

ASHOK

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v.

STATE OF MAHARASHTRA

(Criminal Appeal No.2224 Of 2011)

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MARCH 11, 2015

[PINAKI CHANDRA GHOSE AND N.V. RAMANA, JJ.]

Evidence Act, 1872 – s. 106 – Burden of proof under – Admission of last seen together rule – On facts, murder of wife and two daughters – Husband last seen together with the deceased – Conviction and sentence of husband for offences u/s. 302, 201, 498A IPC by the courts below holding that the onus of proof was on-the husband to explain and prove his case due to admission of last seen together which the husband had failed to explain – On appeal, held: Prosecution did not bring any clinching evidence in support of last seen together theory so as to shift the burden of proof on the husband – Thus, the prosecution evidently failed to prove the guilt of the husband beyond doubt – Order of conviction and sentence of the husband set aside – Penal Code, 1860 – ss. 302, 201, 498A

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Allowing the appeal, the Court

HELD: 1.1 The initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of 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,

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A 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. [Para 13] [384-D-F]

B 1.2 In the instant case, the prosecution failed to discharge its initial burden itself. Therefore, the question of burden of proof shifting to the accused to explain the happening of incidents did not arise. The delay of one month in filing FIR at the very face of it makes the entire

C case of the prosecution as concocted and an afterthought. There is no explanation as to why did the parents of the wife not make any complaint or FIR immediately after the recovery of her dead body. It is

D surprising that nowhere in the case of the prosecution the delay was explained. The accused had put a very consistent story at all stages of the case starting from the missing report to the Section 313 statement without any inconsistency. The statement made by the appellant

E sounds a plausible story and prosecution did nothing to really counter this version. The Sessions Judge found that the story was unreliable as the accused had failed to put on record the bill for the fuel which he went to fill in the bike. However, this reasoning is far from the reality

F as it is well known that not too many people would ask for receipts when refueling their vehicles in India and the accused may not have expected to do so. [Para 16, 17] [386-C-H; 387-A]

G 1.3 With respect to the shifting of burden of proof on the accused to explain the happening on the date of incident, the prosecution relied on the motive that accused-appellant was hoping to get Rs.2 lakhs from wife's aunt. But it is logically flawed since the death of

H wife would not make accused-appellant a rightful

claimant of that amount. Moreover, this motive did not explain the murder of the two daughters. Lack of justified motive would adversely affect the case of the prosecution as the instant case is solely based on circumstantial evidence.[Para 18] [387-B-D]

1.4 There is no merit in the trial court's reasoning in finding the facts that accused asked his colleague to prepare dinner, filing missing report on the next morning and leaving the family at the Gas Agency as incriminating pieces of evidence. The accused could have asked his friend and colleague to prepare dinner in normal course as he would have got late in returning from the village. Further, it was but natural for the accused to search and try to find out his family even before he would go to the police. It was not unnatural to have registered a missing report the very next morning. Also, leaving wife and two daughters at Gas Agency was not so unusual and would depend from person to person. With respect to previous incidents, all that is proved is demand of dowry by the in-laws and the accused-appellant. The allegation that husband would not sleep with the deceased wife when his parents would visit, is the only allegation against the accused-appellant. [Para 19] [387-E-H]

1.5 The prosecution has not brought any clinching evidence in support of last seen together theory so as to shift the burden of proof on the accused-appellant. Thus, the prosecution evidently failed to prove the guilt of the accused-appellant beyond doubt. The judgment and order passed by the High Court as also by the trial court are set aside. [Para 20] [388-A-B]

- A *Trimukh Marotiu Kirkan v. State of Maharashtra* (2006)10 SCC 106; *Ram Gulab Chaudhary v. State of Bihar* 2001 (3) Suppl. SCR 279: (2001) 8 SCC 311; *Nika Ram v. State of H.P.* 1973 (1) SCR 428 : (1972) 2 SCC 80; *Kanhaiya Lal v. State of Rajasthan* 2014 (3) SCR 744 : (2014) 4 SCC 715;
- B *Harivadan Babubhai Patel v. State of Gujarat* 2013 (10) SCR 889 : (2013) 7 SCC 45 – referred to.

Case Law Reference

	(2006)10 SCC 106	referred to	Para 9
C	2001 (3) Suppl. SCR 279	referred to	Para 10
	1973 (1) SCR 428	referred to	Para 11
	2014 (3) SCR 744	referred to	Para 12
	2013 (10) SCR 889	referred to	Para 14

- D CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2224 of 2011.

From the Judgment and Order dated 13.12.2010 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Appeal No. 296 of 2010.

Gaurav Agrawal for the Appellant.

Shankar Chillarge AGA (State of Maharashtra),
Aniruddha P. Mayee for the Respondent.

F The Judgment of the Court was delivered by

G **PINAKI CHANDRA GHOSE, J.** 1. This criminal appeal arises from final order and judgment dated 13 December 2010 of the High Court of Bombay, Nagpur Bench in Criminal Appeal No. 296 of 2010 whereby the High Court has upheld the conviction and sentence of the accused-appellant. The accused-appellant was convicted by the Sessions Judge, Gadchiroli for offences under Sections 302, H 201 and 498A of Indian Penal Code, 1960, for the murder of

his wife Shubhangi and two daughters being Namrata and A
Janhavi. He was sentenced, *inter alia*, for life imprisonment
and a fine of Rs.1 lakh, and in default of payment of fine,
rigorous imprisonment of five years, for offence under Section
302 of the Indian Penal Code. Sentences for offence under
Sections 201 and 498A of Indian Penal Code were to run B
concurrently.

2. The facts of the case are that Ashok, the appellant
herein was the husband of Shubhangi, (deceased herein)
and they had two daughters, Janhavi (5½ years old) and C
Namrata (3½ years old), both deceased. The accused-
appellant and Shubhangi were married on 4th May, 2001
according to customs. The two were related to each other
prior to marriage as first cousins from the side of the
Shubhangi's mother. At the time of their engagement, the D
accused-appellant was pursuing D.Ed. Education and for
completing the said course, Rs.50,000/- was given along
with a 5 gm gold ring and one 15 gm gold chain. In addition,
Rs.1 lakh was spent on the marriage arrangement. E
Thereafter, in 2004 Ashok finished D.Ed. and got a job of
'shikshan sevak' at Arer Navargaon. Till now Shubhangi was
staying at her matrimonial home but after the accused-
appellant got a job, they both started staying at a rented
house in Arer Navargaon. Admittedly, they had cordial F
relations for 6 years of marriage but they got strained after 6
years. It is alleged that once they shifted to Arer Navargaon
the parents of the accused-appellant used to visit them on
festivals. On their visits, it is alleged, the father of the accused-
appellant and the accused-appellant used to talk secretly G
and the accused-appellant would not sleep with Shubhangi.
It is further alleged that the father of the accused-appellant
used to taunt that his son could have got a better earning
lady as his wife and also that Shubhangi had a squint in her
one eye. H

A 3. On the fateful day, i.e. 26 August 2008, as accused-
appellant puts the story is that he took half day's leave from
his school to visit to Wadsa, a nearby village, with his wife
and 2 daughters to buy clothes and other things. On his way
B back, the fuel in his bike exhausted and, therefore, he
dropped his wife and two daughters at the H.P. Gas station
where there was a hotel also. He went to get the fuel and
returned in 15-20 minutes. When he reached back, he found
C Shubhangi, Namrata and Janhavi missing from the place
where he had dropped them. He has stated that after looking
around he thought they might have left for village so he
headed towards the village but he could not find them. He
lodged a missing report next day at 9.30 am and also
D informed the family of Shubhangi that she, along with both
the daughters, was missing. The father and mother of
Shubhangi visited the accused-appellant at the place of
Haribhau, accused's friend, where the accused was at that
time. But, allegedly the accused did not talk to the parents
of Shubhangi properly and left in search of his wife and 2
E daughters.

 4. They could not find the missing persons for three
days until 29th August, 2008 when a dead body was recovered
from Sioni Ghat from the river Vainganga. The body was
F identified to be of Namrata and it was in a decomposed state,
so the post mortem was conducted on the spot itself. It was
revealed that the death was caused by throttling. Further it
was found that death must have occurred within 4 hours of
eating last meal: The last rituals were conducted at the site
G where the body was found. On the next day the body of
Shubhangi was found in the same state as that of Namrata
and the post mortem revealed same medical evidence.

 5. The evidence of one Pradip (PW-6) was also taken.
H He is a colleague of the accused-appellant in school. He
deposed that on 26th August 2008, the accused-appellant

took half day leave from the school and while leaving asked him to prepare dinner as he would get late while returning from Wadsa. PW-6 further deposed that once the dinner was prepared, he called accused-appellant but he did not respond. When accused-appellant returned at around 7.45 pm, the accused-appellant informed him of his missing family.

6. The Trial Court after appreciating the evidence of PW-1 (father of Shubhangi), PW-4 (mother of Shubhangi), PW-5 (sister of PW-4), PW-6 (Pradip, colleague of the accused) and PW-7 (Investigating Officer), found the appellant guilty. PWs 2 and 3 were formal witnesses. The Trial Court noted that the case is based on circumstantial evidence as there was no eye witness. The motive attributed to the accused in this case was that PW-5, aunt of Shubhangi had around Rs. 2 lakhs in her bank account which she received as proceeds from the sale of her agricultural land. Since PW-5 was issueless, she had nominated Shubhangi as her heir. Allegedly, the accused-appellant had made demands of this amount through Shubhangi earlier and Shubhangi had refused to ask her aunt (PW-5) for the money. The case of the prosecution is that the accused-appellant murdered Shubhangi for that money which PW-5 had in her account. The Trial Court's reasoning in handing down the conviction was that admittedly, the accused-appellant was last seen together with the three deceased and according to the learned Sessions Judge the motive was strong. In these circumstances, the burden of proof to explain the suspicious circumstances surrounding the death of the deceased persons was on the accused. It was found that there was unusual delay in lodging a missing report to the police as it was lodged after whole night had passed. Also, the accused-appellant failed to prove his case that he had gone to Wadsa to buy clothes, oil etc. as he did not furnish any bills to prove the story. The accused also failed to furnish the receipt for

A petrol which he allegedly went to fill dropping his family on the way. Also, the Trial Court found that it was improbable that somebody would drop his wife and two daughters on the road while going to the petrol pump to fill the fuel when the distance was walkable. In these circumstances, the learned Sessions Judge held that onus of proof was on the accused to explain and prove his case due to admission of last seen together.

7. The High Court concurred with the reasoning of the Trial Court and found that Section 106 of the Evidence Act, 1872 stood attracted and that the accused-appellant had not explained the circumstances. Therefore, the High Court upheld the conviction and sentence of the appellant.

8. We have heard the learned counsel for both the sides. The main point of consideration that arises in this case is whether the burden of proof shifts on the accused to explain the death of the deceased persons due to 'last seen together' rule? However, before venturing to answer that question, it may be relevant to keep in mind following few points:

(i) There is an unexplained delay of almost one month in filing the FIR. The dead bodies of Namrata and Shubhangi were found on 29th and 30th August, 2008 respectively while the FIR was filed on 27th September, 2008.

(ii) The prosecution has not put forth any story or any version of its own as to how was the murder of three persons committed by the accused.

(iii) There is no question asked even in Section 313 statement of the accused as to whether he killed the deceased persons.

9. The "last seen together" theory has been elucidated

by this Court in *Trimukh Marotiu Kirkan v. State of Maharashtra*, (2006)10 SCC 106, in the following words:

"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 on 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."

10. In *Ram Gulab Chaudhary v. State of Bihar*, (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was 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.

11. In *Nika Ram v. State of H.P.*, (1972) 2 SCC 80, 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.

A 12. The latest judgment on the point is ***Kanhaiya Lal v. State of Rajasthan***, (2014) 4 SCC 715. 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.

C 13. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of 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 Indian Evidence Act. D 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. E F

G 14. Here another judgment in ***Harivadan Babubhai Patel v. State of Gujarat***, (2013) 7 SCC 45, 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. In the present case, the Sessions Judge found following incriminating evidence against the accused :

H (i) Taking half day casual leave on 26th August 2008.

(ii) Last seen when all the deceased were in the company of accused-appellant. A

(iii) Mysterious disappearance of the three deceased persons from the said company.

(iv) Conduct of the accused appellant: B

a) requiring the colleague to prepare the dinner;

b) reporting to police about the missing on the next day; C

c) attitude of the accused appellant in presence of the relatives of the deceased;

d) leaving of 2 daughters and wife at H.P. Gas Agency. D

(v) falsity in defence

(vi) disliking towards the deceased.

(vii) Demand of amount which was kept in the name of Shubhangi by Shalinibai. E

(viii) Post-mortem Report.

15. Now, it may be noted that following lackings in the case of prosecution cannot be overlooked: F

(1) The FIR was lodged after a delay of one month and no explanation has been given for such delay.

(2) There has been no previous incident of any physical cruelty committed by the accused against the any of the deceased. G

(3) The motive as alleged by the prosecution, even if accepted does not explain how will the accused get H

A the money which is in the bank account of Shailinibai
by killing Shubhangi. Shubhangi was merely a nominee
in that account and did not own the money. Her death
would not have made accused a rightful claimant of
that money. In any case, this motive is completely
B irrelevant for explaining the death of the daughters.

(4) The prosecution has not given its own story at all
with respect to what things transpired on 26th August
2008.

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16. Keeping the above points in mind, we are of the
opinion that in the present case the prosecution has failed
to discharge its initial burden itself. Therefore, the question
of burden of proof shifting to the accused to explain the
D happening of incidents does not arise. First and foremost,
the delay of one month in filing FIR at the very face of it
makes the entire case of the prosecution as concocted and
an afterthought. There is no explanation as to why did the
parents of Shubhangi not make any complaint or FIR
E immediately after the recovery of her dead body. It is
surprising that nowhere in the case of the prosecution this
delay has been explained.

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17. Secondly, the accused had put a very consistent
story at all stages of the case starting from the missing report
to the Section 313 statement without any inconsistency. He
states that on 26th August 2008 while returning from Wadsa,
he exhausted fuel in the bike so dropped his wife and two
daughters at HP Gas Agency to go back to get fuel from the
G petrol pump. When he returned in 15-20 minutes, there was
no sign of Shubhangi and two daughters. This, to us, sounds
a plausible story and prosecution has done nothing to really
counter this version. The Sessions Judge found that this
story was unreliable as the accused had failed to put on
H record the bill for the fuel which he went to fill in the bike.

However, we find this reasoning far from the reality as it is well known that not to many people would ask for receipts when refueling their vehicles in India and the accused may not have expected to do so. A

18. With respect to the shifting of burden of proof on the accused to explain the happening of 26 August 2008, the prosecution has relied on the motive that accused-appellant was hoping to get Rs.2 lakhs from Shalinibai. But as we have already noted above, it is logically flawed since the death of Shubhangi would not make accused-appellant a rightful claimant of that amount. Moreover, this motive does not explain the murder of the two daughters. Lack of justified motive would adversely affect the case of the prosecution as the present case is solely based on circumstantial evidence. B C D

19. Further, we find no merit in the Trial Court's reasoning in finding the facts that accused asked his colleague to prepare dinner, filing missing report on the next morning and leaving the family at HP Gas Agency as incriminating pieces of evidence. The accused could have asked his friend and colleague to prepare dinner in normal course as he would have got late in returning from Wadsa. Further, it was but natural for the accused to search and try to find out his family even before he would go to the police. We do not find it was unnatural to have registered a missing report the very next morning. Also, leaving wife and two daughters at HP Gas Agency is not so unusual and would depend from person to person. With respect to previous incidents, all that is proved is demand of dowry by the in-laws and the accused-appellant. The allegation that husband would not sleep with the deceased wife when his parents would visit, is the only allegation against the accused-appellant. E F G H

- A 20. From the above discussion, we conclude that the prosecution has not brought any clinching evidence in support of last seen together theory so as to shift the burden of proof on the accused-appellant. In light of this, the prosecution has evidently failed to prove the guilt of the
- B accused-appellant beyond doubt. Therefore, the appeal is allowed and the judgment and order passed by the High Court as also by the Trial Court are set aside. The appellant is directed to be released forthwith if not required in
- C connection with any other case.

Nidhi Jain

Appeal allowed.

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