

Santosh/SKT

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 176 OF 2019

WITH

INTERIM APPLICATION NO.323 OF 2020

IN

CRIMINAL APPEAL NO. 176 OF 2019

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Sitaram Laxman Dhoom

Age : 28 years, Occu. Agriculturist

R/o. Milanpada, Tal. Surgana, Dist. Nashik

(Presently detained at Nashik Road Central
Prison, Nashik)

...Appellant
(Accused no.1)

Versus

The State of Maharashtra

Through Surgana Police Station

Dist. Nashik

...Respondent
(Complainant)

Ms.Vandana Bait a/w Mr.Amey Deshpande, Mr.Harsh Nishar

& Ms. Niyati Sontakke, for Appellant/ Applicant.

Mr. V. B. Kondedeshmukh, APP for the State.

CORAM: S. S. SHINDE AND
N. J. JAMADAR, JJ.

RESERVED ON: 30th NOVEMBER, 2021.

PRONOUNCED ON: 23rd DECEMBER, 2021

JUDGMENT :- (Per: N. J. JAMADAR, J.)

1. In this appeal, the appellant – accused takes exception to the judgment of conviction and order of sentence dated 30th October, 2018, passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.342 of 2014, whereby and

whereunder the appellant came to be convicted for the offences punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code") and sentenced to suffer imprisonment for life and pay fine of Rs.500/- for the offence punishable under Section 302 and the rigorous imprisonment for three years and fine of Rs.500/- for the offence punishable under Section 201, with default stipulation.

2. The background facts leading to this appeal can be summarized as under:

(a) Namdeo Chaudhari (hereinafter referred to as, "the first informant") is a resident of Dhurapada, Taluka Surgana, District Nashik. His younger brother Somnath resided in the field at Dhurapada along with his wife Shevantabai, son Bhagwat and daughters Goda, Pushpa and Hemanti. Somnath's elder daughter Goda is married to Sitaram, the appellant.

(b) On 28th April, 2014 at about 10.00 a.m., first informant's nephew Bhagwat came to his home and informed him that his sister Pushpa was missing since previous evening. He visited the house of Somnath. But the latter and his wife Shevantabai were not at home. The first informant made

inquiries with the villagers at Dhurapada but whereabouts of Pushpa could not be ascertained.

(c) On 1st May, 2014, Mr. Chiman Kalga Gavande visited the house of the first informant and informed him that in the Mokapada dam, dead body of a female, concealed in a gunny-bag, was found floating and the said dead body was shifted to Government Hospital, Surgana and asked him to ascertain as to whether the corpus was that of Pushpa. The first informant visited Government Hospital, Surgana. The dead body was that of Pushpa. Her right hand and both lower limbs were found amputated. Hence, the first informant lodged report against unknown person for having committed murder of Pushpa (the deceased) and caused disappearance of the evidence. Crime was registered at C.R. No.31 of 2014 at Surgana Police Station for the offences punishable under Sections 302 and 201 of the Indian Penal Code. Investigation commenced thereon.

(d) During the course of investigation, the Investigating Officer visited the place where the body of the deceased was found. The Investigating Officer interrogated witnesses and recorded their statements. It transpired that on 27th April, 2014, the first informant's brother Somanth, deceased Pushpa and Sitaram, the son-in-law of Somnath, had gone to forest at about

9.00 pm. for collecting firewood. At about 10.00 pm., only Somanth and Sitaram returned. Upon being inquired, they replied that the deceased would return later on. When the matter was reported to police and the latter visited the house of the deceased, they found that Somnath committed suicide by hanging.

(e) The appellant – accused no.2 – Sitaram came to be arrested. Accused no.2 made discovery leading to the recovery of the weapons and the clothes which accused no.2 and the deceased Somnath wore at the time of occurrence. As the investigation revealed the complicity of the accused, charge-sheet was lodged against accused no.2 for the offences punishable under Sections 302 and 201 read with Section 34 of the Penal Code for having committed murder of the deceased and caused disappearance of evidence, in furtherance of his common intention with deceased Somnath.

(f) Post committal of the case to the Court of Session, charge was framed against the accused for the offences punishable under Section 302 and 201 read with Section 34 of the Penal Code. Accused no.2 abjured his guilt and claimed for trial.

(g) At the trial, to substantiate the indictment against accused no.2, prosecution examined seven witnesses, being Namdeo Chaudhari (PW-1); the first informant, Shevantabai Chaudhari (PW-2); the mother of the deceased, Hemanti Somnath Chaudhari (PW-6); the sister of the deceased, Bhaskar Chaudhari (PW-3); and Suresh Narayan Olambe (PW-4); the public witnesses to the scene of offence panchanama and discovery, Dr.Sanjay Chandrakant Chaudhari (PW-5), the Autopsy Surgeon, and Mr.Suresh Mohan Paradhi (PW-7), the Investigating Officer, who furnished the details of investigation. Post conclusion of evidence for the prosecution, statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 ("the Code") was recorded. The accused did not lead evidence in his defence, which consisted of denial and false implication based on suspicion.

(h) After appraisal of the evidence, the learned Additional Sessions Judge was persuaded to return a finding of guilt against accused no.2 opining *inter alia* that the prosecution succeeded in establishing the circumstances which incriminate accused no.2, namely the deceased having been last seen in the company of accused no.2 and Somnath, thereafter the deceased was not seen alive by anybody and her corpus was

found in a mutilated state in the dam; accused no.2 made discoveries leading to the recovery of weapons of offence and the bloodstained clothes, which accused no.2 and the deceased accused Somnath wore at the time of the occurrence; accused no.2 pointed out the place where the deceased was done to death and the accused no.2 failed to offer any explanation as regards the circumstances in which the deceased Pushpa met death after she was last seen in the company of accused no.2 and also for the knowledge as to the concealment of the weapons of offence and incriminating articles. Thus, the learned Sessions Judge proceeded to convict accused no.2 for the offences punishable under Sections 302 and 201 read with Section 34 of the Penal Code and impose the sentence, as indicated above.

3. Being aggrieved by and dissatisfied with the aforesaid judgment of conviction and order of sentence, accused no.2 has preferred this appeal.

4. We have heard Ms. Bait, the learned Counsel for the appellant and Mr. Kondedeshmukh, the learned APP for the State/Respondent, at length. With the assistance of the learned Counsels, we have perused the material on record including the

depositions of the witnesses and the documents tendered for the perusal of the Court.

5. Ms. Bait, the learned Counsel for the appellant, assailed the impugned judgment by canvassing a multi-fold submission. Firstly, the learned Additional Sessions Judge misdirected herself in returning the finding of guilt against accused no.2 without adhering to the principles of appraisal of circumstantial evidence as the prosecution case rested solely on circumstantial evidence. Secondly, the learned Additional Sessions Judge was in error in according undue weight to the circumstances of the “last seen” and “discovery”, which were not duly proved. Thirdly, the fact that there was a material discrepancy in the evidence of Shevantabai (PW-2) and her daughter Hemanti (PW-6) as regards the person with whom the deceased had gone to the forest, on the day of occurrence, was lightly brushed aside. Hemanti (PW-6) categorically declined to subscribe to the prosecution version that accused no.2 accompanied deceased Pushpa and Somnath. Thus, the circumstance of last seen could not be said to have been established fully. Fourthly, the conduct of the accused was also not adequately considered by the learned Additional Sessions Judge. Indisputably, accused no.2 accompanied the prosecution witnesses and others, who

went for the search of the deceased Pushpa. This conduct is compatible with the innocence of accused no.2, if considered in the light of the fact that deceased Somnath did not join the search party, urged Ms. Bait. Lastly, in any event, the chain of circumstances, so as to lead to the only hypothesis that it was accused no.2 who committed the offences and none else, has not been established. Therefore, the appeal deserves to be allowed, submitted Ms. Bait.

6. Per contra, Mr. Kondedeshmukh, the learned APP, stoutly supported the impugned judgment. Laying emphasis on the circumstances, which found favour with the learned Additional Sessions Judge, Mr. Kondedeshmukh, would urge that those circumstances unerringly point to the guilt of the accused. Inviting the attention of the Court to the nature of the injuries which the deceased suffered, especially the amputation of right hand and both lower limbs, it was urged that such injuries could not have caused by one person. Sehvantabai (PW-2) the mother-in-law of accused no.2, had no axe to grind against accused no.2 and falsely implicate him. Mr. Kondedeshmukh thus submitted that the learned Additional Sessions Judge was within her rights in convicting the accused on the strength of the circumstantial evidence.

7. To start with, the nature of the death, which deceased met. Dr.Sanjay Chaudhari (PW-5), who conducted the postmortem examination, opined that the cause of death of the deceased was cardio-respiratory arrest due to asphyxia due to strangulation. The right upper limb was amputated from the head of humerus and was missing. The both lower limbs were amputated. There was a ligature mark completely encircled, horizontally and below thyroid cartilage. Dr.Chaudhari (PW-5) further opined that the amputation of the right upper limb and lower limbs was done after the death of the deceased. In his opinion, those amputation were possible by axe (Article-A) and sickle (Article-B).

8. The aforesaid injuries, found on the person of the deceased, lead to no other inference than that of homicidal death. It appears that the deceased was initially done to death by strangulation and, thereafter, her right upper limb and lower limbs were amputated and the body of the deceased, sans the amputated parts, was thrown in the dam.

9. This propels us to the pivotal question of authorship of death. As indicated above, the prosecution case rests solely on circumstantial evidence. In order to properly cull out and appreciate the circumstances which were arrayed against

accused no.2, it may be apposite to have a brief resume of the evidence led by the prosecution and then determine whether the circumstance pressed into service against the appellant were fully and conclusively proved, they constituted a chain of circumstances that led to the only hypothesis of the guilt of accused no.2 and were incompatible with the innocence of the accused no.2.

10. Shevantabi Chaudhari (PW-2), the mother of the deceased informed the Court that the deceased Pushpa was her second daughter. Her marriage was settled. However, she declined to marry. There were quarrels between the deceased and her father Somnath, over the said count. Shevantabai (PW-2) wants the Court to believe that on 27th April, 2014 at about 9.00 pm. her deceased husband Somanth, son-in-law Sitaram (accused no.2) and deceased Pushpa had gone to Kakudda forest for collecting the firewood. Her deceased husband and accused no.2 returned home at about 10.00 pm. She inquired with the accused as to where the deceased Pushpa was. They informed her that the deceased would return later. The deceased did not return. They did search for her but could not trace her. After a couple of days, Chiman Gavande informed them that dead body of a lady was found in the water canal of Moka pada. She claimed to have

visited the hospital and identified the dead body to be that of the deceased.

11. The prosecution examined Hemanti Chaudhari (PW-6), the younger sister of the deceased, to lend support to the version of Shevantabai (PW-2), Hemanti Choudhari (PW-6) did corroborate the version of Shevantabai (PW-2) to the extent that the deceased Pushpa had shown disinclination to marry and, therefore, there were quarrels between her deceased father Somnath and Pushpa. Her father used to beat the deceased on the said count. Hemanti (PW.6), however, refused to subscribe to the prosecution case on the crucial aspect of accused No.2 having accompanied her deceased father Somnath and sister Pushpa to the forest. She made an endeavour to assert that at that time accused No.2 was present at his home at Milanpada.

12. The learned APP made an effort to take her to task. During the course of the cross examination, Hemanti (PW-6) conceded that during the period 27th April, 2014 to 1st May, 2014 she, her mother Shevantabai and her relatives did inquire with deceased Somnath about Pushpa. Her father answered that she would return later. Hemanti (PW-6) further affirmed that accused no. 2 had gone in search of the deceased. However, her father made no effort to search the deceased. She conceded that her father

committed suicide as he blamed himself for the death of the deceased.

13. The aforesaid evidence of Shevantabai (PW-2) and Hemanti (PW-6) constitutes the core of the evidence on the strength of which the circumstance of 'last seen' is sought to be established by the prosecution. We will appraise the potency of the said circumstance, a little later.

14. Bhaskar Choudhary (PW-3), the public witness to the scene of offence panchanama (Exh-22) and the discovery allegedly made by the accused no. 2 leading to the recovery of the weapons of offence and clothes which the deceased Somnath and accused no.2 wore at the time of occurrence, informed the Court that on 6th May, 2014 at Surgana police station, accused No. 2 made a disclosure statement before him that he would show the scene of offence. The accused led the police party to Kakuldara Hill and pointed out the spot. There were blood stains on the stones and the earth. According to Bhaskar Choudhary (PW-3) the panchanama of the scene of offence (Exh-22) was drawn at the said spot.

15. Bhaskar Choudhary (PW-3) further informed the Court that the accused made disclosure statement to the effect that he would show the place where the weapons of offence, namely, the

axe and the clothes which he and deceased Somnath wore at the time of occurrence, were concealed i.e. behind the house of the deceased Somnath at Milanpada field, and produce the same. Accused No. 2, thereafter, led the police party to the said place and took out an axe (Article-A) and a sickle (Article-B) from the bushes. There were blood stains on the handle of the axe (Article-A). Accused No. 2 had also taken out a bag containing the clothes (Articles C to F). Those weapons of offence and articles were seized under panchanama (Exh-23). This version of Bhaskar Choudhary (PW-3) was sought to be corroborated by Suresh Olambe (PW-4), but not in full measure.

16. The testimony of Bhaskar Choudhary (PW-3) and Suresh Olambe (PW-4) was sought to be further corroborated by Suresh Pardhi (PW-7), the investigating officer, who effected the recovery. For Suresh Pardhi (PW-7), accused no.2 made only one discovery leading to the recovery of the weapons of offence i.e. axe (Article-A) and sickle (Article-B) and the clothes (Articles C to F) which were stained with blood.

17. On the strength of the aforesaid evidence, prosecution pressed into service the following circumstances, which according to prosecution, squarely incriminate the accused No.2:-

- (i) Motive.
- (ii) Last seen
- (iii) The situation at the scene of offence, which was pointed out by the accused no.2.
- (iv) The discoveries made by accused No. 2 leading to recovery of the weapons of offence and clothes.

(i) **Motive :**

18. As regards the motive for the crime, even if we construe the testimony of Shevantabai (PW-2) rather generously, we find that her testimony is of little assistance in establishing the fact that accused no.2 shared the same motive which deceased Somnath had. The tenor of the testimony of Shevantabai (PW-2) is that her deceased husband Somnath was enraged as deceased Pushpa declined to solemnize marriage. Thus, there were quarrels between deceased Somnath and Pushpa on the said score. Shevantabai (PW-2) did not profess to inform the Court that accused no.2 also had a grudge against the deceased Pushpa, for her refusal to marry. In the absence of cogent evidence on this count, we are of the view that it would be impermissible to impute clear and strong motive to accused no.2.

(iii) Pointing out the scene of offence and discoveries :

19. We have carefully perused the depositions of Mr. Bhaskar Chaudhari (PW-3) and Suresh Olambe (PW-4), the public witnesses to the scene of offence panchanama (Exh.22) and memorandum of disclosure statement (Exh.25). We find that that there is a significant incongruity in the evidence of Bhaskar Chaudhari (PW-3) and Suresh Olambe (PW-4). The claim of Bhaskar Chaudhari (Pw-3) that the accused had made disclosure statement to point out the scene of offence i.e., the place where the deceased was done to death, is not at all borne out by either scene of offence panchanama (Exh.22) or the memorandum of disclosure statement (Exh.25). The scene of offence panchanama (Exh.22) proceeds on the premise that the police party and the accused visited the place where the deceased was killed. It nowhere records that a disclosure statement made by accused no.2 preceded the said visit to the spot or it was pointed out by accused no.2. On the contrary, it records that after reaching the spot, the accused no.2 pointed out the places where the blood stains were found. By no stretch of imagination, the place of offence can be said to have been thus discovered pursuant to the statement made by the accused no.2. Memorandum of disclosure statement (Exh.25), on the

other hand, records that the accused made the disclosure statement only to point out the place where the weapons of the offence and the clothes were concealed. Moreover, interestingly, the memorandum of disclosure statement (Exh.25) under section 27 of the Evidence Act and the consequent recovery of the weapons of offence and the clothes was effected before the visit to the scene of offence and drawing of the scene of offence panchanama thereat, on the same date, i.e. 6th May 2014.

20. To add to this, Mr.Suresh Olambe (PW-4), the panch witness who was examined in proof of the discovery did not support the prosecution earnestly. Mr. Suresh Olambe (PW-4) went on to concede that he had neither read the contents of disclosure statement nor the seizure memo. Evidently, the circumstances of the accused pointing out the scene of offence and discovery leading to the recovery of weapons of offence and the clothes are fraught with infirmities.

21. There is another aspect which is of material significance. The weapons of offence and clothes were recovered from the bushes behind the house of the deceased Somnath. The law recognizes that when a fact is discovered pursuant to the disclosure statement made by the accused, three possibilities emanate from the knowledge of the accused qua the said

discovery. One, that the accused himself would have concealed a dead-body or an incriminating material. Second, he would have seen somebody else concealing it. And the third is that, he would have been told by another person that it was so concealed.

22. We are mindful of the fact that it is for the accused to offer an explanation as to his knowledge about the concealment. However, in the facts of the case, in the backdrop of the aforesaid extremely unsatisfactory nature of the discovery, we are afraid to hold that the circumstance of recovery of the weapons of offence and the clothes, at the instance of accused no.2, can be said to have been fully and conclusively established.

(ii) **Last seen :**

23. The thrust of the submission on behalf of the prosecution was that on 27th April 2014, the deceased Somnath and accused no.2 had taken the deceased Pushpa to the forest on the pretext of collecting firewood at about 9:00 p.m. Only Somnath and accused No.2 returned. The deceased Pushpa did not return.

24. The testimony of Shevantabai (PW-2) was banked upon to sustain the circumstance of the deceased having been last seen

in the company of the deceased Somnath and accused no.2. Indeed, Shevantabai (PW-2) stood her ground during the course of cross-examination and declined to cave in to the suggestion that it was the deceased Somnath alone who had taken the deceased Pushpa to the forest. In contrast, Hemanti Somnath Chaudhari (PW-6), the sister of the deceased went on to assert that on 27th April 2014, accused no.2-Sitaram was at his home at Melanpada and had not come to their house.

25. The situation which thus emerges is that there is an inconsistency as regards the accused no.2 also having accompanied the deceased Somnath and deceased Pushpa to the forest. Both were the ordinary residents of the house of the deceased Pushpa and had the opportunity to notice the events which unfolded. In the absence of further corroboration to the claim of Shevantabai (PW-2) from any other source, a reasonable doubt arises as to whether the accused no.2 had also accompanied the deceased Somnath and Pushpa.

26. Even if we proceed on the premise that the accused no.2 did accompany the deceased Somnath and Pushpa to forest, the question of application of the principle of “last seen” and the consequences which emanate therefrom warrants consideration. It is trite law that the principle of “last seen” comes into play

where the interval 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 perpetrator of the offence is ruled out. An interval of considerable period between two events, namely the deceased being seen alive in the company of the accused and the death of the deceased, gives rise to the possibility of persons other than the accused playing a role.

27. 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

1(2007) 3 SCC 755

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, 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)

28. 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 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)

29. A useful reference can also be made to the judgment of the Supreme Court in the case of **Ganpat Singh Vs. State of Madhya Pradesh**³ on which reliance was placed by the learned counsel for the appellant. The Supreme Court expounded the formulation of law on the aspect of ‘last seen’ in the following words :

“10 Evidence that the accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event

3 (2017) 16 SCC 353

involving the death at the hands of another. The settled formulation of law is as follows :

“The last seen theory comes into play where the time gap between the point of time when the accused and 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 author of 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 accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases”

30. It would be contextually relevant to consider the aspect of the failure of the accused no.2 to offer any explanation as to the circumstances of the transaction which resulted in the death of the deceased Pushpa. An inference was drawn against the accused no.2 that the learned Additional Sessions Judge as Shevantabai (PW-2) deposed that the accused no.2 did not disclose the whereabouts of the deceased Pushpa when being inquired about. This warrants a correct understanding of the nature of the burden under section 106 of the Evidence Act, 1872.

31. 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. In the case of **Sawal Das Vs. State of Bihar** ⁴, the Supreme Court enunciated the law in clear and explicit terms, as under :-

“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.”

32. Section 106 of the Evidence Act comes into play where the prosecution succeeds in discharging its primary burden and adduces evidence which indicates that the facts, thereby proved, rest within the special knowledge of the accused. The application of the principle contained in section 106 of the Evidence Act was expounded by the Supreme Court in the case of **State of Rajasthan Vs. Kashi Ram** ⁵, in the following words :-

“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

4(1974) 4 SCC 193

5(2006) 12 SCC 254

*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.*"*

33. In view of the aforesaid exposition of the legal position, two postulates emerge. One, if the deceased is last seen alive with the accused, in proximity of the time, at which the deceased is found dead, the accused must offer an explanation as to how and under what circumstances he parted company with the deceased. Two, the failure of the accused to offer reasonable explanation in discharge of the said burden provides an additional link in the chain of circumstances proved against the accused.

34. Reverting to the facts of the case, firstly, it is pertinent to note that the very fact as to whether the accused no.2 was also last seen in the company of the deceased is in the corridor of uncertainty. As indicated above, the evidence of Shevantabai

(PW-2), on this aspect, stands contradicted by the stand of Hemanti (PW-6) and there is no other material which lends support to the claim of Shevantabai (PW-2). Secondly, the fact that accused no.2 is not an ordinary resident of the house of the deceased can also not be lost sight of. Thirdly, the contemporaneous conduct of accused No.2 also becomes relevant. There is evidence to indicate that in contradistinction to the steadfast refusal of the deceased Somnath to join the search party, the accused no.2 had joined the family members and relatives of the deceased in the search of the deceased. Fourthly, in totality of the circumstances, in absence of any other evidence, which incriminates the accused No.2, it would be rather hazardous to base the conviction on the sole circumstance of 'last seen'.

35. The upshot of the aforesaid consideration is that the prosecution has not succeeded in establishing the circumstances arrayed against the accused fully. In view of the failure of the prosecution to establish the discoveries to the hilt, the chain of circumstances gets snapped. At best, the prosecution can be said to have established the circumstance of 'last seen'. It may, again at best, lead to a suspicion. However, it is trite law that suspicion, howsoever strong, cannot take the place of legal proof. It is, thus, said that there is a long mental

distance between “may be true” and “must be true”, which separates the surmises and conjectures from conclusions based on surer evidentiary foundation.

36. For the foregoing reasons, we are of the view that the learned Additional Sessions Judge was not justified in recording a finding of guilt against accused no.2. Resultantly, the appeal deserves to be allowed and the impugned judgment of conviction and order of sentence is liable to be quashed and set aside.

37. Hence, the following order :

O R D E R

- (i) The appeal stands allowed.
- (ii) The impugned judgment of conviction and order of sentence, dated 30th October, 2018, passed by the learned Additional Sessions Judge, Nashik, in Sessions Case No.342 of 2014 for the offences punishable under sections 302 and 201 read with section 34 of the Penal Code stands quashed and set aside.
- (iii) The appellant–Sitaram Laxman Dhoom stands acquitted of the offences punishable under sections 302 and 201 read with section 34 of the Penal Code.
- (iv) The appellant is in custody. He be set at liberty forthwith, if not required to be detained in any other case.

(v) In view of the disposal of the appeal, Interim Application No.323 of 2020 taken out by the appellant, does not survive and also stands disposed of.

All concerned to act on an authenticated copy of this judgment and order.

[N. J. JAMADAR, J.]

[S. S. SHINDE, J.]