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KRISHNAN @ RAMASAMY & ORS.

v.

STATE OF TAMIL NADU

(Criminal Appeal No. 512 of 2010)

JULY 01, 2014

B

**[SUDHANSU JYOTI MUKHOPADHAYA AND  
DIPAK MISRA, JJ.]**

*Penal Code, 1860: ss.364, 302, 201 r/w s.34 – Conviction based on circumstantial evidence – Last seen theory – PW-1, mother of victim-deceased lodged FIR alleging that seven days back, accused persons picked up her son, beat him up and took him away and her son did not return home after that day – Accused no. 3 was arrested who took the police to the borewell where the dead body of deceased was hidden – Courts below convicted accused no.1 to 3 but acquitted accused no.4 and 5 – On appeal, held: As per PW-1, deceased was last seen in temple in the company of accused Nos. 1 to 4 – As per PW-2, maternal aunt of the deceased, deceased was last seen in the Police Station along with accused no.1, who had brought the deceased there. – Prosecution failed to explain the statement given by PW-2 during her cross-examination wherein she stated that when she asked the Police about the deceased, they replied that the deceased was not handed over to them – Therefore, presence of PW-2 at the scene of occurrence was doubtful – She being the highly interested witness and in view of contradictions, her statement cannot be relied upon – Further, if dead body was recovered at the instance of accused No.3, on that basis itself accused nos.1 and 2 cannot be convicted – If accused no.4 was also last seen with deceased along with accused nos. 1 to 3, trial court having given benefit of doubt to accused no.4, there is no reason why same benefit be not given to accused Nos.1 to 3 – Conviction cannot be based*

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*only on circumstance of last seen together with the deceased* A  
– *There was unexplained delay of six days in lodging the FIR*  
– *The body of the deceased was taken from the borewell by*  
*the fire service personnel after more than seven days – There*  
*was no other positive material to show that the deceased was*  
*last seen together with the accused and during intervening* B  
*period of seven days there was nobody in contact with the*  
*deceased – High Court erred in affirming the order of*  
*conviction passed by the trial court.*

*Evidence: Testimony of accomplice – Held: Cannot be* C  
*used against another accused – Penal Code, 1860: ss.364,*  
*302, 201 r/w s.34.*

**The prosecution case was that accused no. 1 and his**  
**wife accused no. 5 were annoyed with the victim-**  
**deceased as the deceased had been in love with their** D  
**daughter and expressed his love to her. On account of**  
**this, the deceased was driven out of the village. On the**  
**fateful day, the deceased visited the village for the**  
**festival. At about 6.30 P.M., when the deceased was with**  
**his friends, accused no. 1, 2, 3 and 5 came there and took** E  
**the deceased to a place near temple and attacked him.**  
**Later at 12 midnight, accused no. 1 and 2 strangulated**  
**him to death. Thereafter, accused 1, 2 and 3 hid the dead**  
**body into a borewell. As the deceased did not return**  
**home, after about 6 days, the mother of the deceased,** F  
**PW-1 made a complaint under Section 365, IPC. Accused**  
**no. 3 was arrested who took the police to the borewell**  
**where the dead body of the deceased was hidden. The**  
**trial court convicted accused no. 1 to 3 under Sections**  
**364, 302 and 201 IPC r/w section 34 IPC but acquitted** G  
**accused no. 4 and 5. The High Court dismissed the**  
**appeal by accused no. 1 to 3. The instant appeal was filed**  
**challenging the order of the High Court.**

**Allowing the appeal, the Court**

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**A HELD: 1. The judgment passed by the trial court as affirmed by the High Court depicted that the prosecution case rested only upon the circumstantial evidence. The Court mainly relied upon the evidence of PW-1, mother of the deceased, confession of accused No.3 and the**

**B postmortem report. The evidence of PW-1 was to the effect that her son was said to have given a flower to the daughter of accused No.1 and since accused No.1 was very much annoyed with her son, she sent her son to Kerala for employment in order to save him from the**

**C accused. After sometime, the deceased had come to his native village for celebrating the Festival and when he was talking to his friends on one evening, he was taken by accused Nos. 1 to 4 for questioning and on hearing the same PW-1 went to the said place where accused**

**D Nos.1 to 4 had been examining the deceased. She saw her son being beaten up by the accused and at that time her son was in an unconscious state. She went and brought the village headman who prevented such beating. He told the accused to leave her son at the Police Station. The accused had kept the deceased till 7.30 p.m.**

**E They sent accused No.2 to bring the auto. Accused Nos.1, 2 and 3 took her son in that auto. Her son had not returned next day. Accused No.1, later on, crossed her house from whom she enquired as to the whereabouts of her son to which he replied that her son would return**

**F within two days. When she further enquired from accused No.1, he replied that he had sent him to Kerala, on paying him Rs.100/-. On the next day, i.e. 6th day she again asked accused No.1 about her son and she told him that she would file a complaint alleging the missing**

**G of her son. Subsequently, after a lapse of 6 days, she had filed a complaint with the Police Station. During the cross-examination, PW-1 accepted that she lodged the complaint after lapse of six days of missing of her son. She further accepted that she had not stated in the**

**H**

complaint that during the Inspector's enquiry that while she had asked accused No.1 about her son, he had replied that her son would return within two days. She further stated that when she dictated the complaint Ex.P.1, one auto driver had reduced it in writing. Auto driver was not examined. [Paras 7, 8 & 9] [349-F-H; 350-A-H; 351-A]

2. PW-2 is the elder sister of PW-1. She stated that on the fateful day, the deceased was lying at the entrance of the house at about 6 o'clock. All the five accused came to PW-1's house and took the deceased for enquiry. They beat up the deceased there. Then the village head told not to beat him and asked them to hand him over to the Police Station. Subsequently, at 8 hrs accused no.2 brought the auto and accused not 1 to 4 took the deceased in that Auto. They had not gone along with them, since there was a darkness. During her cross-examination, she stated that when they had made a visit to Police Station, accused No.1 had brought the deceased to Police Station. Therefore, they asked as to whether the deceased was present there. The Police had replied that the deceased was not handed over to them. [Paras 10 and 11] [351-B-E]

3. PW-4, a coolie stated that he was a friend of the deceased. He further stated that there was an enmity between the deceased and the accused as the deceased had love with the daughter of accused Nos.1 and 5. Due to the threat from accused No.1, the deceased had left the village. He stated that about 6 p.m., he had gone to the temple. Then all the accused had found to have examined the deceased in the Temple. When they were making such enquiry, they had beaten up the deceased. During the cross-examination, he accepted that he has not given any information about the deceased to anybody. He had not engaged in a search as to the disappearance of the

A deceased. He had enquired with the deceased's mother  
as to his disappearance on the third day and she  
informed him that there was no information as to the  
deceased. He further accepted that on 11th April, 2004,  
the Police had enquired him about the deceased, he had  
B not mentioned to anyone as the occurrence happened  
between 4th day and 11th day, with regard to the  
deceased. [Para 12] [351-G-H; 352-A-B]

4. In the FIR, PW-1 did not disclose the presence of  
PW-2 and PW-4 at the scene of occurrence. The deceased  
C was last seen with accused Nos.1 and 4 by Village  
headman who said to have been present at the place  
where the deceased was last seen in the company of  
accused, was neither named as prosecution witness nor  
examined. There was inordinate delay of more than six  
D days in filing the complaint about the missing of the  
deceased but PW-1 did not explain the delay in lodging  
such complaint. PW-1 in her statement stated that the  
deceased was lastly seen with the accused Nos.1 to 4 in  
Mariyamman Temple. PW-2 in her statement stated that  
E the deceased was last seen in the Police Station. The  
case of the prosecution was that the deceased was last  
seen in the autorickshaw by which he was abducted from  
the house of accused No.1. In the complaint, PW-1  
intimated that the deceased was sleeping in the night. In  
F the FIR, the motive of the accused was not disclosed. The  
accused No.3 was not even named in the FIR. The  
manner in which PW-1, mother of deceased gave the  
detail of occurrence which took place on 4th April, 2004  
showed as if she had seen every stage, the manner in  
G which the accused abducted the deceased, beaten up in  
the temple, taken in the autorickshaw, reached from one  
place to another place and then went to the Police  
Station. The statement of PW-1 about accused No.3 was  
an improvement which was not explained. The story of  
H accused to the deceased in the autorickshaw as narrated

in the deposition of PW-1 was another improvement which she has not disclosed in the FIR. [Paras 13 to 16] [352-C-H; 353-A-B]

5. The case of the prosecution rested mainly on the scene of occurrence; the deceased was last seen in the company of accused Nos.1 to 3. As per PW-1, deceased was last seen in the temple in the company of accused Nos. 1 to 4. PW-2 is maternal aunt of the deceased. PW-1 did not disclose the presence of PW-2 at the scene of occurrence where the deceased was last seen in the company of accused Nos.1 to 4. Even if the statement of PW-2 is accepted, then according to her the deceased was last seen in the Police Station along with accused No.1, who had brought the deceased there. The prosecution has failed to explain the statement given by PW-2 during her cross-examination wherein she stated that when she asked the Police about the deceased, they replied that the deceased was not handed over to them. Therefore, the presence of PW-2 at the scene of occurrence was doubtful. She being the highly interested witness and in view of contradictions, her statement cannot be relied upon. [Paras 18 and 19] [353-D-H]

6. The testimony of an accomplice cannot be used against another accused. On the basis of testimony of accused No.3, if dead body was recovered, on that basis the accused Nos.1 and 2 cannot be convicted. If accused No.4 was also last seen with the deceased along with accused Nos. 1 to 3, the trial court having given benefit of doubt to accused No.4 it is not clear as to why the same benefit has not been given to accused Nos.1 to 3. The conviction cannot be based only on circumstance of last seen together with the deceased. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased was last seen on 4th April, 2004 during the Festival at the temple. The body of

A the deceased was taken from the borewell by the fire  
 service personnel after more than seven days. There was  
 no other positive material on record to show that the  
 deceased was last seen together with the accused and  
 intervening period of seven days there was nobody in  
 B contact with the deceased. The Sessions Judge  
 convicted the accused Nos.1 to 3 on the basis of last  
 seen evidence, the correctness of last seen version  
 emanating from PW-1, PW-3 and PW-4 and as the  
 prosecution case is also doubtful, there being  
 C contradiction about place where the accused were last  
 seen with the deceased. The High Court had failed to  
 appreciate the said fact and erred in affirming the order  
 of conviction passed by the Sessions Judge. [Paras 20,  
 21, 23, 25] [354-A-C, H; 355-A-B, D-E]

D *Arjun Marik and Ors. v. State of Bihar* (1994) Supp. (2)  
 SCC 372; 1994 (2) SCR 265 ; *Bodhraj v. State of Jammu  
 and Kashmir* (2002) 8 SCC 45; 2002 (2) Suppl. SCR 67;  
*Jaswant Gir v. State of Punjab* (2005) 12 SCC 438 – relied  
 on.

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#### Case Law Reference:

1994 (2) SCR 265                      Relied on                      Para 21

2002 (2) Suppl. SCR 67                Relied on                      Para 22

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(2005) 12 SCC 438                    Relied on                      Para 24

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
 No. 512 of 2010.

G From the Judgment and Order dated 31.03.2008 in Crl  
 Appeal No. 1009/2005 of the High Court of Judicature at  
 Madras.

R. Balasubramaniam, T.R.B. Sivakumar, Karvnakar, K.V.  
 Vijayakumar for the Appellant.

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M. Yogesh Kanna, A. Santha Kumaran, Vanita C. Giri for A  
the Respondent.

The Judgment of the Court was delivered by

**SUDHANSU JYOTI MUKHOPADHAYA, J.** 1. This appeal B  
is directed against the judgment dated 31st March, 2008  
passed by the High Court of Judicature at Madras in Criminal  
Appeal No.1009 of 2005. By the impugned judgment the High  
Court dismissed the appeal and affirmed the judgment of  
conviction and sentence passed by the learned Sessions Judge  
against the appellants for the offence under Section 364, 302 C  
and 201 read with Section 34 IPC.

2. The case of the prosecution in nutshell is as follows:

Prior to 4th April, 2004, the date of incident, the deceased D  
Manikandan expressed his love to one Rajeswari, daughter of  
accused No.1, Krishnan @ Ramasamy and accused No.5,  
Selvam. For the said reason, there was a commotion which  
resulted in enmity between the accused on the one side and  
the deceased Manikandan on the other side. The deceased E  
was driven out of Neyveli area. Subsequently, on 4th April, 2004  
during Panguni Uthram Kaavadi Festival at Veludaiyanpattu  
village, the deceased visited for the festival. On the said date  
at about 6.30 p.m., the deceased along with his friends was  
talking behind the school at Vadakkumelur. At that time  
accused No.1, Krishnan @ Ramasamy, accused No.2 F  
Rajendiran @ Chinnu, accused No.3, Ramalingam and  
accused No.5, Selvam came there and took the deceased  
Manikandan to the place near Mariyamman Temple and  
attacked him. Later, they took him in an autorickshaw bearing  
Registration No.TN 31Y 2376 and abducted him under the G  
pretext that the deceased was being taken to Police Station.  
On the way, the accused purchased brandy and at 6.15 p.m.  
in the cashew thope belong to one Vijeyendiran the deceased  
was taken out of the autorickshaw. Vijeyendiran told the  
accused not to assemble there. Then, accused Nos.1, 2 and 3 H

A took the deceased Manikandan to the side of the road leading to Vadakkumelur and under a margosa tree Manikandan was compelled to drink brandy. At about 12 midnight accused Nos.1 and 2 strangled the deceased Manikandan by putting his towel around his neck and done him to death. Thereafter,  
B accused Nos.1, 2 and 3 put the dead body into a borewell.

3. On 10th April, 2004, based on the complaint given by the mother of the deceased Manikandan a complaint was registered for an offence under Section 365 IPC. On 13th April, 2004, the Police arrested accused No.3-Ramasamy, who gave  
C a voluntary confession statement in pursuance of which accused No.3 took the Police to the borewell where they had hidden the dead body. Upon the identification of the borewell by accused No.3 with the help of Kurinjipadi fire service  
D personnel, the dead body was taken out by the Police from the borewell. The body was identified by Valarmathi (PW.1), Amrthavalli (PW-2) Gopal (PW-3), Murugan (PW-4) and Rajeswari (PW-5) to be that of Manikandan. The body was sent to Panruti Government Hospital where inquest was conducted  
E by Kabbadasan (PW-13) on 14th March, 2004 at 6 a.m. in the presence of witnesses and panchayatdars. The inquest report is Ex.P.17. Ex.P.9 is the post mortem certificate and Ex.P.10 is the opinion given by the Doctor who conducted postmortem. The Investigating Officer, Kannadasan (PW-13) came to know  
F that the other accused surrendered themselves before the Court. After concluding the enquiry, Kannadasan (PW-13) laid charge sheet against the accused before the Court on 26th May, 2004 for the offence under Sections 364, 365, 302 and 201 IPC. The Sessions Judge secured the presence of the accused, framed charges under Sections 364, 365, 302 and  
G 201 IPC. All the accused pleaded not guilty and claimed to be tried.

4: The prosecution in all examined 13 witnesses, produced Ex.P.1 to P.22 and marked MOS 1 to 4 to prove its case. When the accused were questioned under Section 313 Cr.P.C. on  
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the basis of the incriminating materials made available against them, they denied each and every circumstance put up against them as false and contrary to the facts. Neither any oral evidence nor any documentary evidence was produced on their behalf. After considering all the material on record and hearing the parties, the Sessions Court had come to the conclusion that the prosecution has proved its case only against accused Nos.1 to 3 for the offence under Sections 364, 302 and 201 IPC read with Section 34 IPC and acquitted accused Nos.4 and 5 of the charges levelled against them.

5. To challenge their conviction and sentence accused Nos.1 to 3 moved before the High Court, which dismissed the appeal by the impugned judgment.

6. Learned counsel for the appellants would submit that the Sessions Judge accepted the testimony of the interested witness and on the basis of circumstantial evidence the appellants have been convicted. He would further submit that the prosecution case rests only upon circumstantial evidence but the prosecution has failed to prove such circumstances without any breakage of link, convicted the appellants only on the basis of last seen theory and the confession of accused No.3. He also submitted that the appellants (accused Nos.1 to 3) also stand on the same footing as that of accused Nos. 4 and 5, who were given benefit of doubt, such benefit was not extended to accused Nos.1 to 3.

7. From the judgment passed by the Sessions Judge as affirmed by the High Court, we find that the prosecution case rests only upon the circumstantial evidence. The Court mainly relied upon the evidence of Valarmathi (PW-1), mother of deceased Manikandan, confession of accused No.3 and the postmortem report.

8. The evidence of Valarmathi (PW-1) is to the effect that her son Manikandan was said to have given a flower to the daughter of accused No.1 and since accused No.1 was very

A much annoyed with Manikandan, she sent her son to Kerala for employment in order to save him from the accused. After sometime, Manikandan had come to his native village for celebrating Panguni Uthiram Festival and when he was talking to his friends on one evening, he was taken by accused Nos. B 1 to 4 for questioning and on hearing the same Valarmathi (PW-1) went to said place, namely, Mariyamman Temple where accused Nos.1 to 4 had been examining Manikandan. She saw her son being beaten up by the accused and at that time her son was in an unconscious state. She went and brought the C village headman. Thereafter, Manikandan was taken from the said place in an autorickshaw by the accused. She immediately informed the village elder. The village Head came along with her and prevented such beating. He told the accused to leave her son at the Police Station. The accused had kept D Manikandan till 7.30 p.m. They sent Chinnu @ Rajendiran, accused No.2 to bring the auto, accused Nos.1,2 and 3 had taken her son in that auto. Her son had not returned next day. Accused No.1, Ramasamy later on crossed her house from whom she enquired as to the whereabouts of her son to which he replied that her son would return within two days. When she E further enquired from accused No.1, he had replied that he had sent him to Kerala, on paying him Rs.100/-. On the next day, i.e. 6th day she had again asked accused No.1 about her son and she told him that she would file a complaint alleging the missing of her son. Subsequently, after a lapse of 6 days, she F had filed a complaint with the Police Station (Neyveli Township at 8th Block). The Police having come to know that they were already conducting enquiry from accused No.3 with regard to this case, on the basis of the statement given by accused No.3, Ramalingam, the dead body of her son was retrieved from a G deep borewell by the fire service personnel.

9. During the cross-examination, Valarmathi (PW-1) accepted that she lodged the complaint after lapse of six days of missing of her son. She further accepted that she had not H stated in the complaint that during the Inspector's enquiry that

while she had asked accused No.1 about her son, he had replied that her son would return within two days. She further stated that when she dictated the complaint Ex.P.1, one auto driver had reduced it in writing. Auto driver was not examined. A

10. Amirthavalli (PW-2) is the elder sister of Valarmathi (PW-1), complainant. She stated that Manikandan went to Kerala and had returned for Panguni Uthiram Festival last year. When he was lying at the entrance of the house at about 6 o'clock, all the five accused who were present, descended down to Valarmathi's (PW-1) house and taken Manikandan to Mariyamam Temple for enquiry. They had beaten up Manikandan there. Then the village head had told not to beat him and asked them to hand him over to the Police Station. Subsequently, at 8 hrs accused Rajendiran had brought the auto. Then accused Rajendiran, Chakkarai, Ramasamy and Ramalingam had taken Manikandan in that Auto. They had not gone along with them, since there was a darkness. B  
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11. During her cross-examination, she stated that when they had made a visit to Police Station, accused No.1, Ramasamy had brought the deceased Manikandan to Police Station. E

Therefore, they asked as to whether Manikandan was present there. The Police had replied that Manikandan was not handed over to them.

12. Murugan (PW-4), a coolie at Neyveli, stated that he was a friend of Manikandan. He further stated that there was an enmity between the deceased and the accused as Manikandan had love with Rajeswari, daughter of accused Nos.1 and 5. Due to the threat from accused No.1, Manikandan had left the village. He stated that about 6 p.m., he had gone to the temple. Then all the accused and Ramasamy had found to have examined Manikandan in the Temple. When they were making such enquiry, they had beaten up Manikandan. During the cross-examination, he accepted that he has not given any information about Manikandan to anybody. He had not engaged in a search F  
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A as to the disappearance of Manikandan. He had enquired with  
Manikandan's mother as to his disappearance on the third day  
and she informed him that there was no information as to  
Manikandan. He further accepted that on 11th April, 2004, the  
B Police had enquired him about Manikandan, he had not  
mentioned to anyone as the occurrence happened between 4th  
day and 11th day, with regard to Manikandan.

13. In the FIR, Valarmathi (PW-1) had not disclosed the  
presence of Amirthavalli (PW-2) and Murugan (PW-4) at the  
scene of occurrence at Mariyamman Temple. Nothing was  
C stated with regard to Amirthavalli (PW-2) and Murugan (PW-  
4). Valarmathi (PW-1) did not disclose the presence of  
Amirthavalli (PW-2) at the scene of occurrence. The deceased  
was last seen with accused Nos.1 and 4 by Village headman  
by name, super supparayan, who said to had been present at  
D the place where the deceased was last seen in the company  
of accused, was neither named as prosecution witness nor  
examined. There was inordinate delay of more than six days  
in filing the complaint about the missing of Manikandan but  
Valarmathi (PW-1) has not explained the delay in lodging such  
E complaint.

14. Valarmathi (PW-1) in her statement stated that the  
deceased Manikandan was lastly seen with the accused Nos.1  
to 4 in Mariyamman Temple. Amirthavalli (PW-2) in her  
F statement stated that the deceased was last seen in the Police  
Station. The case of the prosecution is that the deceased  
Manikandan was last seen in the autorickshaw by which he was  
abducted from the house of accused No.1.

15. In the complaint, Ex.P.1, Valarmathi (PW-1) intimated  
G that Manikandan was sleeping in the night. In the FIR, Ex.P.13,  
the motive of the accused was not disclosed. The accused No.3  
was not even named in the FIR.

16. The manner in which Valarmathi (PW-1), mother of  
H deceased Manikandan gave the detail of occurrence which took

place on 4th April, 2004 shows as if she had seen every stage, the manner in which the accused abducted the deceased Manikandan, beaten up in the Mariyamman Temple, taken in the autorickshaw, reached from one place to another place and then went to the Police Station. The statement of Valarmathi (PW-1) about accused No.3 is an improvement which was not explained. The story of accused to the deceased in the autorickshaw as narrated in the deposition of Valarmathi (PW-1) is another improvement which she has not disclosed in the FIR, Ex.P.13.

17. Referring to the material on record, learned counsel for the appellants submitted that there is a doubt about the place where the deceased Manikandan was last seen and the time when he was last seen along with the accused.

18. The case of the prosecution rests mainly on the scene of occurrence; the deceased Manikandan was last seen in the company of accused Nos.1 to 3. As per Valarmathi (PW-1), deceased Manikandan was last seen in Mariyamman Temple in the company of accused Nos. 1 to 4. Amirthavalli (PW-2) is maternal aunt of the deceased. Valarmathi (PW-1) did not disclose the presence of Amirthavalli (PW-2) at the scene of occurrence where the deceased was last seen in the company of accused Nos.1 to 4. Even if the statement of Amirthavalli (PW-2) is accepted, then according to her the deceased was last seen in the Police Station along with accused No.1, Ramasamy who had brought the deceased Manikandan there.

19. The prosecution has failed to explain the statement given by Amrithavalli (PW-2) during her cross-examination wherein she stated that when she asked the Police about Manikandan, they replied that Manikandan was not handed over to them. Therefore, the presence of Amrithavalli (PW-2) at the scene of occurrence is doubtful. She being the highly interested witness and in view of contradictions aforesaid, her statement cannot be relied upon.

A 20. The testimony of an accomplice cannot be used  
against another accused. On the basis of testimony of accused  
No.3, if dead body was recovered, on that basis the accused  
Nos.1 and 2 cannot be convicted. If accused No.4, Rajendiran  
@ Sakkarai was also last seen with the deceased Manikandan  
B along with accused Nos. 1 to 3, the Trial Court having given  
benefit of doubt to accused No.4 it is not clear as to why the  
same benefit has not been given to accused Nos.1 to 3.

C 21. The conviction cannot be based only on circumstance  
of last seen together with the deceased. In *Arjun Marik and*  
*others vs. State of Bihar*, (1994) Supp.(2) SCC 372, this Court  
held as follows:

D *“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*  
E *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.”*

F 22. This Court in *Bodhraj vs. State of Jammu and*  
*Kashmir*, (2002) 8 SCC 45, held that the last seen theory comes  
into play where time-gap between the point of time when the  
accused and the deceased were seen last alive and the  
deceased is found dead is so small that possibility of any  
person other than the accused being the author of the crime  
G becomes impossible. It will be hazardous to come to a  
conclusion of guilt in cases where there is no other positive  
evidence to conclude that the accused and the deceased were  
last seen together.

H 23. There is unexplained delay of six days in lodging the

FIR. As per prosecution story the deceased Manikandan was last seen on 4th April, 2004 at Vadakkumelur village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and intervening period of seven days there was nobody in contact with the deceased. A  
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24. In *Jaswant Gir vs. State of Punjab*, (2005) 12 SCC 438, this Court held that in absence of any other links in the chain of circumstantial evidence, the appellant cannot be convicted solely on the basis of "last seen together" even if version of the prosecution witness in this regard is believed. C

25. In the present case as noticed above, the Sessions Judge convicted the accused Nos.1 to 3 on the basis of last seen evidence, the correctness of last seen version emanating from Valarmathi (PW-1), Amirthavalli (PW-3) and Murugan (PW-4) and as per the prosecution case is also doubtful, there being contradiction about place where the accused were last seen with the deceased Manikandan. The High Court had failed to appreciate the aforesaid fact and erred in affirming the order of conviction passed by the Sessions Judge. D  
E

26. For the reasons aforesaid, we set aside the impugned judgment dated 31st March, 2008 passed by the High Court of Judicature at Madras in Criminal Appeal No.1009 of 2005 and impugned order of conviction and sentence dated 17th November, 2005 passed by the Sessions Judge in Session Case No.61 of 2005. The appeal is allowed. The appellants are directed to be released forthwith, if not required in any other case. F  
G