

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.862 of 2013**

Arising Out of PS. Case No.-95 Year-2011 Thana- DEV District- Aurangabad

Manoj Bhuiyan Son of Karu Bhuiyan Resident of Village-Berahni, P.S.-Deo,
District-Aurangabad.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant : Ms. Smiti Bharti, *Amicus Curiae*
For the State : Mr. Sujit Kumar Singh, APP

**CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)**

Date : 14-09-2023

This appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code”) against the judgment of conviction dated 01.06.2013 and order of sentence dated 07.06.2013, passed by learned Adhoc Additional Sessions Judge-V, Aurangabad (Bihar) in Sessions Trial No.350 of 2011/350(A) of 2011, arising out of Deo P.S. Case No. 95 of 2011, whereby the concerned Trial Court has convicted the sole appellant for the offences punishable under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life.

2. The prosecution story, in brief, is as under:

The informant, namely, Titarshaniya Bhuini gave her



fardebayan on 22.09.2011 at 06:55 a.m. recorded by Shri Suresh Kumar Ram, SHO, Deo Police Station stating therein that in the night of 21.09.2011, her husband after taking meal was sleeping in the house. In the meantime, appellant Manoj Bhuiyan, Son of Karu Bhuiyan came and knocked the door. Thereafter the appellant entered into the house of the informant and took away the husband of the informant with him. It is further alleged that the husband of the informant did not return in the night and the informant heard in the morning that her husband has been killed. The informant went to the place of occurrence and found the dead body of her husband at village Berdhni Bhuiyan Bigha at Deo-Dhibara road.

3. After registration of the FIR, the Investigating Officer carried out the investigation. During course of investigation, he recorded the statement of witnesses. The dead body of the deceased was sent for *post mortem*. Inquest *Panchnama* was also prepared before sending the dead body for *post mortem*. After investigation was over, the Investigating Officer filed charge-sheet against the accused before the concerned Magistrate Court. As the case was exclusively triable by Court of Sessions, the concerned Magistrate committed the same to the Sessions Court where the same was registered as Sessions Trial No.350 of 2011/350(A) of 2011.

4. During course of trial, the prosecution has



examined seven witnesses, namely, PW-1 Dukhi Bhuiyan, PW-2 Golki Devi, PW-3 Nanhak Bhuiyan, PW-4 Rajendra Bhuiyan, PW-5 Tetarsaniya Bhuiyan, PW-6 Ram Bhajan Chaudhary and PW-7 Suresh Kumar Ram and also produced documentary evidence. After the evidence of the prosecution was over, further statement of the appellants-accused was recorded under Section 313 of the Code. The Trial Court, after considering the documentary as well as oral evidence produced by the prosecution, passed the impugned order of conviction as observed hereinabove. The sole appellant-convict has, therefore, filed the present appeal.

5. At this stage, it is relevant to note that on 19.07.2019 this Court passed the following order in the present matter:

“On repeated call, none appeared on behalf of appellant. Sri Ajay Mishra, learned Addl. Public Prosecutor is present.

Put up this appeal on 22nd of this month, with an indication that if on next date, again no one appears on behalf of appellant, the Court may propose to request any counsel to assist the Court as *Amicus Curiae*, considering the fact that the appeal is of the year 2013 and as such, it would not be appropriate to defer further hearing.”

6. Today when the matter was called out, learned Advocate Mr. Kamendra Prasad Singh was present. The learned Advocate submitted that though he had filed appearance on behalf of the appellant, but no objection from him has been obtained on



behalf of the appellant long back. Therefore, he is no longer appearing in this appeal. As observed hereinabove, the appeal is of the year 2013 and the appellant-convict is in jail since September, 2011. This Court, therefore, has no option but to appoint *Amicus Curiae* to assist the Court. We, therefore, requested Ms. Smiti Bharti, Advocate, to assist the Court and she was appointed as an *Amicus Curiae* in the instant appeal.

7. We have heard the arguments of Ms. Smiti Bharti, learned *Amicus Curiae* for the appellant and Mr. Sujit Kumar Singh, learned APP for the respondent-State.

8. Learned *Amicus Curiae* appearing for the appellant Manoj Bhuiyan has mainly contended that in the present case, there is no eye-witness to the incident in question and case of the prosecution is based on circumstantial evidence. It is submitted that only the informant, who is wife of the deceased, i.e., PW-5, has stated that the appellant herein came to her residence and knocked the door and thereafter took the husband of the informant with him and on the next day, dead body of the husband of the informant was found. Only on the aforesaid basis, the Trial Court has recorded the order of conviction against the appellant though there is no other connecting material produced by the prosecution before the Trial Court. It is also submitted that PW-1 and PW-2 have turned hostile and they have not supported the case of the



prosecution whereas PW-3 has put his thumb impression on the FIR and on the inquest report. However, the said witness is not an eye-witness to the incident in question. It is further submitted that PW-6, the doctor has also stated in his cross-examination that by falling heavy tree branch over neck the injury sustained by the deceased could be possible. It is further submitted that even PW-7, the Investigating Officer, has admitted during cross-examination that there is no eye-witness to the incident and he had not found any blood or mark of violence at the place of occurrence. Thus, learned *Amicus Curiae* appearing on behalf of the appellant submitted that the prosecution has failed to prove the case against the appellant-accused beyond reasonable doubt. It is contended, at this stage, that in case of circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn, should be fully established and there must be a chain of evidence so complete as not to leave any reasonable ground for a 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.

9. Learned *Amicus Curiae* for the appellant has placed reliance upon the various decisions rendered by the Hon'ble Supreme Court in the cases of **Sharad Birdhichand Sarda v. State of Maharashtra**, reported in AIR 1984 SC 1622, **Anjan Kumar Sarma Vs. State of Assam**, reported in (2017) 14



SCC 359, Ravi Vs. State of Karnataka, reported in **(2018) 16 SCC 102** and **Reena Hazarika Vs. State of Assam**, reported in **(2019) 3 SCC 289**. Learned *Amicus Curiae*, therefore, requested that impugned order be quashed and set aside and the instant appeal be allowed.

10. On the other hand, learned APP has opposed this appeal by contending that this is a case of circumstantial evidence in which the prosecution has proved that the deceased was lastly seen in company with the appellant-accused. The said fact is established by the prosecution by deposition of PW-5, Tetarsaniya Bhuiny, i.e., the first informant and thereafter the dead body of the deceased was found on the next day. Thus, though there is no eye-witness to the incident in question, but there is ample evidence produced by the prosecution before the Trial Court from which it is proved that appellant-accused has killed the deceased. Learned APP, therefore, urged that the instant appeal be dismissed.

11. We have considered the submissions canvassed by learned counsel appearing for the parties. We also perused the entire evidence produced by the prosecution before the Trial Court. It would emerge from the record that PW-1 Dukhi Bhuiyan and PW-2 Golki Devi have turned hostile and they have not supported the case of the prosecution.

12. PW-3 Nanhak Bhuiyan has stated in his



examination-in-chief that he has put his thumb impression on FIR as well as on inquest report. The appellant killed the deceased by taking him into his house and deceased was *Ojha* (exorcist) and, therefore, he has been killed.

13. PW-4 Rajendra Bhuiyan has stated in his examination-in-chief that he is also not an eye-witness to the occurrence in question. The said witness has also put his thumb impression on the inquest report. The said witness is relative of the deceased. He has stated about the motive of commission of the crime by stating that the wife of the appellant-accused was not well and, therefore, the accused was saying that Mithu Bhuiyan practiced black magic on his wife and, therefore, he has killed the deceased.

14. PW-5 Tetarsaniya Bhuiny has lodged the FIR in which she had given the name of the appellant. During her deposition before the Court, PW-5 has stated in her examination-in-chief that occurrence took place 1½ years ago. She further stated that on that day there was festival of *Jiutiya* (a local festival) and she was in her house with her husband (deceased). At about 09:00 to 10:00 p.m. in the night, occurrence took place. *Dhibri* (pot lamp) was burning. It is deposed that Manoj Bhuiyan (appellant) came and said to open the door and she opened the door. Manoj entered into the house. I identified him in the light of



Dhibri. The appellant took her husband despite my protest. My husband did not return in the night. In paragraph-2 this witness stated that in the morning she came to know that her husband Mithu was killed. It is further stated that after hearing the news, she went to the place where the dead body of her husband was lying. In paragraph-3 this witness stated that her husband sustained injuries on his forehead, eyebrow and below the eye besides sign of pressing of neck. In paragraph-4, PW-5 has stated about the motive for the occurrence by stating that wife of the appellant was ill and the appellant used to tell that your husband has practiced black magic on her and due to that reason the appellant has killed her husband. In paragraph-8 of cross-examination, this witness has deposed that her husband slept at 09:00-10:00 p.m. after taking meal. It was a moonlit night. There are two rooms in her house. In paragraph-9 of her cross-examination, PW-5 stated that on that day she cooked *Bhaat*, *Daal* and *Tarkari* (rice, pulse and vegetables). In paragraph-10, this witness stated that she slept leaving the *Dhibri* burning. Her husband was *Ojha* (exorcist). In paragraph-14, PW-5 has denied the suggestions by stating that it is not the fact that she had not stated before the police that there was festival of Jiutiya. It was 09:00-10:00 p.m. in the night. *Dhibri* was burning. She has identified the appellant in the light of *Dhibri*. PW-5 has also deposed in her cross-examination at paragraph-17



that there was no dispute with the accused with regard to land.

15. PW-6 Ram Bhajan Chaudhary is the doctor who conducted the *post mortem* of the deceased and found following antemortem injuries:

“Rigor mortis present on both upper and lower limbs. Eyes semi opened, mouth semi opened.

Injury-

1. Abrasion below left eye 1½” x ½”

2. Whole body was not swollen

After dissection I found that cranial bone and meninges are intact. Spinal cord and brain meninges were congested.

Neck- Fracture of hyoid bone and tracheal ring seen.

Blood was clotted

Thorax- Both lungs were congested

Cardiac pericardial congested

Left chamber of Heart empty

Rt. Side of Heart was full of clotted blood.

No fracture of ribs seen

Abdomen- Liver, both kidney spleen were congested.

Stomach- Semi digested food particles

Small intestine- Fluid and gases

Large intestine- Faecal matter and gases

Urinary bladder- empty

Cause of death- Due above injuries.

Throatling occurred to him leading Asphyxia. Respiratory and cardiac failure occurred.

Time elapsed since death and P.M. done within six to 12 Hrs.”

15.1 PW-6 deposed in paragraph-6 of his cross-



examination that by falling heavy tree branch over neck the injury may be caused as found above.

16. PW-7 Suresh Kumar Ram was Investigating Officer who had carried out the investigation after registration of the FIR. The FIR was recorded by him on the basis of the information given by Tetarsaniya Bhuini, the first informant. During examination-in-chief, the said witness has given description of the land in paragraph-5 of his deposition from where the dead body of the deceased was found. PW-7 has stated that he found sign of pressing neck by *Gamchha*. He also found swelling near eye brow of left eye and below the eye. This witness states in paragraph-6 that he has recorded the statement of PW-2 Golki Devi who supported the case of the prosecution and stated that on the date of occurrence at about 5 O' clock she heard that dead body of Mithu Bhuiyan is lying on the west side of the road. PW-7 has stated that PW-2 Golki Devi admitted that beside the dead body of the deceased, wife and nephew of the deceased were weeping and crying that in the last night the appellant took away Mithu Bhuiyan (deceased) with him and killed him by pressing his neck. PW-2 has further stated in her statement recorded by PW-7 that the appellant thought that Mithu Bhuiyan practiced black magic on the wife of the appellant, therefore, he has killed the deceased. PW-7 further stated in paragraph-7 of his deposition that



he recorded the statement of PW-1 Dukhi Bhuiyan and PW-3 Nanhak Bhuiyan and they have also supported the prosecution case. PW-1 and PW-3 stated the motive of the occurrence by saying that the appellant had doubted that Mithu Bhuiyan (deceased) practiced black magic on his wife, therefore, the appellant had killed him. PW-7 has further deposed that he had arrested Manoj Bhuiyan on 28.09.2011. This witness has stated in paragraph-14 of his cross-examination that he was posted in Deo Police Station since 2010. Deo is a naxal affected area. This witness in paragraph-16 of his cross-examination has stated that no sign of blood mark or violence was found at the place where the dead body was lying. PW-7 further stated in paragraph-18 of his cross-examination that none of the witnesses has stated about witnessing the occurrence of killing the deceased. In paragraph-19 of his cross-examination, PW-7 stated that he had gone to the house of the deceased in which there is only one room and he has not mentioned anything about cot. This witness has stated in paragraph-20 of his cross-examination that neither informant nor any witness has stated about the identification of the appellant-accused in the light of *Dhibri*.

17. From the aforesaid evidence adduced by the prosecution before the Trial Court, it would emerge that there is no eye-witness to the incident in question and the case of the



prosecution is based on circumstantial evidence and one of the circumstances pointed out by the prosecution during the course of the trial was that the deceased was lastly seen in company of appellant Manoj Bhuiyan when he came to the house of the first informant and called the deceased and both of them went together. The informant has stated that the appellant-accused came to her house during night hours and knocked the door and thereafter she opened the door and in the light of *Dhibri*, she identified the accused. However, if the FIR and the deposition of PW-5 is carefully seen, we are of the view that there are major contradictions in her deposition. Further there is no other prosecution witness who has stated that they have seen the appellant-accused in company of the deceased after the deceased left his house with the appellant. It is pertinent to note that it is specific case of the informant that she forbade the appellant but he took the deceased and the motive attributed to the appellant-accused is that wife of the accused was ill and the accused was of the opinion that black magic has been practised on her. It is the case of the informant that her husband was *Ojha* (exorcist). However, the Investigating Officer has not carried out the investigation in that line whether the husband of the informant was in fact *Ojha* or not nor the prosecution has examined any witness with a view to prove that the deceased was doing the work of



Ojha. It is also pertinent to note that PW-1 and PW-2 have not supported the prosecution case whereas PW-3 and PW-4 are the signatories of the inquest Panchanama and FIR. PW-6, the doctor, has stated in his examination-in-chief that cause of death is due to the injury sustained by the deceased and throttling meted to him leading asphyxia. Respiratory and cardiac failure occurred. During cross-examination, the said doctor has also stated in paragraph-4 of his cross-examination that by falling heavy tree branch over neck, the injury as was found above may be caused.

18. From the aforesaid evidence, it is the case of the prosecution that the deceased was lastly seen in company of the appellant-accused and, therefore, the appellant-accused may have killed the deceased.

19. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra) wherein the Hon'ble Supreme Court has observed in paragraph 150 to 160 as under:

“150. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not



suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

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 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.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The



King v. Horry, (1952) NZLR 111, thus:

“Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.”

155. Lord Goddard slightly modified the expression ‘morally certain’ by ‘such circumstances as render the commission of the crime certain’.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry’s case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay, (1960) 2 SCR 460 : (AIR 1960 SC 500). Lagu’s case as also the principles enunciated by this Court in Hanumant’s case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — Tufail case (1969) 3 SCC 198 (supra), Ramgopal’s case (AIR 1972 SC 656) (supra), Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No 120 of 1957 decided on 19-2-1958), Dharambir Singh v. State of Punjab (Criminal Appeal No 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant’s case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration, (1974) 2 SCR 694 (696) : (AIR 1974 SC 691 at p. 693), Mohan Lal Pangasa v. State of U.P., AIR 1974 SC 1144 (1146), Shankarlal Gyarsilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390) : (AIR 1981 SC 765 at p. 767) and M.G. Agarwal v. State of Maharashtra, (1963) 2 SCR 405 (419) :



(AIR 1963 SC 200 at p. 206) a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in *Deonandan Mishra v. State of Bihar*, (1955) 2 SCR 570 (582) : (AIR 1955 SC 801 at p. 806), to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

“But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation. . . such absence of explanation or false explanation would itself be an additional link which completes the chain.”

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not



otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:

“Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.”

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (AIR 1952 SC 343) (supra). Unfortunately, however, the high Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. When the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.”

20. From the aforesaid decision rendered by the Hon'ble Supreme Court, it can be said that in the case of circumstantial evidence, certain conditions must be fulfilled before the case against the appellants-accused based on circumstantial evidence can be said to be fully established. There must be 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 and none else. Various links in the chain of evidence led by the prosecution has to be satisfactorily proved.

21. We would also like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Anjan Kumar Sarma Vs. State of Assam** (supra), wherein the Hon'ble Supreme Court has observed in paragraphs 14, 17 and 23 as under:

“14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned “must” or “should” and not “may be” established;

(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. (See Sharad Birdhichand Sarda v. State of Maharashtra, SCC p. 185, para 153; M.G. Agarwal v. State of Maharashtra, AIR SC para 18.)



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17. It is settled law that inferences drawn by the court have to be on the basis of established facts and not on conjectures. (See *Sujit Biswas v. State of Assam* [*Sujit Biswas v. State of Assam*, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677] , SCC paras 13-18.) The inference that was drawn by the High Court that the death was caused on 28-12-1992 within the time of 48 hours as mentioned in the post-mortem report is not correct. The post-mortem examination was conducted on 30-12-1992 at 12.00 noon and it was opined by PW 11 that the death occurred 24 to 48 hours prior to the time of post-mortem examination. Even if the time is stretched to the maximum of 48 hours, the death was after 12.00 noon on 28-12-1992. The deceased was in the company of the accused till 9.00 p.m. on 27-12-1992. The inference drawn by the High Court that the accused had killed the deceased on 28-12-1992 in the night-time and thrown the body on the railway track is not on the basis of any proved facts. The trial court is right in holding that there is no evidence on record to show that the deceased was with the accused after 12.00 noon on 28-12-1992.

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



together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under: (SCC p. 776, para 34)

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



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

22. We would also like to refer and rely upon the decision rendered by the Hon’ble Supreme Court in the case of **Ravi Vs. State of Karnataka** (supra) wherein the Hon’ble Supreme Court has observed in paragraphs 3 and 5 as under:

“3. The appellant-accused and the deceased along with Suma (PW 1) and Rama Nayak (PW 2) were together on 26-12-2004, the precise time being around 1.30 p.m. The dead body was recovered after a gap of four (4) days i.e. on 30-12-2004. The post-mortem report indicated that the death had occurred 30 hours prior to the time of post-mortem examination. The medical evidence, therefore, would be suggestive of the fact that the dead body was recovered after about two (2) days from 1.30 p.m. of 26-12-2004.

5. “Last seen together” is certainly a strong piece of circumstantial evidence against an accused. However, as it has been held in numerous pronouncements of this Court, the time-lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the time-lag is considerably large, as in the present case, it would be safer for the court to look for corroboration. In the present case,



no corroboration is forthcoming. In the absence of any other circumstances which could connect the appellant-accused with the crime alleged except as indicated above and in the absence of any corroboration of the circumstance of “last seen together” we are of the view that a reasonable doubt can be entertained with regard to the involvement of the appellant-accused in the crime alleged against them. The burden under Section 106 of the Evidence Act, 1872 would not shift in the aforesaid fact situation, a position which has been dealt with by this Court in *Malleshappa v. State of Karnataka* [*Malleshappa v. State of Karnataka*, (2007) 13 SCC 399 : (2009) 2 SCC (Cri) 394] wherein the earlier view of this Court in *Mohibur Rahman v. State of Assam* [*Mohibur Rahman v. State of Assam*, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] has been extracted. The said view in *Mohibur Rahman* [*Mohibur Rahman v. State of Assam*, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] may be profitably extracted below: (*Malleshappa case* [*Malleshappa v. State of Karnataka*, (2007) 13 SCC 399 : (2009) 2 SCC (Cri) 394] , SCC p. 408, para 23)

“23. ... ‘10. 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. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The



distance between the two places is about 30-40 km. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW 6) does not bear such close proximity with the death of the victim by reference to time or place. According to Dr Ratan Ch. Das the death occurred 5 to 10 days before 9-2-1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24-1-1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed the evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable number of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal.’ (Mohibur Rahman [Mohibur Rahman v. State of Assam, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] , SCC pp. 720-21, para 10)”

23. At this stage, we would like to refer and rely upon the decision rendered by the Hon’ble Supreme Court in the case of **Reena Hazarika Vs. State of Assam** (supra), wherein the Hon’ble Supreme Court has observed in paragraph 9 as under:

“9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent



or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given.”

24. From the aforesaid decision, it can be said that if the prosecution is unable to establish a prima facie case leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused and the benefit of doubt will have to be given to the accused. Further, mere invocation of the last seen theory, *sans* the facts and the evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, unless the prosecution first establishes a *prima facie* case.

25. From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that the circumstances from which the conclusion of guilt is to be drawn should be fully established. Further the fact so established should be consistent with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved, and



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. The inferences drawn by the Court have to be on the basis of the established facts and not on conjectures.

26. Keeping in view the aforesaid decisions, if the facts of the present case, as discussed hereinabove, are carefully examined, we are of the view that the prosecution has failed to prove the complete chain and even the prosecution has also failed to prove by leading cogent evidence that the appellant-accused was lastly seen in the company of the deceased. Thus, the prosecution has failed to prove the case against the appellant beyond reasonable doubt and, therefore, we are of the view that the appellant-accused is required to be acquitted. It is also pertinent to note at this stage that appellant has been arrested on 28.09.2011 and he is in jail since almost approximately 12 years.

27. Looking to the over all facts and circumstances of the present case, we are inclined to allow this appeal and, accordingly, the appeal stands allowed. The impugned judgment of conviction dated 01.06.2013 and order of sentence dated 07.06.2013 passed by learned Adhoc Additional Sessions Judge-V, Aurangabad (Bihar) in connection with Sessions Trial No.350 of



2011/350(A) of 2011, arising out of Deo P.S. Case No.95 of 2011 is quashed and set aside. The appellant, namely, Manoj Bhuiyan is acquitted of the charges levelled against him by the learned trial court. Since appellant, above-named is in jail, he is directed to be released forthwith, if his presence is not required in any other case.

28. At this stage, we would like to appreciate the assistance rendered by learned *Amicus Curiae*, namely, Ms. Smiti Bharti to this Court. We direct Patna High Court Legal Services Committee to pay Rs.5,000/- (Rupees Five Thousand) to learned *Amicus Curiae* for the assistance which she has rendered to us.

(Vipul M. Pancholi, J.)

(Chandra Shekhar Jha, J.)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	21.09.2023
Transmission Date	21.09.2023

