chunni*. Auto was taken into possession. The cricket bat was recovered at the instance of accused Sukhchain Singh. The motorcycle was also taken into possession. The investigation was completed and challan was put up after completion of all the codal formalities. The petitioner being juvenile was tried by the Principal Magistrate, Juvenile Justice Board, Amritsar, in JJB Report No. JJB-65/2014.

3. The prosecution examined a number of witnesses in support of the case. The statement of the juvenile was also recorded under Section 313 Cr.P.C. He denied the case of the prosecution. He was reperussion under Sections 364-A/302/201/506 read with Section 120-B IPC and acquitted under Section 148/149 IPC. He was ordered to undergo stay in the Special Home for a period of three years under Sections 364-A, 302, 201, 120-B

IPC and to undergo stay in the Special Home for a period of one year under Section 506 IPC read with Section 120-B IPC.

4. The petitioner filed an appeal against the judgment and order dated 22.8.2016. The appellate Court dismissed the appeal, hence, this revision.

5. We have heard learned counsel for the parties and gone through the judgments and record very carefully.

6. PW1 Sunil Kumar deposed that he had two children. On 12.6.2012 at about 11.00 A.M. his son was playing cricket. He did not come back. His wife thought that Karan might have gone to his friends house in the neighbourhood. At about 1.45 P.M., he received a call on his mobile no. 98550-17279 from another mobile no. 81467-26215 that his son Karan was in his custody. The caller threatened him not to disclose anybody about it, otherwise he would kill his child. He discussed the matter with his wife and other relatives. He tried to call back. He recorded his statement before the police on 13.6.2012 vide Ex.PA. On 16.6.2012 at about 1.50 P.M., one call was received by his brother Sanjeev Kumar on his mobile no. 98153-18601 from another mobile number seeking ransom of ₹ 1 crore. He told the kidnapper that he was a poor man. They received another call. He told that he could arrange only ₹ 5 lakhs by selling his house. Bones and ashes were taken into possession. On 22.6.2012, they went to the place from where the dead-body was recovered. They identified the belongings of their son on 9.7.2012. On 13.7.2012, his and his wife's blood samples were taken for DNA test. On 16.8.2012, IO showed him the photograph of dead-body of his son. In his cross-examination, he deposed that he did not lodge any report with the police regarding missing of his son from 12.6.2012. He

recorded the statement on 13.6.2012 vide Ex.PA. He has not got recorded in his statement, Ex.PA, that the caller demanded a sum of ₹ 1 crore for release of his son.

7. PW2 ASI Karanjit Singh testified that investigation was entrusted to him. He went to Cremation Ground, Patti. He collected remains of cremation of dead-body including the ashes and bones. These were taken into possession. Site plan was prepared.

8. PW3 Sanjeev Kumar deposed that on 12.6.2012, Karan son of his brother Sunil Kumar went missing while playing. On 16.6.2012 at about 1.20 P.M., he received a call on his mobile no. 98153-18601 from a mobile no. 96466-91879 from an unidentified person. He asked him to give mobile phone to his brother. Unidentified person asked for a ransom of ₹ 1 crore. He again received a call in the evening. On 23.6.2012, he was going towards Aman Avenue. When he reached at gate Hakiman Chowk, Manjit Singh SHO along with police party met him. Police party took him with them. Accused Sarabjit Kaur, Gagandeep Singh (juvenile) and Kinder were also with the police party. The police party went to the house of Gagandeep Singh alias Johny. Johny got recovered one silver chain along with locket. These were taken into possession vide recovery memo, Ex.PW3/A. Accused Sarabjit Kaur got recovered one cream colour *chunni* and one golden colour pillow from back side of almirah from her house. Accused Kulwinder Singh alias Kinder got recovered one shirt purple colour on which *Satyam Shivam* was written in Hindi. Accused Prince was also arrested. Auto rickshaw was taken into possession. On the basis of disclosure statement of accused Prince, one mobile phone was got recovered. In his cross-examination, he admitted that IO received the information at Indira Colony at 1.20 P.M.

They reached Gate Khazana at 1.25 P.M., which was a thickly populated area. No independent witness was joined by IO at the time of alleged arrest of accused Prince. No person of locality was called at the time of alleged recovery. Juvenile Gagandeep met him at Gate Hakima while he was in police custody. He was not interrogated in his presence. The police party went to the house of juvenile Gagandeep Singh. They met so many people. The house of Gagandeep Singh was situated in an area surrounded by so many houses. The chain was recovered from the almirah.

9. PW4 Vijay Kumar deposed that on 12.6.2012 at about 9.00 P.M. he was going towards Chabal Road for his personal work. He met Harpreet Singh @ Happy, Kulwinder Singh @ Kinda, Gagandeep Singh @ Jang and Sukhchain Singh @ Mintu. A young boy was sitting between Gagandeep Singh and Kulwinder Singh on their motorcycle. He enquired from the accused about that young boy and where they were taking him. Accused told him that he was their son and was sick. They were taking him for medicine. On the next day, he went out of station. When he came back he came to know that on 12.6.2012 a boy Karan son of Sunil Kumar of their mohalla was kidnapped and still was untraceable. He was fully sure that accused Gagandeep Singh and Kulwinder Singh along with Harpreet Singh and Sukhchain Singh had kidnapped Karan. He had seen the accused with Sushant @ Karan on 12.6.2012. He identified the juvenile Gagandeep Singh present in the Court. In his cross-examination, he admitted that the complainant was his nephew. On 13.6.2012, he came to know about the kidnapping of Sushant @ Karan. His statement was recorded by the police on 21.6.2012.

10. PW5 Tarsem Singh deposed that he was an auto rickshaw driver. On 12.6.2012 at about 11/11.30 A.M., he was standing ahead of chowk Gate Hakima. He saw Prince on a motorcycle along with Karan @ Sushant. They were going towards Gate Khazana. He went out of station. When he came back on 21.6.2012, he came to know about the kidnapping of Karan. He narrated the whole incident to the IO. In his cross-examination, he deposed that he recorded his statement to the police on 12.6.2012. The attention of the witness was drawn towards judicial file where there was no statement of 12.6.2012. When the police added the name of Gagandeep in this case due to that he also recorded the name of Gagandeep Singh.

11. PW6 HC Takwinder Singh deposed that the statement of complainant Sunil Kumar was recorded vide Ex.PA. FIR was registered.

12. PW7 Inspector Manjit Singh deposed that the statement of the complainant was recorded, vide Ex.PA, on the basis of which FIR, Ex.PW7/C, was recorded. He inspected the spot. On the same day, the complainant received a call regarding kidnapping of his son on his mobile no. 98550-17279 from mobile no. 81467-26215. On verification, the phone was found to be registered in the name of Vanram Kumar. The address was found to be fake and false. The location of the phone was found to be in the area of Khalsa College, Amritsar. On 16.6.2012, brother of the complainant received a ransom call on his mobile no. 98153-18061 from mobile no. 96466-91879 for the demand of ₹ 1 crore. He found that the original buck of sim number 81467-26215 was removed and new sim bearing registration no. 96466-91879 was activated on the same mobile set in which the sim no. 81467-26215 was operated. Sim no. 96466-91879 was obtained by the caller of this mobile from Bittu Telecom, Fatahpur, by furnishing fake

address. A separate FIR was registered against him. He came to know that the owner of the said mobile set was Sahib Singh of Anngarh. It was stolen by one Gholi son of Jaspal Singh. Gholi sold out the said mobile to one Happy of Anngarh. The phone was further handed over to Prince. Prince has given this phone set to his brother-in-law namely Sukhchain Singh. A separate FIR was registered at PS Gate Hakima against Gholi. On 21.6.2012 Vijay Kumar and Tarsem Singh PWs joined in the investigation. Their statements under Section 161 Cr.P.C. were recorded on the basis of which offence under Section 302/201 IPC was added. One diary was got recovered by accused Sukhchain Singh in which the aforesaid numbers were mentioned. On the search of accused Sukhchain Singh, one mobile phone make Sony Ericson double sim along with sim no. 98762-27345 and 96530-61033 was recovered. These were taken into possession. He arrested accused Sukhchain Singh and Harpreet Singh @ Happy. The police party also arrested accused Kulwinder Singh and Gagandeep Singh. From the personal search of Kulwinder Singh, one mobile phone of Beetal of black colour, double sim was recovered. The same was taken into possession. From the possession of Gagandeep Singh, one mobile make Gild, dual sim having dual IMEI numbers was recovered. It was taken into possession. He recorded the statement of PWs. The accused were thoroughly interrogated. Sukhchain Singh was also arrested. Accused Kulwinder Singh revealed that he had kept concealed the shirt of deceased Karan @ Sushant under the bushes in the area of bank of canal Bohru. His disclosure statement is Ex.PW7/W. Accused Gagandeep got recovered the silver chain from his house. The same was taken into possession. Accused Sarabjit Kaur led the police party to her house from where she got recovered one *chunni* and one

comfort. The same were taken into possession. Accused Kulwinder Singh got recovered the shirt. Accused Prince was also arrested. A mobile phone make Nokia 60V was recovered. It was taken into possession. Auto was taken into possession. Accused Harpreet Singh disclosed about cricket bat. It was got recovered. Accused Sukhchain Singh revealed that he had kept concealed one voile and one syringe used in the commission of crime in the house of accused Kulwinder Singh. He could get the same recovered. Motorcycle was also got recovered. In his cross-examination, he has admitted that from where the juvenile was arrested was a thoroughfare.

13. PW8 HC Buta Singh deposed that on 13.6.2012 he was posted at Police Station C-Division, Amritsar. He was present in the police party headed by SHO/ Inspector Manjit Singh. PW1 Sunil Kumar recorded his statement. IO along with PW1 Sunil Kumar visited the spot. The site plan was prepared. Statements of PW Vijay Kumar and Tarsem were recorded on 21.6.2012 on the basis of which offences under Section 302/201 IPC were added. The recoveries were made from the accused. Accused Sukhchain Singh and Harpreet Singh were arrested vide memo Ex.PW7/J and Ex.PW7/K. Accused Kulwinder Singh and Gagandeep Singh were arrested vide memo Ex.PW7/N and Ex.PW7/P. Juvenile Gagandeep Singh led the police party and PW Sanjeev Kumar at his residence, where he opened the lock of almirah and got recovered the silver chain along with locket. In his cross-examination, he admitted that house of accused was situated in the abadi. So many persons were gathered there on seeing the police party but no person was associated.

14. PW9 Dr. Ashish Gupta had conducted the post-mortem examination. According to him, the cause of death was due to fracture of

Hyoid bone and thyroid cartilage. It was ante-mortem and sufficient to cause death in ordinary course of nature. The probable time between injury and death was about within few minutes and the probable time between death and post-mortem examination was about 5 to 10 days. In his cross-examination, he admitted that nobody identified the dead-body in his presence. He could not tell the exact time of death of deceased.

15. PW9 ASI Parduman Kumar (again written as PW9) deposed that on 21.6.2012 he was posted as MHC at Police Station C-Division, Amritsar. On 23.6.2012 one transparent plastic parcel containing one silver chain, one locket written as Karan were deposited with him in the police station. On 9.7.2012, IO called complainant Sunil Kumar and his wife Komal along with councilor Amarjit Singh Bhati in the police station. He produced one parcel of shirt, one parcel of silver chain and one bat. Parcel of shirt was shown to them. It was identified by Komal Arora and Amarjit Singh.

16. PW10 Retd. ASI Sucha Singh deposed that on 20.6.2012 he was posted as IO at Police Station Khalra. He along with other police officials were going to village Basarke where Sarwan Singh got recorded his statement regarding the dead-body of unidentified person lying in the drains. Dead-body was fully damaged. Statement of Sarwan Singh is Ex.PW10/1.

17. PW10 Sawinder Kaur (again mentioned as PW10) deposed that as per record motorcycle Hero Honda no. PB-02-BP-1627 was registered in the name of the Gurpreet Singh son of Dalbir Singh.

18. PW11 Sahib Singh deposed that his mobile phone was stolen during intervening night of 8/9.6.2012 from his house. He went to Police

Station C-Division along with councilor Dilbagh Singh.

19. PW4 Vijay Kumar testified that on 12.6.2012 at about 9.00 P.M. he met Harpreet Singh @ Happy, Kulwinder Singh @ Kinda, Gagandeep Singh @ Jang and Sukhchain Singh @ Mintu. A young boy was sitting between Gagandeep Singh and Kulwinder Singh on their motorcycle. He enquired about that young boy. They told that he was their son and was sick. He was being taken for treatment. On the next day, he went out of station. On his return, he came to know that on 12.6.2012 a boy Karan was kidnapped and was untraceable. He had admitted in his cross-examination that the complainant was his nephew. He had also admitted that on 13.6.2012, he came to know about the kidnapping of Sushant @ Karan. His statement was recorded on 21.6.2012. In case he had seen the accused Harpreet Singh @ Happy, Kulwinder Singh @ Kinder, Gagandeep Singh @ Johny and Sukhchain Singh @ Mintu taking away Karan, he would have definitely told his nephew PW1 Sunil on the same day. His conduct was unusual.

20. PW5 Tarsem Singh has given a new version to the incident. According to him, he was an auto rickshaw driver. On 12.6.2012 at about 11/11.30 A.M., he was standing ahead of chowk Gate Hakima. He saw Prince on a motorcycle and Karan @ Sushant as a pillion rider. They were going towards Gate Khazana. He came back to his house on 21.6.2012 and came to know about the kidnapping of Karan. He narrated the whole occurrence to the IO. He admitted in his cross-examination, that when the police added the name of juvenile Gagandeep in the case due to that he also got recorded the name of Gagandeep Singh.

21. In case PW4 Vijay Kumar and PW5 Tarsem Singh have last

seen the accused taking away Karan, they should have contacted PW1 Sunil Kumar. Their conduct is unusual. PW4 Vijay Kumar had seen Harpreet Singh @ Happy, Kulwinder Singh @ Kinda, Gagandeep Singh @ Jang and Sukhchain Singh @ Mintu taking away Karan on 12.6.2012 at about 9.00 P.M, whereas PW5 Tarsem Singh had seen only accused Prince taking away Karan on 12.6.2012 at about 11/11.30 A.M. The dead-body was recovered on 20.6.2012 as per inquest report. “*The theory of last seen together*” is applicable when the time of last seen together and death is short.

22. Their Lordships of Hon'ble the Supreme Court in *S.K. Yusuf vs State of West Bengal* 2011 (11) Supreme Court Cases 754, have held that theory of '*last seen together*' comes into play, where time gap between point of time when deceased was last seen alive with accused and when deceased was found dead, is so small that possibility of any person other than accused being author of crime becomes impossible. Para 21 of the judgment is reproduced as under:-

“21. The last seen theory comes into play where the time gap between the point of time when the accused and 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.”

23. Their Lordships of Hon'ble the Supreme Court in *Nizam and another vs State of Rajasthan* 2016 (1) Supreme Court Cases 550, have held that “*last seen theory*” is important link in chain of circumstances that would point towards guilt of accused with some certainty. Such theory permits court to shift burden of proof to accused and he must then offer a reasonable explanation as to cause of death of deceased. However, it is not

prudent to base conviction solely on “*last seen together*”. Such theory should be applied, taking into consideration case of prosecution in its entirety and keeping in mind circumstances that precede and follow the point of being so last seen. Where time gap is long, it would be unsafe to base conviction on “*last seen together*”. It is safer to look for corroboration from other circumstances and evidence adduced by prosecution. Paras 14 to 18 of the judgment are extracted below:-

“14. The Courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23.01.2001. Undoubtedly, “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

15. Elaborating the principle of “last seen alive” in State of Rajasthan vs. Kashi Ram (2006) 12 SCC 254, this Court 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 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. (AIR 1960 Mad 218)”

The above judgment was relied upon and reiterated in Kiriti Pal vs. State of West Bengal, (2015) 5 Scale 319.

16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, whether the courts below were right in invoking the “last seen theory.” From the evidence discussed above, deceased-Manoj allegedly left in the truck DL-1GA-5943 on 23.01.2001. The body of deceased-Manoj was recovered on 26.01.2001. The prosecution has contended the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in

proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17. During their questioning under Section 313 Cr.P.C., the appellant-accused denied Manoj having travelled in their truck No. DL-1GA-5943. As noticed earlier, body of Manoj was recovered only on 26.01.2001 after three days. The gap between the time when Manoj is alleged to have left in the truck No.DL-1GA-5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW-4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and

evidence, we find no other corroborative piece of evidence corroborating the last seen theory.”

24. Their Lordships of Hon'ble the Supreme Court in Anjan Kumar Sarma and others vs State of Assam 2017 (14) Supreme Court Cases 359, have held that only circumstance of “*last seen together*” and absence of satisfactory explanation, cannot be made basis of conviction. Paras 19, 20 and 23 to 25 of the judgment are extracted as under:-

“19. The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715, this court held that:

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

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15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation

bears great similarity to that in Madho Singh v. State of Rajasthan [(2010) 15 SCC 588]”

20. In Arjun Marik v. State of Bihar, 1994 Supp (2) SCC 372 this court held that:

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the 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.”

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23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen

together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:

“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 straitjacket 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 of

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, 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.”

24. As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.

25. Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court and acquit the Appellants of the charges of Section 302, 201 read with 34 IPC. The Appellants are directed to be set at liberty forthwith, if not required in any other case.”

25. In Anjan Kumar Sarma's case (supra), their Lordships have also held that mere failure of accused to offer any explanation in his statement under Section 313 Cr.P.C. alone is not sufficient to establish charge against the accused. Paras 21 and 25 of the judgment are extracted as under:-

21. This Court in Bharat v. State of M.P., (2003) 3 SCC 106, held that the failure of the accused to offer any explanation in his statement under Section 313, Cr.P.C alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the Accused stood un-rebutted and thus the Appellants were liable to be convicted.

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25. Due to the lack of chain of circumstances which lead to the only hypothesis of guilt against the accused, we set aside the judgment of the High Court and acquit the Appellants of the charges of Section 302, 201 read with 34 IPC. The Appellants are directed to be set at liberty forthwith, if not required in any other case.”

26. Their Lordships of Hon'ble the Supreme Court in Baiju Kumar Soni and another vs State of Jharkhand 2019 (7) Supreme Court Cases 773, in a case of kidnapping and murder have held that, in a case based on circumstantial evidence, every circumstance must be fully proved and all the circumstances must form a chain of evidence so complete as to exclude every hypothesis other than the guilt of the accused. Paras 15 and 16 of the judgment are extracted as under:-

“15. The law on the point is very well settled that in a case based on circumstantial evidence, every

circumstance must be fully proved and all the circumstances must form a chain of evidence so complete as to exclude every hypothesis other than the guilt of the accused. It was stated by this Court in Sharad Birdhichand Sarda v. State of Maharashtra :

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793, where the following observations were made:

"19. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between “may be” and “must be” is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

16. In Nizam and Another v. State of Rajasthan, (2016) 1 SCC 550, the law on the point was reiterated while acquitting the accused of the charges under Section 302 read with 201 IPC. Paragraphs 9 and 10 of the decision were:-

“9. The principle of circumstantial evidence has been reiterated by this Court in a plethora of cases. In Bodhraj v. State of J&K (2002) 8 SCC 45, wherein this Court quoted (2016) 1 SCC 550 a number of judgments and held as under: (SCC pp. 55-56, paras 10-11)

“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 (1977) 2 SCC 99, Eradu v. State of Hyderabad AIR 1956 SC 316, Earabhadrapa v. State of Karnataka (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Supp SCC 79, Balwinder Singh v. State of Punjab (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P. (1989) Supp (1) SCC 560). 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 AIR (1954) SC 621, 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. (1996) 10 SCC 193, 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.”

10. In Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681, this 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.”

The same principles were reiterated in Sunil Clifford Daniel v. State of Punjab (2012) 11 SCC 205, Sampath Kumar v. Inspector of Police (2012) 4 SCC 124 and Mohd. Arif v. State (NCT of Delhi) (2011) 13 SCC 621 and a number of other decisions.”

27. The case of the prosecution is that the accused asked for ransom on mobile phone. Firstly, the phone call was made to PW1 Sunil Kumar and thereafter to his brother PW3 Sanjeev Kumar. Though the police has taken the call details but these were not exhibited. These were only marked as Mark-A to Mark-C. It was necessary for the prosecution to prove the call details as per Section 65 of the Evidence Act. Ownership of the mobile has also not been proved in accordance with law.

28. PW7 Inspector Manjit Singh and PW8 HC Buta Singh had admitted that the accused was arrested from thickly populated locality and the recoveries also were made from him but no independent witness was

associated at the time of his arrest as well as when the recoveries were made. According to them, some entries were made in the diaries recovered from the accused but the hand writings were not got compared with the hand writings of the accused.

29. According to PW9 Dr. Ashish Gupta, the cause of death was due to fracture of Hyoid bone and thyroid cartilage. However, in his cross-examination, he admitted that nobody identified the dead-body in his presence. He also admitted that he could not tell the exact time of death of deceased.

30. Accordingly, the revision is allowed. The petitioner is acquitted of the charges framed against him by giving benefit of doubt.

(Rajiv Sharma)
Judge

27.1.2020
vs

(Harinder Singh Sidhu)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No