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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
VIKRAM NATH; J., AHSANUDDIN AMANULLAH; J.
CRIMINAL APPEAL No. 859 OF 2011; SEPTEMBER 6, 2023
R. SREENIVASA *versus* **STATE OF KARNATAKA**

Criminal Trial - Last Seen Theory - 'Last seen' theory can be invoked only when the same stands proved beyond reasonable doubt - The burden on the accused would kick in, only when the last seen theory is established. *(Para 15-17)*

Code of Criminal Procedure, 1973; Section 378, 386 - An appellate court, in the case of an acquittal, must bear in mind that there is a double presumption in favour of the accused. When two views are possible, the one favouring the accused is to be leaned on. *(Para 17-18)*

For Appellant(s) Ms. Kiran Suri, Sr. Adv. Mr. S.j. Amith, Adv. Ms. Aishwarya Kumar, Adv. Ms. Vidushi Garg, Adv. Dr. (mrs.) Vipin Gupta, AOR

For Respondent(s) Mr. V. N. Raghupathy, AOR Mr. Manendra Pal Gupta, Adv. Mr. M. Bangaraswamy, Adv. Mr. S. Shashank Reddy, Adv.

J U D G M E N T

AHSANUDDIN AMANULLAH, J.

Heard learned counsel for the parties.

2. The present criminal appeal, under The Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, is directed against the Final Judgment and Order dated 20.10.2010 in Crl. A. No.1952/2005 (hereinafter referred to as the "Impugned Judgment") passed by the High Court of Karnataka at Bengaluru (hereinafter referred to as the "High Court"), whereby the High Court was pleased to allow the appeal filed by the State *qua* the sole appellant.

THE FACTUAL PRISM:

3. The appellant was a co-accused along with one other. Upon trial, both were acquitted. However, in appeal before the High Court preferred by the State of Karnataka, the appellant has been convicted under Section 302[1] of the Indian Penal Code, 1860 (hereinafter referred to as the "IPC") and sentenced to undergo life imprisonment.

4. According to the prosecution story, on 03.01.2002 at about 4:30 P.M., an unidentified dead body of a male was found by the Complainant (PW1) in his field leading to institution of complaint with police. Later, the body was identified to be that of one Krishnappa. The allegation is that Accused No.1 (appellant herein) along with Accused No.2 with a common intention killed the deceased. The motive statedly being that the deceased had developed illicit intimacy with the appellant's sister. It is alleged that both accused had further tried to destroy evidence by setting fire to the dead body by pouring petrol. The prosecution examined 12 witnesses including the Complainant/PW1 and one of the attestors to the inquest.

5. Upon trial, the Principal Sessions Judge, Bangalore Rural District, Bangalore by Judgment and Order dated 09.06.2005 acquitted the accused of offences under Sections 302 and 201 of the IPC, holding that the prosecution had failed to prove that the deceased

[1] **302. Punishment for murder**.—Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

was last seen in the company of the accused and had also failed to prove the extra-judicial confession.

6. Aggrieved by the Judgment and Order dated 09.06.2005, the State of Karnataka filed Criminal Appeal No.1952 of 2005 before the High Court. The High Court *vide* the Impugned Judgment reversed the order of acquittal passed by the Trial Court *qua* the appellant whereas the appeal against the co-accused-Accused No.2 (hereinafter referred to as "A2") was dismissed. The same is under challenge in the present appeal by the appellant.

SUBMISSIONS OF THE APPELLANT:

7. Learned counsel for the appellant submitted that the ground for acquittal by the Trial Court is based on evidence and the reasons given are cogent for holding that the prosecution had failed to prove its case against the accused under Sections 302 and 201[2] of the IPC. It was further submitted that the High Court erred in reversing the order of acquittal against the appellant whereas not interfering with the acquittal of the A2 as, basically, the role(s) assigned to both is the same.

8. Learned counsel for the appellant submitted that in the charge framed by the Trial Court, it was clearly mentioned that the specific allegation was that A2 was the person who had come to the house of the deceased two days prior to the fateful incident and taken him away on the pretext that the appellant's father wanted to meet him whereas during deposition, PW3 and PW8 have stated that it was the appellant who had come and taken the deceased with him.

9. Learned counsel submitted that this very basic aspect which completely changes the theory of last seen cannot result in conviction of the appellant as that is the sole ground for reversal of acquittal by the High Court. It was submitted that the only material to hold that the deceased was last seen in the company of the appellant, by the High Court, was the testimony of PW10, that too based on the extra-judicial confession by the appellant before the police, when PW10 during trial had turned hostile. Thus, it was contended that such finding and reliance on the testimony of PW10 is erroneous. It was submitted that even the alleged recovery is not proved and most importantly there was no forensic examination conducted to prove that the blood belonged to the deceased. The theory of the appellant buying petrol from PW10, who has turned hostile, is also, according to learned counsel for the appellant, enough to entitle the appellant to benefit of doubt.

10. It was further submitted that even the deceased's wife stated in her evidence that there was cordial relationship between the appellant and family of the deceased and thus, the theory of strong animosity also stands negated.

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[2] **201. Causing disappearance of evidence of offence, or giving false information to screen offender**.— Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

if a capital offence.—shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life.—and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten years' imprisonment.—and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Illustration

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

11. Learned counsel submitted that had there been such strong enmity between the two sides, there was no occasion for the deceased to have accompanied the appellant to his house and that too late in the night. It was urged that a strong pointer to the falsity of the allegation(s) is the fact that the deceased's wife admitted during deposition that even when the deceased did not return for two-three days, she had not made any complaint and a very vague reason for such conduct is given saying that even in the past he (the deceased) used to go away for two-three days.

SUBMISSIONS OF THE RESPONDENT-STATE:

12. Learned counsel for the State, on the other hand, in support of the Judgement impugned submitted that there was a strong motive for the appellant to kill the deceased. Learned counsel for the State relied upon the decision of this Court in ***State of Rajasthan v Kashi Ram,* (2006) 12 SCC 254**, the relevant being at Paragraphs 19-23, for the proposition that once the accused is found to be the person with whom the deceased was last seen, the onus is on the accused to explain as to where the victim had gone or how the incident occurred:

'*19. Before adverting to the decisions relied upon by the counsel for the State, we may observe that whether an inference ought to be drawn under Section 106 Evidence Act is a question which must be determined by reference to proved*[3]*. It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts.*

20. In Joseph v. State of Kerala [(2000) 5 SCC 197 : 2000 SCC (Cri) 926] the facts were that the deceased was an employee of a school. The appellant representing himself to be the husband of one of the sisters of Gracy, the deceased, went to St. Mary's Convent where she was employed and on a false pretext that her mother was ill and had been admitted to a hospital took her away with the permission of the sister in charge of the Convent, PW 5. The case of the prosecution was that later the appellant not only raped her and robbed her of her ornaments, but also laid her on the rail track to be run over by a passing train. It was also found as a fact that the deceased was last seen alive only in his company, and that on information furnished by the appellant in the course of investigation, the jewels of the deceased, which were sold to PW 11 by the appellant, were seized. There was clear evidence to prove that those jewels were worn by the deceased at the time when she left the Convent with the appellant. When questioned under Section 313 CrPC, the appellant did not even attempt to explain or clarify the incriminating circumstances inculpating and connecting him with the crime by his adamant attitude of total denial of everything. In the background of such facts, the Court held: (SCC p. 205, para 14)

"Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see State of Maharashtra v. Suresh [(2000) 1 SCC 471 : 2000 SCC (Cri) 263]). That missing link to connect the accused-appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy."

21. In Ram Gulam Chaudhary v. State of Bihar [(2001) 8 SCC 311 : 2001 SCC (Cri) 1546] the facts proved at the trial were that the deceased boy was brutally assaulted by the appellants. When one of them declared that the boy was still alive and he should be killed, a chhura-blow was inflicted on his chest. Thereafter, the appellants carried away the boy who was not seen alive thereafter. The appellants gave no explanation as to what they did after they took away the boy.

[3] There is a typographical error in the text of the judgment.

The question arose whether in such facts Section 106 of the Evidence Act applied. This Court held: (SCC p. 320, para 24)

"In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference."

22. In Sahadevan v. State [(2003) 1 SCC 534 : 2003 SCC (Cri) 382] the prosecution established the fact that the deceased was seen in the company of the appellants from the morning of 5-3-1985 till at least 5 p.m. on that day when he was brought to his house, and thereafter his dead body was found in the morning of 6-3-1985. In the background of such facts the Court observed: (SCC p. 543, para 19)

"Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 CrPC they have not taken any specific stand whatsoever."

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218 : 1960 Cri LJ 620]'

ANALYSIS, REASONING AND CONCLUSION:

13. Having bestowed thoughtful consideration to the rival submissions and taking into account the totality of the circumstances, this Court finds that the Impugned Judgment cannot be sustained. The fact that there is major discrepancy in the charge framed by the Court and the statement of the witnesses - the specific allegation that A2 was the one who had taken away the deceased from his house, whereas during deposition the deceased's wife and his brother have stated that it was the appellant who had taken away the deceased is enough to raise doubts with regard to the veracity and authenticity of such statements. Furthermore, the fact that the deceased, late at night, agreed to go to the house of the appellant, when seen in the backdrop of the allegation that there was strong animosity between the two, appears to be highly improbable. These circumstances creating a doubt as to the appellant's involvement in the crime attain more credence when

gauged apropos the factum of the deceased being missing for more than two days, yet neither his wife nor his brother reported the deceased as missing. It does not appear that the deceased's family took any steps to find out as to where the deceased had gone. The deceased's wife has testified that relations between the parties were cordial, and has not hinted at animosity.

14. The decision relied upon by learned counsel for the State [***Kashi Ram*** (*supra*)] is not relevant in the instant facts and circumstances for the simple reason that in the said case, the fact of 'last seen' had been established and thus, it was held that the accused therein, in whose company the victim was last seen had to explain as to what happened. Whereas in the present case, the very fact whether the deceased had in fact gone with the appellant, after which his dead body was found had not been proved, as is the requirement in law. In ***Kashi Ram*** (*supra*) itself, this is evincible from the subsequent paragraph:

'***24.*** *There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.*'

(emphasis supplied)

15. The burden on the accused would, therefore, kickin, only when the last seen theory is established. In the instant case, at the cost of repetition, that itself is in doubt. This is borne out from subsequent decisions of this Court, which we would advert to:

(a) ***Kanhaiya Lal v State of Rajasthan*, (2014) 4 SCC *715, where it was noted:***

'***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.*'

(emphasis supplied)

(b) ***Nizam v State of Rajasthan*, (2016) 1 SCC 550**, the relevant discussion contained at Paragraphs 16-18, after noticing ***Kashi Ram*** (*supra*):

'*16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the "last seen theory". From the evidence discussed above, deceased Manoj allegedly left in the truck DL 1 GA 5943 on 23-1-2001. The body of deceased Manoj was recovered on 26-1-2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.*

17. During their questioning under Section 313 CrPC, the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, the body of Manoj was recovered only on 26-1-2001 after three days. The gap between the time when Manoj is alleged to have left in Truck No. DL 1 GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya Village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people from different areas come for enjoyment.

18. In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In 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 the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the "last seen theory"; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.'

(emphasis supplied)

16. The cautionary note sounded in ***Nizam*** (*supra*) is important. The 'last seen' theory can be invoked only when the same stands proved beyond reasonable doubt. A 3-Judge Bench in ***Chotkau v State of Uttar Pradesh*, (2023) 6 SCC 742** opined as under:

'*15. It is needless to point out that for the prosecution to successfully invoke Section 106 of the Evidence Act, they must first establish that there was "any fact especially within the knowledge of the" appellant. …*'

(emphasis supplied)

17. In the present case, given that there is no definitive evidence of last seen as also the fact that there is a long time-gap between the alleged last seen and the recovery of the body, and in the absence of other corroborative pieces of evidence, it cannot be said that the chain of circumstances is so complete that the only inference that could be drawn is the guilt of the appellant. In ***Laxman Prasad v State of Madhya Pradesh*, (2023) 6 SCC 399**, we had, upon considering ***Sharad Birdhichand Sarda v State of Maharashtra*, (1984) 4 SCC 116** and ***Shailendra Rajdev Pasvan v State of Gujarat*, (2020) 14 SCC 750**, held that '… *In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime.*' It would be unsafe to sustain the conviction of the appellant on such evidence, where the chain is clearly incomplete. That apart, the presumption of innocence is in favour of the accused and when doubts emanate, the benefit accrues to the accused, and not the prosecution. Reference can be made to ***Suresh Thipmppa Shetty v State of Maharashtra*, 2023 INSC 749**[4].

18. That apart, in ***Chandrappa v State of Karnataka*, (2007) 4 SCC 415**, it was laid down that an appellate court, in the case of an acquittal, must bear in mind that there is a double presumption in favour of the accused. It was also emphasised that when two views are possible, the one favouring the accused is to be leaned on. The powers of the appellate Court have been recently summarised in ***Jafarudheen v State of Kerala*, (2022) 8 SCC 440** at Paragraphs 25-27. On these factors as well, the Impugned Judgment is untenable.

19. For the reasons aforesaid, the appeal is allowed. The Impugned Judgment of conviction and sentence passed by the High Court is set aside. The appellant is discharged from the liability of his bail bonds.

[4] 2023 SCC OnLine SC 1038.