

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.78 of 1997
Arising out of P.S. Case No.-50 Year-1992 Thana- Vaishali District- Vaishali

1. Jai Prakash Rai, son of Sri Mangal Rai, resident of village Bhagwanpur Ratti, P.S. Vaishali, Dist. Vaishali.
2. Sakaldeep Rai, son of Sri Raghu Rai, resident of village Sararia, P.S. Lalganj, Dist. Vaishali. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellants	:	Mr. Surendra Kumar Singh, Sr. Advocate
	:	Mr. K.K. Tiwary, Advocate
	:	Mr. Lokesh, Advocate
	:	Mr. Ashok Kumar Sinha No 2, Advocate
	:	Mr. Praveen prakash, Advocate
	:	Mr. Shasank Sinha, Advocate
For the Respondent	:	Mr. Dilip Kumar Sinha, Addl.PP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 03-07-2024

The present appeal is arising out of the judgment of conviction dated 17th day of February, 1997 and the order of sentence dated 17.02.1997 (hereinafter referred to as the ‘impugned judgment and order’ respectively) passed by the learned 4th Additional Sessions Judge, Vaishali at Hajipur (hereinafter referred to as the ‘learned trial court’) in Sessions Trial No. 221 of 1996 arising out of Vaishali P.S. Case No. 50 of 1992. By the impugned judgment and order, the appellants have been convicted for the offences under Sections 364, 302 and 201/34 of

the Indian Penal Code (in short 'IPC') and have been ordered to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 364 IPC and rigorous imprisonment for life under Section 302 IPC respectively. There is no separate sentence for the offence punishable under Section 201/34 IPC.

Prosecution Case

2. The prosecution case is based on a written report submitted by the Dafadar of Beat No. 4, resident of Village-Kamtauliya, Post-Vaishali, District-Vaishali on 26.05.1992 to the Officer-Incharge of Vaishali Police Station at Hajipur. The Dafadar, namely, Majkur Alam (PW-7) informed in his written report that the Chaukidar Vashisht Rai had come to him and informed that an unknown person has been murdered and the dead body of that unknown person has been concealed by some unknown person in the siphon of state boring at Tola Hamraha in Village-Bhagwanpur Rati, the said body had been concealed by putting soil over the body. PW-7 has stated that he went to the said place and found that large number of persons had assembled there, he saw portion of the leg of the deceased inside siphon of the boring, therefore, he requested the Officer-Incharge of Police Station to take appropriate action.

3. Upon investigation, the police submitted a chargesheet against two persons, namely, Jai Prakash Rai (appellant no. 1) who died during pendency of the appeal and Sakaldeep Rai (appellant no. 2) in respect of whom the present appeal survives, for the offences under Sections 364, 302 and 201/34 IPC. The investigation revealed that both the accused had abducted Chaturbhuj Rai in the third week of April 1992 in order to commit his murder, they committed murder of Chaturbhuj Rai and with an intention to save themselves from the Penal action, they threw the dead body in the siphon of state boring at Bhagwanpur Rati Tola within the jurisdiction of the Vaishali Police Station.

4. After submission of the chargesheet, learned Magistrate took cognizance of the offences as stated above and on finding that the accused persons are liable to be tried in the sessions triable offences, the records were committed to the court of sessions. After committal proceeding, charges were framed against both the accused, they denied the charges and claimed to be tried whereafter the learned trial court proceeded with the trial.

5. It would appear from the records of the learned trial court that in order to prove the guilt of the accused persons beyond all reasonable doubts, the prosecution examined as many as 16

witnesses on its behalf and four documentary evidences were marked as exhibits such as Exhibits ‘1’, ‘1/1’, ‘1/2’, ‘2’, ‘1/3’, ‘3’ and ‘4’. The details of the witnesses produced on behalf of the prosecution and the exhibits marked on their behalf in course of trial are being shown hereunder in tabular form:-

List of exhibits:-

Exhibits	Description of documents/articles
Ext ‘1’	Signature of Informant on Fardbeyan
Ext ‘1/1’	Signature of Suraj Rai on Inquest Report (carbon copy)
Ext ‘1/2’	Signature of Dr. Praveen Kr. On P-14
Ext ‘2’	Postmortem report
Exhibit ‘1/3’	Signature of Dr. Amarnath Jha on P.M.
Exhibit ‘3’	Formal FIR
Exhibit ‘4’	Inquest report

List of Prosecution Witnesses:-

P.W.-1	Jalandhar Rai @ Jai Nandan Rai
P.W.-2	Ram Ekwai Rai
P.W.-3	Fudin Rai @ Kuldeep Rai
P.W.-4	Maheshwar Bhagat
P.W.-5	Bidya Nand Bhagat
P.W.-6	Rampriit Rai
P.W.-7	Manjkur
P.W.-8	Raghu Rai
P.W.-9	Jagarnath Rai
P.W.-10	Suraj Rai
P.W.-11	Usha Devi @ Mina Devi
P.W.-12	Dr. Pravin Kumar
P.W.-13	Dr. Amarnath Jha
P.W.-14	Janak Singh
P.W.-15	Bhageshwari Devi
P.W.-16	Brahamdeo Rai

6. After closure of the prosecution evidences, the statement of the accused persons were recorded under Section 313 of the Code of Criminal Procedure (in short 'CrPC'), they pleaded innocence and claimed that they would submit their written statement in defence.

7. On behalf of the defence neither any oral nor any documentary evidence could be produced.

Findings of the Learned Trial Court

8. Upon analysis of the evidences available on the record, both oral as well as documentary, the learned trial court concluded that the entire prosecution case is two-fold, one on the point of abduction of the deceased and the other as to murder of the deceased by the accused persons and recovery of the dead body along with clothes and money bag which were the source of identification of the dead body. The learned trial court held that on the point of abduction of the deceased, PW-4, PW-5, PW-11, PW-15 and PW-16 have supported the prosecution case. It has been further observed that although some of the witnesses have been declared hostile in this case and some has been tendered for cross-examination but the most competent witness among all would be the inmates of the house of the deceased who had occasion to see

that the accused persons had abducted the deceased and the deceased had accompanied them to see the girl for marriage of her younger brother Bajrangi. The learned trial court found that the independent witnesses such as Maheshwar Bhagat (PW-4) and Bidya Nand Bhagat (PW-5), who are the co-villagers of the deceased, both have fully supported the prosecution case in their evidence. Usha Devi @ Mina Devi (PW-11) who is the wife of the deceased, Bhagirat Devi (PW-15), the mother of the deceased and Brahmdev Rai (PW-16) being father of the deceased are the other material witnesses who have fully supported the fact of abduction by the accused persons. The learned trial court, therefore, held that the prosecution has proved the charge under Section 364 IPC against the accused persons.

9. Similarly, as regards the charge under Section 302 IPC, the learned trial court held that it is to be proved by circumstantial evidences. It has been found on the basis of the evidences that after a month of the alleged occurrence, one dead body of unknown was recovered from the siphon of the state boring in Village-Bhagwanpur Rati. This is the village of accused Jai Prakash Rai (dead). The learned trial court noticed that in the evidence of the witnesses including the Doctor and the I.O., it has come that the dead body was highly decomposed and that was not

identifiable and the trunk of the dead body was separated from the other part of the body but then it has also come in the evidence that on the dead body, there were shirt, pant, underwear, money bag and diary and from these articles, the wife of the deceased and other witnesses identified the dead body of the deceased Chaturbhuj Rai. Referring to the evidence of the Doctor (PW-12), the learned trial court observed that PW-12 has stated in his evidence that pant was also found with the dead body which was not mentioned in the inquest report and a money bag was found in the back pocket of the pant and the money bag containing currency notes of Rs.825/- of different denominations which were handed over to the accompanying constable with the *post mortem* report. The I.O. (PW-14) has stated that during the course of investigation, along with the *post mortem*, he had received pant and money bag containing Rs.825/-.

Submissions on behalf of the Appellant No. 2

10. Learned senior counsel for the appellant no. 2 submits that the prosecution case has some inherent shortcomings and it would appear from a close reading of the depositions of the prosecution witnesses that while they have talked about the presence of the appellant no. 2 with appellant no. 1 in the village of the deceased for purpose of a talk of marriage with the younger

brother of the deceased, none of the prosecution witnesses has attributed any motive to the appellant no. 2. It is submitted that while the prosecution witnesses have stated in course of evidence that the deceased Chaturbhuj Rai had a land dispute with his neighbor Rajdeo Rai and there was a case also in this regard but for last few days, they were on talking terms and Jai Prakash Rai (the appellant no. 1) and this appellant both had visited the house of the deceased for purpose of marriage of the sister of this appellant with the younger brother of the deceased. It is submitted that this statement of the prosecution witnesses, particularly that of the wife of the deceased who has deposed as PW-11 that on 17.04.1992 in fact, both the appellants had taken breakfast in the house of the deceased whereafter they had left with the deceased on a motorcycle to see the girl would show that both the parties were ultimately maintaining good relationship so much so that despite the fact that Jai Prakash Rai, happened to be the devar of sister of Rajdeo Rai, a marriage negotiation was going on with him for the marriage between the sister of this appellant and the younger brother of the deceased.

11. It is submitted that in a case of circumstantial evidence, the motive is an important aspect which is required to be proved to bring home the guilt of the accused.

12. Learned senior counsel submits that the prosecution case rests on the “last seen theory” and circumstantial evidences. The question would be as to whether in absence of a definite evidence to conclude that the appellant no. 2 would be responsible for the murder of Chaturbhuj Rai, he may be held guilty of committing murder even as the time gap between the last seen and the recovery of the dead body is long.

13. Learned senior counsel submits that on perusal of the evidence on record, it would appear that in this case, PW-1, PW-6 and PW-8 have been declared hostile. PW-2, PW-3 and PW-9 are tendered witnesses. The Dafadar, who is the informant of the case, is PW-7 and Suraj Rai in whose presence the dead body has been recovered is PW-10. The two doctors, namely, Dr. Praveen Kumar and Dr. Amarnath Jha (PW-12 and PW-13 respectively). Janak Singh, the I.O of the case is PW-14. Usha Devi @ Mina Devi (PW-11) is the wife of the deceased, Bhagirath Devi (PW-15), the mother of the deceased and Brahmdev Rai (PW-16), the father of the deceased. Out of these witnesses, PW-4, PW-5, PW-11, PW-15 and PW-16 are the material witnesses. While the wife of the deceased (PW-11) has not identified the dead body of her husband (refer paragraph ‘13’ of her deposition), it is PW-4 and

PW-5 who claimed to have identified the dead body of Chaturbhuj Rai.

14. Learned senior counsel submits that the prosecution witnesses have though stated that they had seen the deceased going with the accused persons on 17.04.1992 on motorcycle to show the girl and Rajdeo had also gone with them on an another motorcycle and Chaturbhuj Rai did not return thereafter, the fact remains that the prosecution did not lodge any Sanha much less any FIR raising any doubt/suspicion against the accused persons. Moreover, Rajdeo was not charge-sheeted after investigation and even in course of trial though the prosecution witnesses have stated about the prior enmity with Rajdeo Rai and his relationship with the accused persons particularly appellant no. 1, no effort was taken to get said Rajdeo Rai summoned under Section 319 CrPC in course of trial.

15. It is submitted that although the father of the deceased (PW-16) has stated in his deposition that a Sanha was given on 04.05.1992 but Darogjee did not take any action and then he claimed to have written to the Superintendent of Police, Muzaffarpur also on 21.05.1992 but in course of trial, the said written application sent to the SP Muzaffarpur could not be produced and exhibited.

16. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Sharad Birdhichand vs. State of Maharashtra** reported in **AIR 1984 SC 1622** (paragraphs '151' '152' and '153'), learned senior counsel submits that it has been categorically held by the Hon'ble Supreme Court that in a case of circumstantial evidence, the various links in the chain of evidence led by the prosecution must be satisfactorily proved and the said circumstances must point to the guilt of the accused with reasonable definiteness and further that the circumstance is to be in proximity to the time and situation. It is pointed out that the Hon'ble Supreme Court has referred another judgment of the Hon'ble Supreme Court in the case of **Hanumant vs. State of Madhya Pradesh** reported in **AIR 1952 SC 343** which is said to be the most fundamental and basic decision of the Hon'ble Apex Court. It is submitted that the Hon'ble Apex Court has further reiterated the observations of the Court in the case of **Shivaji Sahabrao Bobade and Anr. vs. State of Maharashtra** reported in **(1973) 2 SCC 793** which lays down the five golden principles to constitute the panchsheel of the proof of a case based on circumstantial evidence.

17. Further reliance has been placed on the judgment of the Hon'ble Apex Court in the case of **Kanhaiya Lal vs. State of**

Rajasthan reported in **(2014) 4 SCC 715**. Paragraphs ‘8’, ‘11’, ‘12’ and ‘15’ of the judgment has been placed before this Court to submit that the “last seen theory” cannot be taken as a solitary basis for the conviction of the appellant. There must be something more, establishing connectivity between the accused and the crime.

18. Learned senior counsel has further relied upon the judgment of the Hon’ble Supreme Court in the case of **R. Sreenivasa vs. State of Karnataka** reported in **AIR 2023 SC 4301** wherein the Hon’ble Supreme Court was considering a case in which the deceased was missing for more than 2 days yet neither his wife nor his brother reported that his brother is missing. The Hon’ble Supreme Court found that the dead body of the deceased was recovered after three days. This gap between the time when the deceased had allegedly left in the truck and the recovery of the body was held not so small to draw an inference against the appellant in the said case. On the strength of this judgment, learned senior counsel submits that in the present case, the deceased Chaturbhuj Rai left his house on 17.04.1992. It has come in evidence that after 2-3 days only when the son of PW-15 did not return, her husband had gone to Balka village but he was told that her son had already gone (paragraph ‘5’ of her

deposition). In fact, PW-15 has stated in her deposition that her family had no quarrel with Rajdeo Rai on account of any land dispute and the deceased had social relationship. It is, thus, submitted that on this point, the prosecution witnesses are not consistent and the evidence of PW-11 and that of PW-15 would in fact be opposite to each other. In such circumstance, when there is no iota of evidence that this appellant no. 2 had gone to village Bhagwanpur Rati with the appellant no. 1 and the deceased and there being no evidence that he was seen in the village Bhagwanpur Rati or near the place from where the dead body was recovered, considering the time gap, no connectivity of the appellant no. 2 may be found with the alleged murder of Chaturbhuj Rai.

19. It is, thus, submitted that the learned trial court has committed an error in proper appreciation of the evidences on the record and has convicted the appellant no. 2 without there being cogent materials to prove the guilt of the appellant no. 2 beyond all shadow of doubt. In his submissions, the impugned judgment and order of the learned trial court are liable to be set aside.

Submissions on behalf of the State

20. Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the State has opposed the submissions of Mr.

Surendra Kumar Singh, learned senior counsel for the appellant no. 2. It is submitted that the prosecution witnesses have proved beyond all reasonable doubts that on 17.04.1992, the appellant no. 2 was accompanying the deceased on the motorcycle which was being driven by the appellant no. 1 (since deceased). In this regard, the evidence of the wife of the deceased (PW-11) would be important to take note of. She has stated that both the appellants and Rajdeo had come to the house of the deceased for purpose of a talk of marriage between the *bhagini* of Jai Prakash Rai (appellant no. 1) and the *devar* of PW-11, namely, Bajrangi. They had stayed overnight and her husband had gone with them to see the girl but he did not return.

21. Learned Additional Public Prosecutor for the State submits that the motive behind the alleged occurrence of murder is the prior enmity of the deceased with Rajdeo Rai as these appellants were related to Rajdeo Rai but unfortunately, because of the poor quality of investigation, the I.O did not submit a charge-sheet against Rajdeo Rai and this aspect of the matter was completely missed out.

22. Learned Additional Public Prosecutor for the State submits that the dead body was found in the village Bhagwanpur Rati which is the village of the appellant no. 1. According to him,

this is a very strong circumstance suggesting that the deceased was taken to village Bhagwanpur Rati in the name of seeing the girl for marriage purpose where he was killed and there his dead body was concealed in the siphon of the state boring. Learned Additional Public Prosecutor submits that the *post mortem* report of the deceased has been proved by Dr. Praveen Kumar (PW-12) who has found that the time elapsed since death would be more than a month. The *post mortem* report (Exhibit '2') has been referred to, to demonstrate that the dead body was badly decomposed and bonny injuries were present suggesting that the deceased was subjected to the assault by sharp piercing weapon. It is submitted that the presence of appellant no. 2 with the appellant no. 1 and then leaving together with him and taking away the deceased on the motorcycle having been proved by the prosecution witnesses, the subsequent circumstance of the recovery of the dead body from the village-Bhagwanpur Rati would complete chain of criminological events to prove the guilt of the appellant no. 2 beyond all reasonable doubts.

23. It is further submitted that PW-16 has stated in his evidence that he had submitted a request in the police station to record a Sanha, however, he did not remember the month and date thereof. He has stated in his evidence that he had submitted an

application to the S.P. and the copy of the said application was given to Darogajee. This statement of PW-16 explains the delay in lodging of the FIR.

24. It is submitted that so far as the judgments of the Hon'ble Supreme Court on which reliance have been placed by the learned Senior Counsel for the appellant no. 2 are concerned, those have been rendered in their own facts and circumstances of the case. So far as the facts of the present case are concerned, according to him, it is not only that the 'last seen' has been proved but more than that has been proved by the prosecution showing the guilt of the appellant no. 2 beyond all reasonable doubts.

Consideration

25. We have heard learned senior counsel for the appellant no. 2 and learned Additional Public Prosecutor for the State as also perused the trial court's records. On careful analysis of the prosecution evidences, it is found that the prosecution has been able to prove that the deceased appellant no. 1, namely, Jai Prakash Rai and this appellant had come to the house of the deceased to discuss the marriage proposal of the *bhagini* of appellant no. 1 with the younger brother of the deceased. In this regard, the evidence of PW-11, PW-15 and PW-16 who are the wife, mother and father respectively of the deceased are wholly

reliable. In their cross-examination, the defence could not take out any contradiction on this issue from these witnesses.

26. We further find that so far as the prosecution case that the deceased had left with appellant no. 1 Jai Prakash Rai and this appellant on the same motorcycle and Rajdeo had also gone with another motorcycle have been proved, therefore, so far as that particular date i.e. 17.04.1992 is concerned, on that date, the deceased, appellant no. 1, the appellant no. 2 and Rajdeo Rai all had gone together to see the girl. According to PW-15, only after 2-3 days, when Chaturbhuj Rai did not return, her husband had gone to village Balka to find out his whereabouts. She has stated in paragraph '2' of her deposition that Rajdeo Rai returned here after 4-5 days and on query made from him about Chaturbhuj Rai, he told PW-15 that he is not aware of his whereabouts, thereafter, inquiry was made at the place of this appellant on which this appellant told that Chaturbhuj Rai had gone after seeing the girl.

27. From this statement of PW-15, it is evident that only after 4-5 days from 17.04.1992, the family members of the deceased Chaturbhuj Rai were not able to get any information about him but there is no evidence on the record to show that any significant step was taken by the wife, mother and father of the deceased to lodge a complaint regarding missing of Chaturbhuj

Rai and suspicion, if any, against this appellant. Even if for argument sake, it is accepted that PW-15 had gone to Karja Police Station on 04.05.1992 to submit a Sanha, it was only after about 20 days. The statement of PW-15 that she had gone to submit Sanha in Karja Police Station on 04.05.1992 but Darogajee did not take any action in the matter is not wholly reliable because her subsequent statement that on 21.05.1992, she had given a written application to the Superintendent of Police, Muzaffarpur in this regard has not been proved even as the copy of the said written application and the proof of submission thereof in the office of Superintendent of Police, Muzaffarpur could not be brought in evidence in course of trial.

28. This Court further finds that in his cross-examination, Brahmdev Rai (PW-16) who is the father of the deceased has stated about the land dispute with Rajdeo Rai but contrary to his claim of land dispute, his wife who is the mother of the deceased and has deposed as PW-15 has stated in paragraph '6' of her deposition that there was no land dispute and quarrel between her family and that of Rajdeo Rai. We are of the considered opinion that in this case, the prosecution is not able to prove the motive behind the occurrence that too the motive against appellant no. 2.

29. We further find from the materials on the record that there is no iota of evidence to connect all the circumstances of this case with the appellant no. 2. There is no evidence that the deceased had visited the village of appellant no. 2. The fact that the dead body has been recovered from Village-Bhagwanpur Rati is one of the circumstances which would have at best indicated about the presence of the deceased in the said village of which the appellant no. 1 is the resident.

30. In the case of **Sharad Birdhichand** (supra) , the Hon'ble Supreme Court has observed in paragraphs '151', '152' and '153' as under:-

“**151.** Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh, 1952 SCR 1091 : (AIR 1952 SC 343). This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v. State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra) :

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so

established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

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

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

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

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

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

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

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

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

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

31. In the case of **Kanhaiya Lal** (supra), while dealing with a case of “last seen theory”, the Hon’ble Supreme Court observed in paragraphs ‘11’, ‘12’ and ‘15’ as under:-

“**11.** The primary, if not the solitary basis of the conviction of the appellant is on the theory of last seen, as the deceased Kala along with accused Kanhaiya Lal visited the house of PW 4 Hurma at 9.00 p.m. on 31-8-2003. PW 4 Hurma did not fully support the prosecution case and was declared hostile. In his examination-in-chief he has stated that on the occurrence night he returned home at 8.00 p.m. and at about 9.00 p.m. accused Kanhaiya Lal and Kala came to his house and demanded daru and he gave one bottle and received a sum of Rs 15 from accused Kanhaiya Lal and they returned together and the next day morning the wife of Kala, PW 10 Shantibai came and inquired from him about her husband Kala and he told her about the visit of Kala with accused Kanhaiya Lal to his house the previous night. It is the testimony of PW 10 Shantibai that her husband Kala did not return home on the night of the occurrence and in the morning she went to the house of PW 4 Hurma and inquired and came to know from him about the visit of

her husband along with accused Kanhaiya Lal to his house in the night. Though PW 4 Hurma was treated as a hostile witness, the above testimony of him is corroborated by the testimony of PW 10 Shantibai.

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

15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh v. State of Rajasthan*² .”

32. In the case of **R. Sreenivasa** (supra) as discussed above, the Hon’ble Supreme Court found that a time gap of three days from the date on which the respondents were seen last with the deceased was not so small to draw inference against the appellants. The Hon’ble Supreme Court applied the judgment of **Kanhaiya Lal** (supra) and held in the facts of the said case that in

2. (2010) 15 SCC 588 : (2012) 4 SCC (Cri) 767

the absence of definite evidence that the appellants and the deceased were last seen together and when the time gap is long, it would be dangerous to come to a conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. It has been held that where the time gap is long, it would be unsafe to base conviction on the “last seen theory”. It is safer to look for corroboration from other circumstances and evidence adduced by the prosecution.

33. In this case, we have though found that Chaturbhuj Rai had left in the company of Jai Prakash (deceased appellant no. 1), this appellant no. 2 and Rajdeo but did not return, in normal course, in view of Section 106 of the Evidence Act, the burden of proof would have shifted upon the persons with whom Chaturbhuj Rai had left to see the girl but the fact is that Rajdeo was not made accused in this case. Rajdeo had disclosed PW-16 that after seeing the girl, Chaturbhuj had left for his village. There is no evidence that after seeing the girl, Chaturbhuj had left for his village in the company of this appellant no. 2, the evidence on the record would show that the time gap is of about a month, the prosecution has not established that appellant no. 2 had been seen in village-Bhagwanpur Rati or near about the siphon of the state boring. There is no iota of evidence to this effect. Unfortunately, the link

showing the circumstances under which the deceased reached village-Bhagwanpur Rati, the persons who were with him and in particular the presence of the appellant no. 2 in village-Bhagwanpur Rati could not be proved. As stated above, in absence of there being any motive established against appellant no. 2 and in the missing link of the chain of criminological events, in our opinion, it would not be safe to convict appellant no. 2 for the offence under Sections 364, 302 and 201/34 IPC.

34. We are, therefore, of the view that the appellant no. 2 deserves the benefit of doubt. Accordingly, the impugned judgment and order are set aside. The appellant no. 2 is acquitted of the charges under Sections 364, 302 and 201/34 IPC giving him benefit of doubt. Since he is on bail during pendency of the appeal, he is discharged from the liability of the bail bonds.

35. This appeal is allowed.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

SUSHMA2/ Raj

AFR/NAFR	
CAV DATE	
Uploading Date	11.07.2024
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