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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.184 OF 2021

Pramod @ Pappu s/o Sumersingh Roy, aged
about 29 years, occupation : labour, r/o
Dokranji, tahsil Kewlari, district Seoni
(Madhya Pradesh). **Appellant.**

:: V E R S U S ::

State of Maharashtra, through Police
Station Officer, Police Station Khaperkheda,
Tahsil Saoner, district Nagpur. **Respondent.**

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Shri D.V.Chauhan, Counsel for the Appellant.
Shri M.J.Khan, Additional Public Prosecutor for the
Respondent/State.
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CORAM : ROHIT B.DEO & URMILA JOSHI-PHALKE, JJ.
CLOSED ON : 14/12/2022
PRONOUNCED ON : 31/03/2023

JUDGMENT (Per : Urmila Joshi-Phalke, J.)

1. By this appeal, the appellant (accused) has
challenged judgment and order of conviction and sentence
dated 7.11.2020 passed by learned Additional Sessions
Judge-2, Nagpur in Sessions Trial No.11/2016 whereby
learned Judge below convicted the accused for offence
punishable under Section 302 of the Indian Penal Code and

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sentenced him to suffer imprisonment for life and to pay fine Rs.10,000/- and in default of payment of the fine amount to suffer simple imprisonment for six months. However, learned Judge below acquitted the accused of offence punishable under Section Section 201 of the Indian Penal Code.

2. The case of the prosecution as emerges from police papers and evidence recorded, in brief, can be summarized, as follows:

The accused was having live-in-relationship with a woman (deceased) and, therefore, they both came to Nagpur and were doing labour work. They were residing together as husband and wife. The accused and the deceased both were working as labourers at the construction site of one Mr.Singh at Beltarodi, Besa. On 1.9.2015, the accused left the place of work along with the deceased on a pretext that he is visiting his native place. The accused along with the deceased came at the house of his friend namely Kanhaiyya, at Dhamkaye Nagar, Jaripatka. They stayed at the house of said Kanhaiyya. As said Kanhaiyya was staying along with

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one Dharmendra Nemchand Lilhare, both went to sleep at the place of third person as the deceased and the accused stayed at their house. When they returned in the morning at their house, they found that the accused and the deceased were not in the room. They thought that both might have left their house and, therefore, they have ignored the fact that they left without informing them. On the next day, dead body of the deceased was found under new bridge of Kolar River at mouza Dahegaon. The said fact was informed to the police by one Watchman. Immediately, the police visited the alleged spot of the incident. The police have drawn the spot panchanama as well as inquest panchanama. While drawing the spot panchanama, the police seized articles like one green colour saree, two green and blue colour blouses, red colour petticoat, white colour shirt, one blue-white-black piece of shirt, one black colour brassiere and one black colour nicker, and two red colour blouse pieces. In another polythene bag, they found tobacco, comb, nokia phone, two slippers, two shoes, two mustard cards. The police also seized simple and blood stained soil. The police also noticed

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injuries on the person of the deceased and, therefore, the dead body was immediately shifted to the hospital for postmortem. After receipt of the postmortem report, it revealed that the death of the deceased is due to smothering. The First Information Report was lodged by one Subhash Babulal Guralikar who was working as a Security Guard at MSEB, Khaperkheda against an unknown person. During investigation, it revealed that prior to the incident the deceased and the accused were residing together. It further revealed that prior to the incident, the deceased and the accused were lastly seen together. At the time of the spot panchanama, mustard cards of the accused were also found along with the deceased. During the investigation, the involvement of the accused was revealed. Hence, chargesheet was filed against the accused after completion of the investigation.

3. As the offence punishable under Section 302 of the Indian penal Code is exclusively triable by the Court of Sessions, learned Judicial Magistrate First Class committed the case to the Court of Sessions for trial. The charge was

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framed against the accused vide Exhibit-6 and the accused pleaded not guilty and claimed to be tried.

4. In support the case of the prosecution, the prosecution has examined in all eight witnesses, as follows:

1. PW1 Khushal Mahadeorao Ingole, vide Exhibit-22, pancha on spot;

PW2 Gautam Naresh Shrawankar, vide Exhibit-37, labour working with the accused and the deceased;

PW3 Durgesh Neware, vide Exhibit-38, labour working with the deceased;

PW4 Sunil Namdeo Sukhdeve, vide Exhibit-39, pancha on memorandum statement and discovery panchanama;

PW5 Dharmendra Nemchand Lilhare, vide Exhibit-46, witness on last seen;

PW6 Pramod Yadav, vide Exhibit-48, the brother of the deceased;

PW7 Dinesh Murlidhar Zingare, vide Exhibit-68, pancha on Test Identification Parade; and

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PW8 Prashant Yashwant Thawre, vide Exhibit-72, Investigating Officer.

5. Besides the oral evidence, the prosecution placed reliance on following documents:

1. Chemical Analyzer's Reports Exhibits-8 and 9, 16 to 18,
2. Inquest panchanama, Exhibit-12,
3. panchanama regarding dead body identification, Exhibit-13,
4. spot panchanama, Exhibit-23,
5. seizure memo of articles found at the spot, Exhibit-24,
6. report, Exhibit-27,
7. seizure memo of clothes of deceased, Exhibit-32,
8. seizure memo of photographer of the accused, Exhibit-33,
9. seizure memo of memory card of C.C. TV Footage, Exhibit-35,
10. seizure memo of C.C. TV Footage Exhibit-35,
11. First Information Report, Exhibit-39,

12. memorandum statement of the accused, Exhibit-40,

13. discovery panchanama, Exhibit-41,

14. arrest panchanama, Exhibit-53,

15. seizure memo regarding photographs of spot, Exhibit-54,

16. CDR Details Exhibit-57,

17. postmortem report Exhibits-59 and 60,

18. test identification parade panchanama, Exhibit-69,

19. letters to Chemical Analyzer Exhibits-73 to 75,

20. letter to the Superintendent of Police of Nagpur Rural for CDR Report, Exhibit-77,

21. station diary entries, Exhibits-80 and 81.

6. After recording the evidence, the incriminating evidence is put to the accused to obtain his explanation regarding the evidence appearing against him. The defence of the accused is of total denial and of false implication.

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7. After hearing both sides, learned Judge below was pleased to convict the accused for offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life.

8. Being aggrieved and dissatisfied with the judgment and the order of the sentence and the conviction, the present appeal is preferred by the accused on the ground that learned Judge below had not considered the evidence on record which is in the nature of circumstantial evidence. The prosecution miserably failed to prove the chain of circumstances on which the prosecution placed reliance. In fact, there is absolutely no evidence to connect the accused with the alleged offence. Learned Judge below has committed a manifest error by convicting the accused on the strength of the deposition of two witnesses who claims to have seen the accused with the company of the deceased prior to five days of lodging of the First Information Report. Thus, the conviction of the accused is on surmises and conjectures. For the said reasons, as per the contention of

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the accused, the conviction and the sentence imposed upon him is liable to be set aside.

9. Heard learned counsel Shri D.V.Chauhan for the appellant/accused and learned Additional Public Prosecutor Shri M.J.Khan for the respondent/State. Also, perused the record with their able assistance.

10. Learned counsel Shri D.V.Chauhan for the accused submitted that the entire case revolves around the circumstantial evidence which is in the nature of "last seen". As per the prosecution case, the deceased and the accused were lastly seen at the house of one Kanhaiyya. Said Kanhaiyya is not examined by the prosecution. It is settled law that in "last seen theory" that dead body should be found with the close proximity of time from the last seen of the accused with the company of the deceased. In the present case, the accused was seen in the company of the deceased lastly on 1.9.2015 and the dead body was found on 5.9.2015. The prosecution further relied upon the circumstance that the deceased and the accused were live-in-relationship with each

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other and the accused had not explained when they departed from each other. Another circumstance, on which the prosecution relied upon, is that both the accused and the deceased were seen in a C.C. TV Footage. It is pertinent to note that though C.C. TV Footage are placed on record and persons, who are in authority and superintendence over the C.C. TV Units, are not examined. The evidence regarding Test Identification Parade is also not established by examining the Tahsildar who held the Test Identification Parade. Thus, the circumstantial evidence is not proved by the prosecution which unerringly points out the guilt of the accused. Hence, the accused is to be acquitted of charges levelled against him.

11. On the other hand, learned Additional Public Prosecutor Shri M.J.Khan for the State submitted that the prosecution established the chain of circumstances by adducing the evidence on "last seen" as well as the evidence in the nature of C.C. TV Footage wherein the deceased and the accused were seen together. The evidence of the brother of the deceased shows that there was live-in-relationship

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between the deceased and the accused. They both were residing together. The evidence of PW2 Gautam Shrawankar and PW3 Durgesh Neware shows that they both have seen the accused and the deceased alive together. The evidence of PW5 Dharmendra Lilhare shows that the deceased and the accused visited his room at Jaripatka and stayed there and, thereafter, the deceased was not seen by anybody and her dead body was found. The accused has not given any explanation. Thus, the circumstances on record sufficiently show that it was the accused who is responsible for the death of the deceased. Hence, no interference is called for in the impugned judgment and order of conviction.

12. After hearing both the sides, first and foremost question arises for consideration is that whether the prosecution succeeded to prove the charge levelled against the accused on the basis of circumstantial evidence.

13. Firstly, it is to be seen whether the death of the deceased is homicidal one.

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14. The postmortem report which is at Exhibit-58 is admitted by the defence. As per the postmortem report, the dead body of the deceased was brought to the hospital for postmortem examination on 5.9.2015. On examination, rigor mortis was found to be present in both lower legs and was absent in upper part of the body and upper limbs. The postmortem lividity was present over the back and buttocks. On examination, following injuries are found on the person of the deceased :

1. Lacerated wound present over the vault of skull over the left parietal region of size 5 cm x 0.5 cm, margins of wound are irregular. Bone deep.
2. Contused abrasion present over the middle of forehead, at glabella of size 0.5 cm x 0.5 cm dark red in color.
3. Multiple circular to irregular abrasions present over the left side of face over an area of 4 cm x 4 cm, varying in size from 0.5 cm x 0.3 cm to 1 cm x 1.2 cm dark red in color.
4. Abrasion present over the angle of left mandible 1 cm x 0.5 cm, dark red in color.

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5. Contused abrasion present over the left side of chin, crossing midline of size 4 cm x 0.5 cm dark red in color.

6. Contused abrasion present over the right upper lip of size 0.5 cm x 0.2 cm dark red in color.

7. Contused abrasion present over the right ala of nose of size 2 cm x 1 cm dark red in color.

8. Contused abrasion present over the chin 1 cm below the lower lip of size 1 cm x 0.5 cm dark red in color.

9. Abrasion present over the inner aspect of right lower lip of size 2 cm x 0.5 cm red in color.

10. Multiple contusions present over the inner aspect of left side of upper and lower lip of size 0.5 cm dark red in color.

11. Contusions present over the inner aspect of left upper lip of margin of size 02 cm x 0.5 cm dark red in color.

12. Contusions present over the inner aspect of left upper margin at the left angle of mouth of size 1 cm x 0.5 cm dark red in color.

13. Contusion present over the anterior aspect of neck in mid line at the level of thyroid cartilage of size 02 cm x 03 cm, bluish red in color, situated 8 cm above supra sterna notch.

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14. Contusion present over the anterior aspect of left side of neck of size 02 cm x 02 cm lateral to thyroid cartilage, bluish in color, situated 0.5 cm lateral to injury no.13.

15. Contusion present over the front of neck in mid line of size 03 cm x 02 cm, bluish red in color, situated 0.5 cm above injury no.13.

16. Contused abrasion present over the right lateral aspect of neck of size 01 cm x 0.5 cm, situated 04 cm lateral to midline, dark red in color.

17. Linear abrasion present over the right lateral aspect of neck of size 03 cm x 0.1 cm situated 0.5 cm above injury no.16, dark red in color.

18. Linear abrasion present over the left anterior aspect of neck of size 01 cm x 0.1 cm situated 0.5 cm above injury no.17, dark red in color.

19. Linear abrasion present over the left lateral aspect of neck of size 2.5 cm x 0.1 cm. situated 0.5 cm above injury no.18.

20. Linear abrasion present over the left lateral aspect of neck of size 01cm x 0.1 cm. situated 0.5 cm above injury no.19.

21. Contused abrasion present over the right lateral aspect of neck of size 2 cm x 01 cm situated 2 cm postero-lateral to injury no.16.

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22. Multiple small tiny abrasion present over the right lateral aspect of neck over an area of 02 cm x 01 cm, dark red in color.

23. Multiple crecentric abrasion present over the right lateral aspect of neck over an area of 01 cm x 01 cm of sizes varying from 1 cm x 0.1 cm to 0.1 cm x 0.1 cm.

24. Contused abrasion present over the lateral aspect of upper 1/3 of right Fore arm of size 02 cm x 01 cm, dark red in color.

25. Multiple small contused abrasion present over the anterior aspect of upper 1/3 of right forearm over an area of size 02 cm x 01 cm dark red in color.

26. Four cre-centric abrasions present over the medical aspect of right knee of size varying from 01 cm x 0.2 cm to 0.2 cm x 0.2 cm, dark red in color.

27. Contused abrasion present eh lower 1/3 of postero-lateral aspect of left thigh of size 07 cm x 1.5 cm, dark red in color.

28. Abrasion present over the anterior aspect of left wrist of size 02 cm x 0.5 cm, red in color.

29. Multiple crecentric abrasion present over area of size 05 cm x 04 cm on distal aspect of lower 1/3 of left forearm. Lower most abrasion is 03 cm above wrist joint of size varying from 0.6 cm x

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0.2 cm to 0.4 cm x 0.2 cm. margins sharp. dark red in color.

30. Abrasion present on posterior aspect of right shoulder 4 cm posterior and downwards to tip of right shoulder of size 02 cm x 0.6 cm, dark red in color.

31. Contused Abrasion present over the inner aspect of right buttock over an area of 09 cm x 6 cm of size varying from 02 cm x 01 cm to 0.5 cm x 0.5 cm, irregular shaped, dark red in color.

32. Multiple small contused abrasion present over upper part of left buttock over an area of 06 cm x 04 cm, varying in size from 01 cm x 0.5 cm to 0.5 cm x 0.5 cm, dark red in color.

33. Multiple linear abrasion present over the posterior aspect of upper 1/3 of left thigh over an area of 10 cm x 04 cm, varying in size from 02 cm x 0.1 cm to 0.5 cm x 0.1 cm, red in color.

34. Multiple linear abrasion present over the posterior aspect of upper 1/3 of left thigh over an area of 07 cm x 03 cm, varying in size from 03 cm x 0.1 cm to 0.5 cm x 0.1 cm, red in color.

35. Multiple contusions present over the posterior aspect of left knee, over an area of 07 cm x 04 cm of size varying from 04 cm x 02 cm to 01 cm x 0.1 cm, dark red in color.

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36. Contusion present over upper 1/3 of posterior aspect of left leg of size 0.3 cm x 1.5 cm, dark red in color.

37. Abrasion present over the left calf region of size 02 cm x 0.5 cm red in color.

38. Abrasion present over the posterior aspect of lower 1/3 of right thigh of size 05 cm x 02 cm, red in color.

39. Multiple irregular shaped contused abrasion present over posterior aspect of upper 2/3 of right thigh over an area of 17 cm x 09 cm, varying in size from 02 cm x 01 cm to 0.1 cm x 0.1 cm.

40. Multiple abrasions present over the medial aspect of right knee of size varying from 01 cm x 0.2 cm to 0.2 cm x 0.2 cm. Pale in color.

41. Abrasion present over the medial aspect of upper 1/3 of Right leg of size 01 cm x 0.5 cm, pale in color.

42. Multiple abrasions present over the middle of left leg of size varying from 01 cm x 0.5 cm to 0.5 cm x 0.2 cm.

43. Abrasion present over the lateral aspect of left knee of size 01 cm x 0.5 cm Injury no. 40 to injury no 43 are Peri-mortem injuries.

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15. On internal examination, Medical Officer has found underscalp hemato0ma present over left parital region over an area of size 05 cm x 3.5 cm red in colour. On examination of thorax, right lung was found adherent to anterior chest wall. Both lungs intact, congested, reddish froth oozes out, petichial hemorrhages are present over the anterio-lateral aspect of both lungs. Contusion present over left upper lobe of size 02cm x 3cms, dark bluish red in colour. The contusions present over the left lower lobes 2cms x 2cms dark red in colour. On examination, the Medical Officer opined that the injury Nos.3 to 23 are antemortem injuries and sufficient to cause death in the ordinary course of nature. The cause of the death of the deceased is death due to smothering. Admittedly, the cause of death is not challenged by the defence. Smothering is mechanical obstruction of the flow of air from the environment into the mouth and or nostrils. Smothering is form of asphyxia which is caused by closing the external respiratory orifices either by hand or by other means. Smothering can also be done by blocking up the cavities of the nose and mouth by the

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introduction of foreign substance. The smothering is also a form of strangulation effected by hand and is, therefore, often referred as a manual strangulation.

16. Besides the evidence of postmortem report, the prosecution also placed reliance on the inquest report Exhibit-12 which is also admitted by the defence. As per the inquest report, two injuries are found on the left side of the head which are external injuries. Some stains are found on both the legs. The marks are also seen on the neck of the deceased. The abrasions are seen on the right side of the neck. Thus, the evidence in the nature of postmortem report and inquest report shows that injuries are found on the person of the deceased and the death of the deceased is due to smothering. There is no other reason coming forward to show that the death of the deceased is caused as a natural death or suicidal death or accidental death. The defence has not challenged the cause of death and, therefore, the evidence on record is sufficient to show that the death of the deceased is caused which is homicidal in nature.

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17. Admittedly, the entire case of the prosecution is based on the circumstantial evidence. The law is settled regarding the circumstantial evidence that:

i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established,

(ii) the circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused,

(iii) 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 none else, and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of a guilt of the accused and such evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence.

18. In the present case, the prosecution mainly relied upon the following circumstances:

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1. the deceased and the accused were residing live-in-relationship,

2. the deceased and the accused left the construction site on which they were working on the pretext that they are living the work place to visit their native place,

3. the accused and the deceased came at Jaripatka area and resided in the room of Kanhaiyya and PW5 Dharmendra Lilhare. They stayed there overnight and left without informing anybody. The dead body of the deceased was found on 5.9.2015,

4. the accused gave a memorandum statement that he will show the place of the incident and in pursuance of the statement he led the panchas, the investigating officer, and shown the said place,

5. during investigation, C.C. TV Footage of one STD Booth was obtained wherein the accused went to call his friend with the deceased. The C.C. TV Footage from one square in front of Jaripatka Police Station was also seized wherein the accused and the deceased were seen together,

6. Test Identification Parade of the accused was carried out, and

7. the medical evidence and the Chemical Analyzer's Report and the C.C. TV Footage was copied in one memory card and sent to analysis.

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The analysis report shows that the person present in photographs appears to be related by visual analysis with possible identification to the person present in the video file.

19. To prove the alleged circumstances, regarding the deceased and the accused were together and subsequently the dead body of the deceased was found, the implicit reliance was placed on the evidence of PW2 Gautam Shrawankar, Exhibit-37 who was a labour working with the deceased and the accused at the construction site. As per his evidence, the accused and the deceased were working with him. The accused was residing along with the deceased as his wife at Beltarodi, Besa. On 1.9.2015, at about 10:00 am, the accused informed him that he is leaving to visit his native place for 2-3 days along with his wife and asked him to look after his goods. Accordingly, the accused left along with his wife. The Investigating Officer shown him the photo of the deceased and he informed the police that the person in the photograph is the wife of the accused. The evidence of PW3 Durgesh Neware is also to the extent that on 1.9.2015

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at about 10:30 am the accused left along with his wife and told him to look after his goods. Both these witnesses are cross-examined, but nothing is transpired from their cross-examination.

20. The next witness examined by the prosecution is PW5 Dharmendra Lilhare, vide Exhibit-46. He is the person who was residing along with the Kanhaiyya as a tenant at Dhamkaye Nagar, Jaripatka Nagpur. He testified that in the month of September 2015, when he returned at about 6:00 pm from work, he found that Kanhaiyya was present along with a man and a woman in the house. On enquiry, said Kanhaiyya disclosed that the man and the woman will reside in their house for one night. As the room was very small, he went to the room of his friend to sleep. He returned to his house on the next date at about 6:00 am to 7:00 am and noticed that only Kanhaiyya was present and the man and the woman were not present in the house. Said Kanhaiyya informed him that in the previous night he also went to the house of his friend Nirdosh Bawankar to sleep. In the morning, when he returned, he saw that both the man and

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the woman were not present in the house. He thought that they might have returned. Thus, the sum and substance of the evidence is only to the extent that the accused and the deceased stayed in his room and left without informing anybody. During the cross-examination, he admitted that he is not aware when the accused and the lady left the room. He is also not aware whether the woman left with the accused or any other person.

21. Thus, regarding the "last seen", only these witnesses came before the Court. It is pertinent to note that as per evidence of PW2 Gautam Shrawankar and PW3 Durgesh Neware, the accused and the deceased left the work site on 1.9.2015. As per evidence of PW5 Dharmendra Neware, a man and a woman stayed in their room for one night. He is not aware whether they both left together or separately. Admittedly, no other evidence is on record to show that the accused and the deceased left together from the room of PW5 Dharmendra.

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22. The another circumstance, on which the prosecution relied upon, is the evidence of PW1 Khushal Mahadeorao Ingole, who acted as a pancha on the spot panchanama and seizure report. As per his evidence, he was called by the police to act as a pancha at the bank of Kolar River. One dead body was found lying there. Besides, the dead body, one carry bag containing saree, shirt, a pair of chappal, shoes, blouse, mobile phone handset of Nokia company, and muster cards with names were found. The police have collected the blood stained soil and simple soil. Accordingly, the panchanama was drawn. The police have seized all articles found there. During the cross-examination, he admitted that from panchanamas Exhibits-23 and 24 it nowhere reveals that he read the contents of panchanamas or contents are read over to him. He denied the suggestion that the panchanamas were already written and he merely signed on the panchanamas.

23. The prosecution further relied upon various panchanamas like seizure of the clothes of the deceased Exhibit-32 and seizure of the photographs of the accused

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Exhibit-33. Exhibit-34 is the panchanama showing that the Investigating Officer has collected the C.C. TV Footage from one STD Booth situated at Lohapool, Nagpur. The said panchanama is also admitted by the defence. As per the said panchanama, the Investigating officer has collected the C.C TV Footage by copying the same in a memory card with the help of one Shri Uday P.Saneshwar. The panchanama further discloses that the place from which the said C.C. TV Footage is collected is Vaibhav Business Centre, Lohapool Nagpur. Exhibit-35 is the C.C. TV Footage copied by the Investigating Officer in one memory card in presence of panchas from Shivam Traders at Jaripatka with the help of Shri Uday P.Saneshwar. As per the evidence of PW8 Investigating Officer Prashant Thawre, the deceased and the accused were seen together in the C.C. TV Footage. The C.C. TV Footage from Vaibhav Business Centre at Loha Pool, Nagpur and Shivam Traders at Jaripatka, Nagpur were obtained on 23.9.2015. It is pertinent to note that as per the panchanama, the said C.C. TV Footage is copied in one memory card with the help of one Shri Uday P.Saneshwar,

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but said Uday P.Saneshwar is not examined. The panchanama nowhere discloses the date on which the deceased and the accused were seen together. The timing 3:00 pm to 4:00 pm is mentioned, but the date is not mentioned. Thus, the prosecution neither examined the person who copied the footage in memory card nor examined the panchas to prove the panchanama.

24. The evidence of the prosecution to prove the memorandum statement of the accused and the discovery of the place of the incident is on the basis of evidence of PW4 Sunil Namdeo Sukhdeve. PW4 Sunil Sukhdeve has not supported the prosecution case. He completely left the loyalty towards the prosecution to prove the contents of the memorandum statement of the accused and discovery to that effect and, therefore, the prosecution relied upon the evidence of PW8 Investigating Officer Prashant Thawre. The evidence of the Investigating Officer regarding the memorandum statement and the discovery panchanama is very cryptic in nature. He nowhere states that the accused made a memorandum statement voluntarily. His evidence is

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only to the extent that the accused gave memorandum statement that he is ready to show the place of the incident. Thus, the evidence as to the discovery of facts is very cryptic and it nowhere states that the voluntarily statement was made by the accused and in view of the statement, material information was discovered.

25. PW6 Pramod Yadav, is the brother of the deceased. His evidence is only to the extent that the deceased and the accused were residing together live-in-relationship. His sister eloped with the accused and was staying along with the accused. There is no dispute that the deceased was residing along with the accused as his wife.

26. PW8 Prashant Thawre, is the Investigating Officer, who narrated about the investigation carried out by him. As per his evidence, he received investigation of Crime No.141/2015. He visited the alleged spot of the incident and drawn the spot and the inquest panchanamas. At the spot of the incident, the articles, which were lying near the dead body of the deceased, were seized by him and, thereafter,

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the identification of the dead body was carried out under the panchanama. At the spot, he found muster cards which are seized by drawing panchanama Exhibit-24. The C.C. TV Footage, showing that the accused went to one S.T.D. Booth along with the deceased and made a phone call to his friend, was obtained by drawing panchanama Exhibit-34. Thereafter, the C.C. TV Footage from Shivam Traders situated in front of the Jaripatka Police Station, Nagpur was also obtained by drawing panchanama Exhibit-35. The C.C. TV Footage was sent for analysis and the report is at Exhibit-19. The Test Identification Parade of the accused was carried out. His further evidence shows that during the investigation it was revealed that the accused was having illicit relations with the deceased. On 4.9.2015, the accused along with the deceased went to the room of his friends Dharmendra and Kanhaiyya and, thereafter, he left the said room along with the deceased without informing his friends and the dead body of the deceased was found in the next morning. Thus, after completion of the investigation, he submitted the chargesheet against the accused. His evidence further shows

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that during the investigation, he collected the Call Detail Records (CDR) regarding the mobile phone of the accused. He also collected the analyzer's report Exhibit-19 which shows that C.C. TV Footage obtained from the Shivam Traders and the Vaibhav Business Centre was copied in a memory card and the said memory card was sent for examination. On analysis, the analyzer analyzed that total one video file dated 4.9.2015 from 15:25 hours to 15:40 hours of camera was found in Exhibit-1 which was given in enclosed DVD marked as "Annexure DVD-Cyn-113-15" and the details are given in the file mentioned below. It further shows that total two video files dated 4.9.2015 from 15:06.30 hours to 15:30:45 hours and 15:30:46 hours to 21.5.2006 of camera 05 were found in Exhibit-2 which were given in enclosed DVD marked as "Annexure DVD-CYN-113-15". The person present in the photographs provided for reference in Exhibit-3 appears to be related by visual analysis with possible identification to the persons present in the video file named as "HCVR_ch1_main 20150904152500_20150904154000.dav was found in

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Exhibit-1. The analysis report further shows that the person present in the photographs provided for reference in Exhibit-4 appears to be related visual analysis with possible identification to the person present in the video file named as "HCVR_ch1_main_20150904152500_20150904 154000.dav" was found in Exhibit-1.

27. On the basis of the oral as well as the documentary evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt.

28. On analysis of the evidence and on appreciation, following facts are relevant to appreciate the evidence:

1. it is not disputed that the deceased and the accused were living together live-in-relationship;
2. it is further not in dispute that both the deceased and the accused were working with one Singh Builder, Beltarodi, Besa;
3. as per the evidence of PW2 Gautam Shrawankar and PW3 Durgesh Neware, both the

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accused and the deceased were working along with them with one Singh Builder at Beltarodi, Besa and on 1.9.2015 at about 10:00 am they left the construction site on the pretext that they are going to their native place;

4. as per the evidence of PW5 Dharmendra Lilhare, the accused and the deceased came to their room at Dhamkaye Nagar, Jaripatka, Nagpur in the month of September 2015 at about 6:00 pm as they were acquainted with one Kanhaiyya who was residing along with him. Said Kanhaiyya is not examined by the prosecution. The evidence of PW5 Dharmendra Lilhare nowhere shows the date on which the deceased and the accused came to his room;

5. the evidence of PW5 Dharmendra Lilhare further discloses that as the deceased and the accused resided in his room, he as well as Kanhaiyya went at their friend's room to sleep

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and when they returned in the next morning, the accused and the deceased had already left without informing them;

6. on 5.9.2015 the dead body of the deceased was found under the bridge of Kolar River;

7. the First Information Report was lodged by one Subhash Babulal Guralikar against an unknown person on the basis of which the crime was registered;

8. the accused was arrested on 16.9.2015;

9. after registration of the crime, the Investigating Officer has visited the alleged spot of the incident. During the spot panchanama, the articles like clothes of the deceased, one white colour shirt, muster cards, one mobile phone of Nokia company were found near the dead body of the deceased which were seized;

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10. the clothes which were on the person of the deceased were also seized. On 17.9.2015, photograph of the accused was obtained by calling the photographer and the same was seized;

11. during the investigation, the Investigating Officer has collected the C.C. TV Footage from Vaibhav Business Centre, Loha Pool, Nagpur by drawing panchanama Exhibit-34. As per the said panchanama, the accused and the deceased were seen in the C.C. TV Footage between 15:00 pm to 16:00 pm at Loha Pool, Nagpur. The recital of the panchanama shows that the Investigating Officer has obtained the said C.C. TV Footage in one memory card by copying the same;

12. the Investigating Officer has further obtained the C.C. TV Footage from one Shivam Traders situated in front of the Jaripatka Police Station, Nagpur by copying the same in a memory card;

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13. all the incriminating articles and the C.C. TV Footage were sent for chemical analysis along with letter Exhibit-75 dated 11.5.2015. The analysis report is at Exhibit-19; and

14. the medical evidence shows that the death of the deceased is homicidal one.

29. Thus, the entire prosecution case revolves around the evidence of PW2 Gautam Shrawankar; PW3 Durgesh Neware, and PW5 Dharmendra Nemchand Lilhare, as to the fact that the accused and the deceased were lastly seen together. The only circumstance on the basis of which the accused is convicted is the last seen evidence. There is no dispute that the deceased and the accused were residing and working together. To prove the circumstance of "last seen", the prosecution has placed reliance on the evidence of PW2 Gautam Shrawankar and PW3 Durgesh Neware. From their evidence, it reveals that the deceased and the accused left Beltarodi, Besa on 1.9.2015 at about 10:00 am. The evidence of PW5 Dharmendra shows that the accused and

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the deceased both came to his room as they were acquainted with Kanhaiyya who was residing along with him. Admittedly, he has not narrated as to on which date they came to their room to reside. The dead body of the deceased was found on 5.9.2015 in early hours at about 6:00 am. As regards whereabouts the accused and the deceased from 1.9.2015 to 5.9.2015 is not on record. Learned Judge below has placed reliance on the evidence of the Investigating Officer who narrated during his chief-examination that during the investigation it was revealed to him that on 4.9.2015 the accused along with the deceased went to the room of his friends Dharmendra Lilhare and Kanhaiyya at night time and, thereafter, they left the room without informing them. Admittedly, PW5 Dharmendra Lilhare nowhere stated during his evidence before the Court that both the accused and the deceased came to his room on 4.9.2015. Learned Judge below observed in the judgment in paragraph No.32 that *"the PW8 Investigating Officer, in the cross-examination, stated that Kanhaiyya Wagare stated to him that the deceased and the accused reached his room at*

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6:30 pm and said Kanhaiyya Wagare had left the said room at 8:45 pm after taking the dinner. So, it appears that the defence has not disputed that the deceased and the accused visited the room of PW5 Dharmendra and Kanhaiyya on 4.9.2015 at about 6:30 pm, conversation was taken place between PW5 Dharmendra and the accused, all of them took the meal, the accused and the deceased stayed there for some time, the deceased was seen alive in the company of the accused at about 8:45 pm on 4.9.2015”.

30. On perusal of the evidence of PW5 Dharmendra Lilhare, it is apparent that he nowhere stated that both the deceased and the accused came to the room on 4.9.2015. His evidence also nowhere shows that there was any communication between them. Though learned Judge below has referred the evidence of Investigating Officer PW8 Prashant Thawre and observed that said Kanhaiyya told the Investigating Officer that the deceased and the accused came to his room, in fact, the Investigating Officer has only stated that during the investigation it revealed to him that both the deceased and the accused came to the room of PW5

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Dharmendra Lihare and Kanhaiyya on 4.9.2015. Admittedly, PW5 Dharmendra Lihare has not stated the date and Kanhaiyya is not examined by the prosecution.

31. Learned Judge below further placed reliance on the statement of PW5 Dharmendra Lihare recorded under Section 164 of the Code of Criminal Procedure and held that the said statement is recorded by learned Magistrate wherein PW5 Dharmendra Lihare specifically stated that on 4.9.2015 at about 6:00 pm, when he returned to his room, Kanhaiyya informed him that the accused and the deceased would stay in their room in the night.

32. Thus, the observation of learned Judge below is that the accused and the deceased were lastly seen together on the basis of statement recorded under Section 164 of the Code of Criminal Procedure which is recorded by learned Magistrate. Learned Judge below had considered the circumstance of "last seen" together on the basis of evidence of PW5 Dharmendra Lihare, who has not stated the date "4.9.2015". Learned Judge below further placed reliance on

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the statement recorded under Section 164 of the Code of Criminal Procedure wherein he has stated the date. Thus, learned Judge below has taken into consideration the statement recorded under Section 164 of the Code of Criminal Procedure to hold that the deceased and the accused were lastly seen together.

33. The statement recorded under Section 164 of the Code of Criminal Procedure can never be used as substantive evidence of truth of facts, but it may be used for contradictions and corroborations of a witness who made it. The statement made under Section 164 of the Code of Criminal Procedure can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witnesses. The law regarding statements under Section 164 of the Code of Criminal Procedure is well settled that the said statements can be used only for the purpose of contradictions under Section 145 or for corroboration under Section 157 of the Indian Evidence Act.

34. In the case of Gurjant Singh vs. State of Rajasthan reported in (AIR 1970 SC 1305) wherein the Honourable Apex Court has held that statements, recorded under Section 164 of the Code of Criminal Procedure, could not be considered as evidence, but were corroborative of what was stated earlier in the committal Court.

35. In the case of Ram Kishan Singh vs. Harmit Kaur and another reported in (AIR 1972 SC 468) wherein the Honourable Apex Court has reiterated that the statement under Section 164 of the Code of Criminal Procedure is not a substantive evidence and it can be used only to corroborate or to contradict the witnesses. The Honourable Apex Court had an occasion to deal with this aspect in the case of George and others vs. State of Kerala and another, reported in (1998)4 SCC 605 and in paragraph No.36, after reproducing the evidence recorded in the trial court, observed that from the judgment of the trial court we notice that the substantial parts of the comments are based on the statements recorded under Section 164 of the Code of Criminal Procedure and not his evidence in Court. The

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statement was treated as substantive evidence; as would be evident from the following, amongst other observations made by the learned trial Court. xxxxx (portion is reproduction of evidence in that case).

It is further observed that the trial court has ignored the fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 of the Code of Criminal Procedure cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him.

36. In view of the settled position of law, it is not permissible to use statements recorded under Section 164 of the Code of Criminal Procedure and such statements cannot be used as substantive evidence.

37. In the case of **Utpal Das and another vs. State Of West Bengal**, reported in **AIR 2010 SC 1894** also the Honourable Apex Court held that the statement recorded under Section 164 of the Code of Criminal Procedure can never be used as substantive evidence of truth of facts and

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may be used for contradictions and corroborations of witnesses who made it. The statement made under Section 164 of the Code of Criminal Procedure can be used to cross-examine the maker of it.

38. In the light of the above well settled legal position, it is not permissible to use statements recorded under Section 164 of the Code of Criminal Procedure as substantive evidence. Learned Judge below ignored the above said legal position and used the statement recorded under Section 164 of the Code of Criminal Procedure of PW5 Dharmendra Lilhare as a substantive evidence which is not permissible.

39. Thus, the observation of learned Judge below, that the circumstance of "last seen" is proved by the prosecution on the basis of the statement recorded under Section 164 of the Code of Criminal Procedure, is against the well settled legal position.

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40. Besides the evidence of PW5 Dharmendra Lilhare, whether there is any evidence regarding the "last seen", the answer is "No".

41. The evidence of PW2 Gautam Shrawankar and PW3 Durgesh Neware is only to the extent that the accused and the deceased left the work place on 1.9.2015 and the dead body of the deceased was found on 5.9.2015. There is no evidence on record to show that anybody has seen the accused and the deceased together between 1.9.2015 and 5.9.2015.

42. The theory of "last seen together" is one where two persons are seen together alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is so short, presumption as to person alive being the author of death of the other can be drawn. Time gap should be such as to rule out the possibility of somebody else committing the crime. Last seen together is one of principles which can be taken into consideration in establishing the guilt of the accused. The circumstances of

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“last seen together” not by itself and necessarily leads 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.

43. In the case of Jaswant Gir vs. State of Punjab, reported in 2005(12) SCC 438, the Honourable Apex Court observed that even assuming that the deceased had accompanied the accused in their vehicle, that circumstance by itself did not irresistible conclusion that the appellant and his companion had killed the deceased and thrown the dead body in the culvert. In Sk. Yusuf vs. State of West Bengal, reported in (2011) ALL MR (Cri) 2365, the Honourable Apex Court has reiterated its observation in State of U.P. vs. Satish, reported in (2005) 3 SCC 114 that the “last seen theory” comes into play where the time-gap between point of time when the accused and deceased were seen last alive and when the deceased dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It was held that where there is a long gap between the “last seen together” and the crime and

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there is possibility of other persons enter there, it is hazardous to rely on the theory of "last seen together". It is further held that even if time-gap is short, there is no possibility of others intervening, it is safer to look for corroboration.

44. It is well settled that criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Indian Evidence Act with regard to the circumstances under which death may have taken place.

45. Recently, the Honourable Apex Court, in Criminal Appeal No.972/2013 (Jabir and others vs. The State of

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Uttarakhand) decided on 17.1.2023, has dealt with the issue regarding the admissibility of the evidence regarding the last seen doctrine and held that it has been repeatedly emphasized by this court, that the "last seen" doctrine has limited application, where the time lag between the time the deceased was seen last with the accused, and the time of murder, is narrow; furthermore, the court should not convict an accused only on the basis of the "last seen" circumstance.

46. In the case of Rambraksh @ Jalim vs State Of Chhattisgarh, reported in (2016)12 SCC 251) the Honourable Apex Court stated, as follows:

"10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution

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has to complete the chain of circumstances to bring home the guilt of the accused.

11. In a similar fact situation this Court in the case of Krishnan v. State of Tamil (2014) 12 SCC 279, held as follows:

21. The conviction cannot be based only on circumstance of last seen together with the deceased. In Arjun Marik vs. State of Bihar (1994) Supp (2) SCC 372) "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."

22. This Court in Bodhraj vs. State (2002) 8 SCC 45) held that: "31. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible." It will be hazardous to come to a conclusion of guilt

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in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together.”

47. In the light of the above well settled legal position, admittedly, there is no evidence on record to show the deceased and the accused were “lastly seen together” prior to finding of the dead body of the deceased. If the period, between the “last seen together” and the dead body was found, is considered, the time is so long and possibility of someone else committing the offence cannot be ruled out.

48. The other evidence, on which the prosecution relied upon to prove the circumstance of “last seen together”, is, two panchanamas Exhibits-34 and 35. These both panchanamas are admitted by the defence.

As per the evidence of Investigating Officer PW8 Prashant Thawre, Examined vide Exhibit-72, during the investigation it revealed to him that the accused and the deceased together is captured by the C.C. TV Footage installed at Vaibhav Business Centre, Loha Pool, Nagpur. He obtained the C.C. TV Footage by copying the same in the

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memory card. Accordingly, the panchanama was drawn. He also obtained the C.C. TV Footage from Shivam Traders situated in front of Jaripatka Police Station, Nagpur showing the accused and the deceased together.

Admittedly, the prosecution neither has adduced the evidence by examining the owner of the Vaibhav Business Centre or the owner of the Shivam Traders. Also, the prosecution has not adduced the evidence by examining the person who had copied the said C.C. TV Footage. The said C.C. TV Footage is also not produced before the Court.

Thus, the prosecution has relied upon the electronic evidence in the nature of C.C. TV Footage.

49. The Information Technology Act was enacted by the Parliament which provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, which involve the use of alternatives to paper-based methods of communication and storage of information to facilitate the electronic filing of documents. Sections 65A and 65B of the

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Indian Penal Code are introduced by making special provisions for proving the contents of the electronic record in terms of Section 65B. The said Section which contains a non-obstante clause permitted any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

50. The Honourable Apex Court in the case of Anvar P.V vs. P.K.Basheer and others reported in (2014)10 SCC 473 wherein it is held that the Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with.

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51. The Honourable Apex Court in the case of Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal reported in (2020)7 SCC 1 held that production of certificate under Section 65B(4) is mandatory only in cases of secondary evidence that is where primary evidence is not led, original not produced.

52. Here, admittedly, in the present case, the data was copied. The person, who copied the data, is not examined and the persons, who have superintendence over the C.C. TV Units in both places i.e Vaibhav Business Centre and Shivam Traders, are not examined. The C.C. TV Footage which was directly and immediately stored in the hard drive of the computer is the original media, that was self generated and created without any human intervention. The C.C. TV Footage sent for analysis is not the primary evidence and, therefore, requires certificate under Section 65B of the Indian Evidence Act. The C.C. TV Footage was not produced before the Court for viewing the same. There is no evidence on record to show that the C.C. TV Footage has not been interpolated or tampered. The hard disc which is primary

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evidence is not produced on record. If the evidence by producing the hard disc would have been on record, it would have been established the genuineness. In fact, the evidence to prove the C.C. TV Footage itself is not produced by the prosecution. Thus, the "last seen theory", on the basis of the C.C. TV footage, is also not proved by the prosecution.

53. Here, in the present case, the time gap, between the point of time, when the accused and the deceased were seen last alive and when the deceased was found dead, itself is not proved. There is a long gap between the "last seen together" and the crime and the possibility of other persons entered into cannot be ruled out.

54. Admittedly, the accused has not explained the circumstance of last seen together. However, mere failure of the accused to explain the circumstance is not sufficient to prove the charges levelled against the accused.

55. The Honourable Apex Court in the case of S.Kaleeswaran vs. State, by the Inspector of Police Pollachi Town East Police Station, Coimbatore District, Tamil Nadu,

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reported in 2022 Live Law (SC) 903 held in paragraph No.11 that "it is well settled that if there is considerable time gap between the persons seeing together and the proximate time of the crime, the circumstances of last seen together, even if proved cannot clinchingly fasten the guilt of the accused. In paragraph No.12 it is further held that the failure of the accused, in a case based on circumstantial evidence which included "last seen together theory", to explain under Section 313 Cr.PC as to under what circumstances the victim suffered death, would also not be a ground to arrive at an irresistible conclusion that the accused were involved in the commission of the alleged crime."

56. In the present case, as observed earlier, "the theory of last seen" is not at all proved by the prosecution from which irresistible conclusion can be drawn that the deceased and the accused were lastly seen together. The analysis report Exhibit-19 is also not helpful to the prosecution to prove the "theory of last seen".

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57. Another circumstance, on which the prosecution relied upon, is the articles i.e. shoes, clothes of the accused, and muster cards which are found with the dead body of the deceased. Admittedly, the deceased and the accused were residing together live-in-relationship and, therefore, finding of these articles with the deceased cannot be incriminating circumstance against the accused. The prosecution further placed reliance on the evidence of PW4 Sunil Sukhdeve and Investigating Officer PW8 Prashant Thawre to prove the memorandum statement and discovery of the place where the alleged incident has taken place. PW4 Sunil Sukhdeve has not supported the prosecution case and the evidence of Investigating Officer PW8 Prashant Thawre nowhere shows that the accused made a voluntary statement and shown his willingness to make a statement. His evidence is only to the extent that the accused person gave a memorandum statement contending that he is ready to show the place of the incident. The discovery panchanama, as contemplated under Section 27 of the Indian Evidence Act that mere

statement that the accused led the police and the witnesses to the place, is not indicative of the information given.

58. In another judgment Subramanya vs. State of Karnataka, reported in 2022 LiveLaw (SC) 887. The Honourable Apex Court considered the aspect that how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 and held that mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. In para Nos.78 to 87 the Honourable Apex Court has discussed the legal position regarding Section 27 of the Indian Evidence Act and held that mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given. But, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to discovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the

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prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true.

59. In the light of the well settled legal position, if the evidence of pancha PW4 Sunil Sukhdev and Investigating Officer PW8 Prashant Thawre is scrutinized, their evidence nowhere shows that the accused made a voluntary statement. So, the discovery of fact regarding the place of the incident on the basis of the memorandum statement of the accused is also not proved by the prosecution on the basis of cogent and reliable evidence.

60. To prove the identification of the accused, during the Test Identification Parade, the prosecution has examined

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PW7 Dinesh Zingare, who acted as a pancha. His evidence is only to the extent that he was called as a pancha. The Tahsildar was present at the Central Jail, Nagpur. Seven persons were standing in one row. One witness identified one accused who was standing at serial No.5 in row. Admittedly, neither the Tahsildar nor the witness who identified the accused is examined by the prosecution. There is no evidence that Shekhar Dhurve, the witness, who identified the accused, has seen the accused prior to the incident. In fact, the prosecution has not adduced the evidence regarding the role of witness Shekhar Dhurve. The evidence of Investigating Officer PW8 Prashant Thawre is also silent regarding the role of this witness Shekhar Dhurve. Thus, the evidence regarding the Test Identification Parade is also not helpful to the prosecution. Moreover, the evidence regarding the Test Identification Parade is not the substantial evidence. The purpose of conducting Test Identification Parade is that persons, who claim to have seen offenders at the time of occurrence, to identify them from amongst other individuals without tutoring or aiding from any source. The

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Test Identification Parades belong to the stage of investigation of crime and there is no provision which compels the investigation agency to hold or confer a right on accused to claim a TIP. The Test Identification Parades are governed in the context by the provision of Section 162 of the Code of Criminal Procedure. The Test Identification Parades may lend corroboration to the identification of the witness in court but it is not substantive evidence. The identification of the accused in the court constitutes substantive evidence.

61. Thus, in the present case, the evidence regarding the Test Identification Parade is also not cogent not reliable. In fact, the Test Identification Parade is not proved by the prosecution.

62. Admittedly, the entire prosecution case is rested on the circumstantial evidence. The circumstantial evidence is the evidence of the relevant facts from which the existence of the facts can be inferred. 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 only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible.

63. In the present case, the entire prosecution case is rested on circumstances of last seen. 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. 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 where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible.

64. Here, in the present case, in fact, the evidence, when the deceased and the accused were lastly seen, itself is

absent. It is not in dispute that the death of the deceased is caused due to smothering which is a homicidal death. However, the prosecution failed to adduce the evidence regarding the circumstances of "last seen" corroborated by the other circumstances. Learned Judge below relied upon the statement of PW5 Dharmendra Lihare recorded under Section 164 of the Code of Criminal Procedure as a substantive evidence which is against the fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 of the Code of Criminal Procedure as substantive evidence and can be used only for the purpose of contradicting or corroborating. In view of the settled position of law, it is not permissible to use the said statement as a substantial evidence and, therefore, the conviction based on the basis of the said statement to prove the "last seen theory" deserves to be set aside. The sole reliance on the "last seen circumstance" on the basis of the said statement is not justified.

65. In view of the settled legal position of law and the discussion above, the conviction and the sentence

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imposed upon the accused by learned Judge below cannot not sustained. Hence, we pass following order:

ORDER

(1) The Criminal Appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 7.11.2020 passed by learned Additional Sessions Judge-2, Nagpur in Sessions Trial No.11/2016 is hereby quashed and set side.

(3) The appellant/accused is acquitted of offence punishable under Section 302 of the Indian Penal Code.

(4) The appellant/accused be released forthwith, if he is not required in any other case.

The criminal appeal is **allowed** and **disposed** of accordingly.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B.DEO, J.)

!! BrWankhede !!

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