IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

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HON'BLE SHRI JUSTICE VISHAL MISHRA

ON THE 16th OF OCTOBER, 2024

CRIMINAL APPEAL No. 159 of 2011

ASHISH PATHAK

Versus

THE STATE OF MADHYA PRADESH

Appearance:

Shri Akshay Pawar – Advocate for appellant.

Shri Abhishek Singh – Government Advocate for the respondent/State.

Reserved on : 19/09/2024

Pronounced on : 16th/10/2024

JUDGMENT

Per: Justice G.S. Ahluwalia

This Criminal Appeal under Section 374(2) of Cr.P.C. has been filed against the Judgment and Sentence dated 9-6-2010 passed by 2nd Additional Sessions Judge, Rewa in S.T. No.332/2009, by which the appellant has been convicted and sentenced for the following offences :

S.No.	Conviction under Section	Sentence
1.	302 of IPC	Life Imprisonment and fine of Rs.5000/- in default 2 years R.I.
2.	201 of IPC	2 years R.I. and fine of Rs.500/- in default 6 months R.I.

Both the sentences shall run concurrently.

2. According to prosecution story, the complainant Phoolchand Saket lodged an FIR that he is a scrap dealer and deals with waste Cartoon and

bottles. His hut is situated by the side of canal. On 10-7-2009, at about 7-8 P.M., he closed his shop and went back. In the morning, at about 7:30 A.M., he came to his hut and found that near the Dhaba of Lala Pathak, lot of persons had gathered. He also went there and saw that the dead body of Lala Pathak was lying with only a shirt on the dead body. Injuries were there on head, hand and buttocks. Yesterday, i.e., 10-7-2009, the appellant was drinking liquor with the deceased. It appears that somebody has killed Lala Pathak and his dead body is lying near his Dhaba. Accordingly, the police registered the offence.

3. The dead body was sent for postmortem. Statements of witnesses were recorded. Blood stained and plain earth were seized from the spot. Blood stained cloths of the deceased, empty liquor bottle, one piece of *Dari,* one dirty shirt, one white coloured *Gamchha* were also seized from the spot. On the basis of disclosure statement made by appellant, one iron *Tangi* stained with blood, one blood stained shirt, one pair of socks, one pair of black coloured shoe were seized from the house of the appellant. The appellant was arrested. The seized articles were sent to F.S.L. for forensic examination. The police after completing investigation filed the charge sheet for offence under Sections 302, 201 of IPC.

4. Trial Court by order dated 17-11-2009 framed charges under Sections 302, 201 of IPC.

5. Appellant abjured his guilt and pleaded not guilty.

6. Prosecution examined Keshav Prasad Pathak (P.W.1), Dr. Atul Singh (P.W.2), Badri Prasad Pathak (P.W.3), Umakant Pathak (P.W.4), (No one has been examined as P.W.5), Saraswati Pathak (P.W.6), Smt. Neelam Pathak (P.W.7), Phoolchand Saket (P.W.8), Shyamlal Rawat (P.W.9), Lal Chand Gupta (P.W.10), Bhagwandeen Dahiya (P.W.11), Shivakant Tiwari (P.W.12), Smt. Geeta Pathak (P.W.13), K.P. Tripathi

(P.W.14), Arun Kumar Mishra (P.W.15), Resham Singh (P.W.16) and Satya Prakash (P.W.17).

7. Appellant examined Lovkush Prasad Dwivedi (D.W.1) in his defence.

8. Trial Court by impugned Judgment and Sentence, convicted and sentenced the appellant for the above mentioned offences.

9. Challenging the Judgment and Sentence passed by the Trial Court, it is submitted by Counsel for appellant that prosecution has failed to prove the chain of circumstances beyond reasonable doubt.

10. *Per contra*, Counsel for State has supported the findings recorded by the Trial Court.

11. Heard the learned Counsel for the parties.

12. This Case is based on circumstantial evidence of **Last Seen Together and recovery of incriminating articles.**

13. Before considering the facts of the case, this Court would like to consider the law governing the field of Circumstantial Evidence.

14. The Supreme Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra,** reported in **(1984) 4 SCC 116** has held as under:

> **152.** 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*. 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 (Alias) Simmi* v. *State of Uttar Pradesh* and *Ramgopal* v. *State of Maharashtra*. It may be useful to extract what Mahajan, J. has laid down in *Hanumant case*:
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> "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."

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

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"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.

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

> **155.** 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 *King* v. *Horry* thus:
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> "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."
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> **156.** Lord Goddard slightly modified the expression "morally certain" by "such circumstances as render the commission of the crime certain".
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> **157.** 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 case* was approved by this Court in *Anant Chintaman Lagu* v. *State of Bombay*. *Lagu case* as also the principles enunciated by this Court in *Hanumant case* have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — *Tufail case*, *Ramgopal case*, *Chandrakant Nyalchand Seth* v. *State of Bombay*, *Dharambir Singh* v. *State of Punjab*. There are a number of other cases where although *Hanumant case*[1] has not been expressly noticed but the same principles have been expounded and reiterated, as in *Naseem Ahmed* v. *Delhi Administration*, *Mohan Lal Pangasa* v. *State of U.P.*, *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra* and *M.G. Agarwal* v. *State of Maharashtra* — a five-Judge Bench decision.

15. Supreme Court in the case of **Shailendra Rajdev Pasvan v. State of Gujarat,** reported in **(2020) 14 SCC 750** has held as under:

> **13.** Thus, the entire case of the prosecution is based on circumstantial evidence. It is well settled that in a case which rests on circumstantial evidence, law postulates twofold requirements:
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> (*i*) Every link in the chain of the circumstances necessary to establish the guilt of the accused must be established by the

prosecution beyond reasonable doubt.

(*ii*) All the circumstances must be consistent pointing only towards the guilt of the accused.

14. This Court in *Trimukh Maroti Kirkan* v. *State of Maharashtra* has enunciated the aforesaid principle as under: (SCC p. 689, para 12)

"*12*. … The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence."

15. Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In *Bodhraj* v. *State of J&K*, *Rambraksh* v. *State of Chhattisgarh*, *Anjan Kumar Sarma* v. *State of Assam* following principle of law, in this regard, has been enunciated: (*Shailendra Rajdev Pasvan case*, SCC OnLine Guj para 16)

"*16*. …The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

16. Thus, it is clear that prosecution must prove that all the chains of circumstantial evidence are complete and the allegation of guilt must be

cogently and firmly established without leaving 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.

17. Accordingly, the evidence led by prosecution shall be considered in the light of law laid down by Supreme Court.

18. Prosecution has relied upon the following Circumstances:

a. The death of Umashanker is homicidal in nature.

b. That deceased was seen for the last time in the company of the appellant.

c. Dead body of the deceased was found on the next day near the Dhaba of deceased.

d. Incriminating articles were seized from the appellant.

Nature of death of Umashanker

19. Dr. Atul Singh had conducted the post-mortem of the dead body of Umashanker and found the following injuries:

> (i) Incised wound on neck 18x3xbone deep;
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> (ii) Incised wound on neck 16.3.bone deep on the left side of injury no.1 cutting upto 12x1x bone deep.
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> On internal examination
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> Fracture of frontal Parietal Occipital region 7x1 cm. blood clotting of 5 x ½ cm on the base of skull and fracture of 2nd and 3rd cervical bone was found.
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> Cause of death of failure of respiratory system due to shock. The post-mortem report is Ex. P.1. In cross-examination, only one question was put, and it was stated by this witness, that the injuries could have been sustained by fall on pointed object.

20. Considering the nature of injuries (external and internal), it is held that the death of Umashanker was homicidal in nature.

Last Seen Together

21. Before considering the aforesaid circumstance, this Court would like to consider the law governing the field of Last Seen Together.

22. Supreme Court in the case of **Shailendra Rajdev Pasvan v. State of Gujarat,** reported in **(2020) 14 SCC 750** has held as under:

> **15.** Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In *Bodhraj* v. *State of J&K*, *Rambraksh* v. *State of Chhattisgarh*, *Anjan Kumar Sarma* v. *State of Assam* following principle of law, in this regard, has been enunciated: (*Shailendra Rajdev Pasvan case*, SCC OnLine Guj para 16)
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> "*16*. …The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

23. Supreme Court in the case of **Ashok v. State of Maharashtra,** reported in **(2015) 4 SCC 393** has held as under:

> **8.** The "last seen together" theory has been elucidated by this Court in *Trimukh Maroti Kirkan* v. *State of Maharashtra*, in the following words: (SCC p. 694, para 22)
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> "*22*. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally

resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.**"

9. In *Ram Gulam Chaudhary* v. *State of Bihar*, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

10. In *Nika Ram* v. *State of H.P.*, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is *Kanhaiya Lal* v. *State of Rajasthan*. In this case this Court has held that 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 the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

12. From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence

Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.

24. Supreme Court in the case of **Digamber Vaishnav v. State of Chhattisgarh,** reported in **(2019) 4 SCC 522** has held as under:

> **40.** The prosecution has relied upon the evidence of PW 8 to show that the accused and victims were last seen together. It is settled that the circumstance of last seen together cannot by itself form the basis of holding accused guilty of offence. If there is any credible evidence that just before or immediately prior to the death of the victims, they were last seen along with the accused at or near about the place of occurrence, the needle of suspicion would certainly point to the accused being the culprits and this would be one of the strong factors or circumstances inculpating them with the alleged crime purported on the victims. However, if the last seen evidence does not inspire the confidence or is not trustworthy, there can be no conviction. To constitute the last seen together factor as an incriminating circumstance, there must be close proximity between the time of seeing and recovery of dead body.
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> **41.** In *Arjun Marik* v. *State of Bihar*, it has been held as under: (SCC p. 385, para 31)
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> "*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."

> **42.** In *Kanhaiya Lal* v. *State of Rajasthan*, the Court has reiterated that the last seen together does not by itself lead to the inference that it was the accused who committed the crime. It is held thus: (SCC p. 719, para 12)
> "*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."

25. Therefore, the circumstance of Last Seen Together shall be considered in the light of the law laid down by Supreme Court, that not only, there should be a close proximity between Last Seen Together and the time of death, but also that whether the prosecution has discharged its burden thereby requiring the appellant to explain as to what happened with the deceased.

26. Prosecution has examined Keshav Prasad Pathak (P.W.1), Badri Prasad Pathak (P.W.3), Umakant Pathak (P.W.4), Smt. Saraswati Pathak (P.W.6), Smt. Neelam Pathak (P.W.7), Phoolchand Saket (P.W.8) and Smt. Geeta Pathak (P.W.13) as witnesses of Last Seen Together.

27. **Keshav Prasad Pathak** (P.W.1) has stated that after the death of his father, he regularly goes to Naubasta to give vegetables to his mother. On 11-7-2009, he was going to Naubasta. When he reached near the Dhaba of Umashanker, he saw that Ashish Pathak, Phoolchand, Ganesh Saket, Surendra @ Manja Saket, Bhagwandeen were sitting and were consuming liquor. At that time, K.P. Tripathi, S.I. came there and talked to Phoolchand and Ashish Pathak. Thereafter, this witness went to Naubasta. At about 10 P.M., when he was returning back, he saw that all the above mentioned persons were sitting and deceased Umashanker was also sitting along with them and was consuming liquor. Except these persons, no other

person was there. On 11th when he was going towards Chirahula temple, he was informed by Phoolchand that somebody has killed his brother and has thrown his dead body near the canal. He went there and found that dead body was lying about 100 ft.s away from Dhaba and had no cloths on it. He saw 3-4 injuries. Thereafter, he went to police, but he was informed that information has already been given by Phoolchand. He informed the police that the persons who were consuming liquor with Umashanker, must have killed him. On his request, Phoolchand, Ashish, Surendra and Sunny Kol were taken in custody and thereafter, Ashish accepted his guilt. He further stated that his dispute with J.P. Mill is going on for the last more than 20 years. Umashanker used to go to J.P. for demanding his money and job. J.P. personnel used to make Umashanker sit for the whole day and thereafter, used to get him detained under Section 110 of Cr.P.C. Even his father was got detained by J.P. personnel. In fact, the entire family was got detained.

28. This witness was cross-examined and in cross-examination he claimed that although he had informed the police that at 5 P.M. and at 10 P.M., he had seen Ashish in the Dhaba, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.1. He also claimed that he had informed the police that Ashish, Phoolchand, Ganesh Saket, Manja Saket and Bhagwandeen were sitting and were consuming liquor, but could not explain as to why this fact is not mentioned in his police statement, Ex. P.1. This Court has also gone through the police statement, Ex. D.1 and found that there was no allegation of Last Seen Together. Therefore, it is clear that the evidence of this witness that he had seen Ashish Pathak in the Dhaba of Umashanker at 5 P.M. and 10 P.M. and they were consuming liquor with Umashanker is a major contradiction, which cannot be relied

upon. Therefore, the evidence of this witness with regard to Last Seen Together is not trustworthy.

29. **Badri Prasad Pathak** (P.W.3) has stated that in the month of December 2008, at about 10 P.M., he was in his house. At that time, Umashanker had come and informed that Ashish had tried to strangulate him. Since, this witness did not support the prosecution in its entirety, therefore, he was declared hostile. In cross-examination by Public Prosecutor, this witness admitted that in December, 2008, Umashanker had informed him that Ashish was calling to his house. He further stated that Ashish had forcibly taken to his house and had also made him to drink liquor. Ashish had also tried to strangulate him. He admitted that he had advised Umashanker that he should leave the company of Ashish. He admitted that on 10-7-2009, he was on his duty. On 11-7-2009, at about 10:30 A.M. he came to know that dead body of Umashanker is lying near his Dhaba. He was informed by Neelkanth that Umashanker and Ashish had gone to Adarsh Colony.

30. In cross-examination, he claimed that he had informed the police that accused had pressed the neck of Umashanker but could not explain as to why this fact is not mentioned in his police statement, Ex. D.1. Even otherwise, it is clear from the evidence of this witness, that it was December 2008, when Umashanker had informed this witness about strained relationship with Ashish, whereas the incident took place on 10-7-2009 i.e., after more than 7 months. So far as the information given by Neelkanth that Umashanker and Ashish had gone towards Adarsh colony is concerned, it is clear that this witness is a hearsay witness and the prosecution has not examined Neelkanth. Therefore, in absence of substantive evidence of Neelkanth, the allegation that Umashanker and

Ashish had gone to Adarsh Colony cannot be relied upon as Last Seen Together.

31. **Umakant Pathak** (P.W.4) has stated that he was informed by *Gomati Wale* that on the date of incident, Umashanker @ Lala was with Appellant for the whole day and had consumed liquor at 10 P.M. and Phoolchand, Rakesh, Mekhaiya and Manja were also with them. However, this witness is a hearsay witness, therefore, in absence of substantive evidence of *Gomati wale*, his evidence is of no value. The police has not examined any person who can be treated as *Gomati Wale*.

32. **Smt. Saraswati Pathak** (P.W.6) is Bhabhi of deceased Umashanker. She has stated that on the date of incident, her husband [Keshav Prasad Pathak (P.W.1)] had returned back from Naubasta at about 8 P.M. and went to sleep. Umashanker came to her house and enquired from her *Devrani* as to whether food is available or not? Then she informed that everybody has gone to bed. Thereafter, Umashanker went away. Umashanker was with Ashish and Phoolchand. Ashish was identified by this witness in Court also. On the next day, She got an information regarding murder of Umashanker.

33. In cross-examination, She specifically stated that Umashanker had come all alone and She had not seen Appellant and only Umashanker had demanded food. She further stated that She had not seen anybody else. Since, this witness had resiled from her evidence given in examination-in-chief, therefore, the Public Prosecutor should have declared her hostile, but that was not done. Thus, it is clear that the evidence of this witness with regard to Last Seen Together has no value.

34. **Smt. Neelam Pathak** (P.W.7), has stated that at about 10 P.M., Umashanker came to her house. At that time, Ashish Pathak, Phoolchand were also with him. All the three were in inebriated condition. They

demanded for food. Food was provided by her which was served by her mother-in-law. After having food, all the three went away. On the next day, She came to know about the murder of Umashanker.

35. In cross-examination, She stated that she had never informed the police that Appellant was also with Umashanker. She further stated that her evidence that Appellant was also with Umashanker is false. Since, this witness had resiled from her evidence given in examination-in-chief, therefore, the Public Prosecutor should have declared her hostile, but that was not done. Thus, it is clear that the evidence of this witness with regard to Last Seen Together has no value.

36. **Smt. Geeta Pathak** (P.W.13) has stated that the dispute of his son Umashanker was going with company. He used to go to company for demanding money and job. Sunny Goud, had threatened that he would get him killed. Even Ramesh Gupta, Rawat and Rana had run over the jeep as a result Umashanker had suffered fracture. However, no action was taken by police. About 2 days back, Umashanker had informed that it appears that neither they would give money nor job but they may get him killed. On the day of incident, Umashanker, Appellant and Phoolchand had come to her house and had meals thereafter, they went to Dhaba and it appears that they consumed liquor and Umashanker must have been killed while he was asleep. This witness had not supported the prosecution case in its entirety, therefore, She was declared hostile by Public Prosecutor. She stated that her land was acquired for the company. On 10-7-2005, when She came back from her parental home, Umashanker was in his Dhaba. Umashanker had come in the night for having meals.

37. If the evidence of this witness is considered in the light of evidence of Smt. Saraswati Pathak (P.W.6), then it is clear that there is a contradiction as to whether, Umashanker was given meals in the house or

not? Saraswati Pathak (P.W.6) has stated in her examination in chief, that when Umashanker demanded for food, then She informed that everybody has gone to bed. This witness has not stated that food was given to Umashanker, whereas Geeta Pathak (P.W.13) has stated that food was given to Umashanker, Ashish and Phoolchand. Furthermore, Smt. Geeta Pathak (P.W.13) did not state that Umashanker, Appellant and Phoolchand Saket were in inebriated condition. Further, Keshav Prasad Pathak (P.W.1) has not stated that Umashanker had come to his house along with Appellant and Phoolchand Saket. Furthermore, according to Geeta Pathak (P.W.13), Umashanker had come along with Ashish and Phoolchand. Phoolchand has not been made an accused. Thus, the solitary evidence of Geeta Pathak (P.W.13) with regard to Last Seen Together doesnot inspire confidence of the Court. However, the effect of evidence of this witness shall be considered after considering the remaining circumstances.

38. **Phoolchand Saket** (P.W.8) who had given information which was registered as *Merg intimation* Ex. P.4 has turned hostile on the question of Last Seen Together.

Seizure of Articles

39. On the memorandum of appellant, Ex. P.11, one iron blood stained *Tangi*, one shirt of full sleeves having blood stains, one pant having blood stains, one pair of socks and one pair of black coloured shoes were seized vide seizure memo Ex. P.12. The seizure witnesses Resham Singh (P.W.16) and Arun Kumar Mishra (P.W.15) have supported the seizure of aforesaid articles. K.P. Tripathi (P.W.14) is the investigating officer and he has also supported the seizure of aforesaid articles on the memorandum of the appellant, Ex. P.11.

40. Thus, the prosecution has proved that one iron *Tangi*, one shirt of full sleeves, one pant, one pair of socks and one pair of black coloured shoes were seized from the possession of Appellant.

F.S.L. report

41. As per the F.S.L. report, Ex. P.14, no blood was found on Article B,E,H,I,J,K,L. Article B is plain earth seized from the spot. E is empty bottle seized from spot. H is the iron *Tangi* seized from appellant. I is shirt seized from appellant. J is pant seized from appellant. K is pair of socks and L is pair of shoe. Thus, no blood was found on any of the articles seized from the possession of Appellant. Therefore, the seizure of articles i.e., one iron *Tangi*, one shirt of full sleeves, one pant, one pair of socks and one pair of black coloured shoes cannot be said to be incriminating circumstance indicating the involvement of Appellant in the offence.

42. Thus, it is clear that at the most, it can be said that the evidence of Smt. Geeta Pathak (P.W. 13) is available on record to prove the circumstance of Last Seen Together. Since, it did not get corroboration from the evidence of Keshav Prasad Pathak (P.W.1), Smt. Saraswati Pathak (P.W.6) and also according to police, Smt. Geeta Pathak (P.W.13) had seen the appellant and Phoolchand in the company of Umashanker and the police did not implicate Phoolchand as an accused, therefore, it is clear that the evidence of Smt. Geeta Pathak (P.W.13) cannot be relied upon to convict the appellant. Even otherwise, there is no evidence to show that the deceased and the appellant were seen near the place of incident. Even otherwise, the evidence of Last Seen Together alone is a very weak type of evidence and in absence of corroboration, it would be hazardous to rely on the same.

43. Supreme Court in the case of **Ashok v. State of Maharashtra,** reported in **(2015) 4 SCC 393** has held as under:

8. The "last seen together" theory has been elucidated by this Court in *Trimukh Maroti Kirkan* v. *State of Maharashtra*, in the following words: (SCC p. 694, para 22)

"*22*. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.**"

9. In *Ram Gulam Chaudhary* v. *State of Bihar*, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor was his body found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

10. In *Nika Ram* v. *State of H.P.*, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is *Kanhaiya Lal* v. *State of Rajasthan*. In this case this Court has held that 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 the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

> **12.** From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.
>
> **13.** Here another judgment in *Harivadan Babubhai Patel* v. *State of Gujarat*, would be relevant. In this case, this Court found that the time-gap between the death of the deceased and the time when he was last seen with the accused may also be relevant.

44. Supreme Court in the case of **Satye Singh v. State of Uttarakhand,** reported in **(2022) 5 SCC 438** has held as under:

> **19.** Applying the said principles to the facts of the present case, the Court is of the opinion that the prosecution had miserably failed to prove the entire chain of circumstances which would unerringly conclude that alleged act was committed by the accused only and none else. Reliance placed by learned advocate Mr Mishra for the State on Section 106 of the Evidence Act is also misplaced, inasmuch as Section 106 is not intended to relieve the prosecution from discharging its duty to prove the guilt of the accused.
>
> **20.** In *Shambu Nath Mehra* v. *State of Ajmer*, this Court had aptly explained the scope of Section 106 of the Evidence Act in criminal trial. It was held in para 11 : (AIR p. 406)
>
> "*11*. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the

> contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle* v. *Emperor* and *Seneviratne* v. *R.*, All ER at p. 49."
>
> **21.** In the case on hand, the prosecution having failed to prove the basic facts as alleged against the accused, the burden could not be shifted on the accused by pressing into service the provisions contained in Section 106 of the Evidence Act. There being no cogent evidence adduced by the prosecution to prove the entire chain of circumstances which may compel the Court to arrive at the conclusion that the accused only had committed the alleged crime, the Court has no hesitation in holding that the trial court and the High Court had committed gross error of law in convicting the accused for the alleged crime, merely on the basis of the suspicion, conjectures and surmises.

45. Under these circumstances, this Court is of considered opinion that the prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. Accordingly, he is **acquitted** of charge under Sections 302, 201 of IPC.

46. *Ex consequenti*, the Judgment and Sentence dated 9-6-2010 passed by 2nd Additional Sessions Judge, Rewa in S.T. No.332/2009 is hereby **set aside.**

47. The appellant was granted bail by order dated 29-4-2011. Thereafter, he did not appear and accordingly, on 21-6-2016 a statement was made that appellant has been arrested in connection with offence under Section 307 of IPC and therefore, he could not appear. Accordingly, this Court directed that the appellant shall not be released from Central Jail Rewa where he is lodged in connection with offence punishable under Section 307 of IPC without prior permission of this Court in this appeal. Thereafter, no permission was ever sought by the appellant. However, the State Counsel has provided the details of his period of detention sent by Jail Superintendent, Central Jail according to which the appellant has remained in jail as an under-trial prisoner from 13-7-2009 to 9-6-2010 and as a convict from 10-12-2010 till 26-5-2011. Thus, it appears that inspite of order dated 21-6-2016 passed by this Court, the appellant was released in the case which was registered for offence under Section 307 of IPC. Be that as it may. If it is found that the appellant is still in jail in connection with this offence, then he shall be immediately released in this case. Otherwise, his bail bonds are hereby discharged. He is no more required in this case.

48. Let a copy of this judgment be sent to the Trial Court along with its record for necessary information and compliance.

49. Appeal succeeds and is hereby **allowed**.

(G.S. AHLUWALIA)
JUDGE

(VISHAL MISHRA)
JUDGE

Arun*