A DINESH KUMAR

v.

THE STATE OF HARYANA

(Criminal Appeal No. 530 of 2022)

B MAY 04, 2023

[SUDHANSHU DHULIA AND SANJAY KUMAR, JJ.]

Penal Code,1860 – ss.302,364,392,394,201 and 34 – Evidence Act, 1872 – ss.27,101,106 and 165 – The case of prosecution was based on circumstantial evidence i.e. the evidence C *of 'last seen' and the 'discoveries' made from the information given by the appellant – Appellant(accused) and one co-accused convicted by Trial Court for the murder of the deceased – Two separate appeals were filed before the High Court – During the pendency of the appeal, the co-accused passed away, thus, his appeal stood abated* D *– The appeal of the present appellant was dismissed, thus conviction and sentence of the trial court was upheld by the High Court – On appeal, held: In the present case, when there is no close proximity between circumstances of last seen together and the approximate time of death, the evidence of last seen becomes weak, such* E *circumstances by itself cannot form the basis of guilt – Further, the evidence of recovery had already been disclosed by the co-accused by the time the present appellant was arrested and thus the relevant facts were already in the knowledge of the police – Thus, disclosure and discovery made thereafter cannot be read against the present appellant – There cannot be a "discovery" of an already discovered* F *fact – As far as the recovery of 'Parna' and watch of the deceased from the disclosure statement made by appellant, this evidence in itself is not sufficient to fix guilt on the appellant – Prosecution failed to establish important links in this case –* Rigor mortis *was present in the body after 90 days remained unexplained –* G *Prosecution did not explain – Defence did not question – Prosecution was not able to prove its case beyond reasonable doubt – Judgment of trial court and High court set aside.*

Evidence Act, 1872 – s. 165 – Judge's power to put questions or order production – Held: The duty of the presiding judge of a criminal trial is not to watch the proceedings as a spectator or a H

recording machine but he has to participate in the trial 'by envincing intelligent active interest by putting questions to witnesses in order to ascertain truth.'

Allowing the appeal, the Court

HELD:1. The recovery of the stolen tractor, the place where the murder was committed and the place where body was thrown in the canal were facts which were already in the knowledge of the police, since it is the case of the prosecution that the co--accused, who was arrested by the police 2 days preceding the arrest of the present appellant, had earlier led to the same discoveries on 12th, 13th & 14th of May, 2000. So, this disclosure and discovery made thereafter cannot be read against the present appellant. There cannot be a "discovery" of an already discovered fact! What remains is the discovery of currency notes, wrist watch, 'Parna' and hair. The forensic report of hair only says that it belongs to 'human'. The currency notes cannot be really identified with the deceased. What remains is the watch and the 'Parna', which has been identified with the deceased. The second is the evidence of "last seen". This is in the form of PW-10 who is the neighbour of the complainant and who had seen the appellant along with co-accused with the deceased on 08.05.2000 at about 7.30 PM in the evening. [Para 8][229-F-H; 230-A-B]

2. The prosecution has failed to establish important links in this case, which is so vital in a case of circumstantial evidence. *Rigor mortis* present in the body after 90 hours is unusual, though possible under certain circumstances. It was the duty of the prosecution to explain it. The defense too failed to question it and the Court remained silent. [Para 11][233-D-E]

3. The evidence of last seen becomes an extremely important piece of evidence in a case of circumstantial evidence, particularly when there is a close proximity of time between when the accused was last seen with the deceased and the discovery of the body of the deceased, or in this case the time of the death of the deceased. This does not mean that in cases where there is a long gap between the time of last seen and the death of the deceased the last seen evidence loses its value. It would not, but

then a very heavy burden is placed upon the prosecution to prove that during this period of last seen and discovery of the body of the deceased or the time of the death of the deceased, no other person but the accused could have had an access to the deceased. The circumstances of last seen together in the present case by itself cannot form the basis of guilt .The circumstances of last seen together does not by itself lead to an irrevocable conclusion that it is the accused who had committed the crime. The prosecution must come out with something more to establish this connectivity with the accused and the crime committed. Particularly, in the present case when there is no close proximity between circumstances of last seen together and the approximate time of death, the evidence of last seen becomes weak. [Para 12][233-E-G; 234-A-B]

4. As per the post-mortem which was conducted on 12.05.2000 at 4:15 P.M, the death was 48 hours prior to the post mortem, which means it was before 4:00 P.M. on 10.05.2000. Even assuming that the death has taken place, a day earlier i.e. 09.05.2000, still there is a long gap between the last seen which is at 7:00 pm on 08.05.2000 and the morning of 09.05.2000. In this case, even if this court take the time between the last seen and the approximate time of death as per the post-mortem, which would go beyond 48 hours preceding the time of post-mortem and the time of death can be stretched to the morning of May 9, 2000, which still begs an explanation from the prosecution as to the time gap, as the deceased was last seen with the two accused on 08.05.2000 at 7:00 P.M. [Para 12][234-E-F, G; 235-A]

5. The burden of proof is always with the prosecution. It is the prosecution which has to prove its case beyond a reasonable doubt. Section 106 of the Act does not alter that position. It only places burden for disclosure of a fact on the establishment of certain circumstances. This Court have no reason to doubt the testimony of PW-10, the sole witness of last seen. In his statement under Section 313 of the Code of Criminal Procedure, when the appellant was questioned about being in the company of the deceased on 08.05.2000 along with co-accused, no explanation was given by the appellant about his whereabouts. It is for this

reason that it has been held that the accused has not been able to discharge his burden under Section 106 of the Act and therefore this has to be read as an additional link in the chain of evidence against the appellant. However, Section 106 of the Act would not even come to play here under the facts and circumstances of the present case. What has to be kept in mind is that Section 106 of the Act, only comes into play when the other facts have been established by the prosecution. In this case when the evidence of last seen itself is on a weak footing, considering the long gap of time between last seen by PW-10 and the time of death of the deceased, Section 106 of the Act would not be applicable under the peculiar facts and the circumstances of the case. [Paras 12, 13][235-H; 236-A-D]

6. As far as the recovery is concerned, the recovery is again weak. The so-called alleged place of crime and the recovery of tractor or the place where the tractor was abandoned had already been disclosed by the co-accused by the time the present appellant was arrested. Therefore, making a disclosure about the place of occurrence or the place where the tractor was abandoned is of no consequence. As far as the recovery of watch, currency notes of Rs. 250/-, hair and 'Parna' from the residence of the appellant are concerned, the currency notes and hair have not been identified with the deceased. In a criminal trial, the prosecution has to prove its case beyond reasonable doubt. This heavy burden has to be discharged by the prosecution. It becomes even more difficult in a case of circumstantial evidence. In the present case, the nature of circumstantial evidence is weak. In order to establish a charge of guilt on the accused, the chain of evidence must be completed and the chain must point out to one and only one conclusion, which is that it is only the accused who have committed the crime and none else. This Court was afraid the prosecution has not been able to discharge this burden. [Para 14][236-E-H]

7. In the present case the prosecution has not been able to prove its case beyond reasonable doubt. The evidence of last seen, only leads upto a point and no further. It fails to link it further to make a complete chain. All this court have here is the evidence of last seen, which as this court have seen looses much

of its weight under the circumstances of the case, due to the long duration of time between last seen and the possible time of death. What this court can call as discovery here under Section 27 of the Act, is the discovery of 'Parna' and watch of the deceased. This evidence in itself is not sufficient to fix guilt on the appellant. In a case where there is no direct eye witness to the crime, the prosecution has to build its case on the circumstantial evidence. It is a very heavy burden cast on the prosecution. The chain of circumstances collected by the prosecution must complete the chain, which should point to only one conclusion which is that it is the accused who had committed the crime, and none else. Each evidence which completes the chain of evidences must stand on firm grounds. In the considered opinion of this Court, the evidence placed by the prosecution in this case does not pass muster the standard required in a case of circumstantial evidence. [Para 15][237-E-H; 238-A]

Ram Chander v. State of Haryana **1981 AIR 1036 : [1981] 3 SCR 12;** *Anjan Kumar Sarma & Ors. v. State of Assam* **(2017) 14 SCC 359;** *Malleshappa v. State of Karnataka* **(2007) 13 SCC 399 : [2007] 10 SCR 153;** *Nizam & Anr. v. State of Rajasthan* **(2016) 1 SCC 550 : [2015] 10 SCR 786;** *State of Goa v. Sanjay Thakran* **(2007) 3 SCC 755 : [2007] 3 SCR 507;** *Ajit Singh v. State of Maharashtra* **(2011) 14 SCC 401 : [2011] 13 SCR 1000 - referred to.**

Case Law Reference

[1981] 3 SCR 12	**referred to**	**Para 11**
(2017) 14 SCC 359	**referred to**	**Para 12**
[2007] 10 SCR 153	**referred to**	**Para 12**
[2015] 10 SCR 786	**referred to**	**Para 12**
[2007] 3 SCR 507	**referred to**	**Para 12**
[2011] 13 SCR 1000	**referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 530 of 2022. A

From the Judgment and Order dated 31.05.2017 of the High Court of Punjab & Haryana at Chandigarh in CRA No. 650 of 2003.

A. Sirajudeen Sr. Adv., Naresh Kumar (SCLSC), Keerthik Vasan, Rajaseker, Xavier Felix, Advs. for the Appellant. B

Dinesh Chander Yadav, AAG, A S Rishi, Ishwar Chand, Manoj Gautam, Dr. Monika Gusain, Advs. for the Respondent.

The Judgment of the Court was delivered by

SUDHANSHU DHULIA, J. C

1. The appellant, and one Mange Ram, were convicted in Sessions Trial No. 47 of 2000, for offences under Sections 302/364/392/394/201 read with Section 34 of Indian Penal Code ('IPC'), by the learned Additional Sessions Judge, Jagadhri, Haryana. They were awarded life sentence under Section 302 IPC, and lesser sentence on the remaining convictions, vide order dated 11.07.2003. The two then filed separate appeals before Punjab and Haryana High Court. During the pendency of his appeal the co-accused Mange Ram passed away on 24.10.2004, and his appeal stood abated *vide* order dated 11.05.2017. The appeal of the present appellant was dismissed and the conviction and sentence of the trial court was upheld by the High Court, *vide* its order dated 31.05.2017. His SLP before this Court was given leave on 28.03.2022. D E

We have heard at length, the learned senior counsel Mr. A. Sirajudeen for the appellant and Mr. Dinesh Chander Yadav, learned Additional Advocate General for the State of Haryana. F

2. The case of the prosecution is entirely based on circumstantial evidence. The 'evidence' of last seen and the "discoveries" made from the information given by the appellant. The facts of the case are as under:-

3. The deceased Gurmail Singh was a resident of village-Dhimo, District, Yamuna Nagar, Haryana. On the morning of 08.05.2000, he left his village on his tractor, for the nearby village of 'Dadupur', (which is at a distance of 15-20 kilometers). In Dadupur he was to meet his sister and his brother-in-law. He was with his sister and brother-in-law between 2.00 P.M. to 5.30 P.M on 08.05.2000 and according to his brother-in-law G H

A (PW-1) he left their house at about 5.30 P.M on 08.05.2000. Gurmail Singh never returned to his village. Meanwhile, Harbans Singh, the brother of the deceased (the two brothers were staying together with their families in village Dhimo), goes to village Dadupur on 11.05.2000 i.e. after 3 days, to enquire from his sister about the whereabouts of their brother, when he is told that the deceased had left their house on 08.05.2000 itself at about 5.30 P.M.!

Harbans Singh then lodges the F.I.R. at P.S Buria, District Yamuna Nagar (Haryana), at 4.00 p.m on 11.05.2000. He states in the F.I.R. that Gurmail Singh is his brother, and the two live together as a joint family in village Dhimo. Then he narrates how his brother left his village in the morning on 08.05.2000 on his tractor to meet their sister, but has since not returned. He states that while he was searching for his brother, he met his neighbour Karanjit Singh, at the petrol pump of village Dadupur, who informed him that he had seen Gurmail Singh on his tractor on 08.05.2000 at around 7.00 pm with Mange Ram and Dinesh (the two accused), who were residents of nearby villages. He promptly went to those villages to find out about the where about of these two persons, when he was informed that they were missing since 08.05.2000. He then states in his F.I.R. that these two persons Mange Ram and Dinesh are known to be vagabonds and they have kidnapped his brother in order to rob him of his tractor. A case was then registered by Police on 11.05.2000 under Section 364 IPC.

The body of the deceased was recovered next day i.e. on 12.05.2000, at 1.30 P.M. from a canal. The inquest was conducted the same day and the body was sent for post-mortem. The post-mortem was conducted at about 4:15 P.M. on 12.05.2000 by Dr. Sumesh Garg (PW-4) and Dr. Ashok Kumar Sharma at Civil Hospital, Jagadhri. The body was found to be swollen with the skin peeling off from many places. *Rigor mortis* was found to be present in all four limbs of the deceased, but was absent in the neck. The tongue and lips of the deceased was dark red in colour and swollen and further there was red coloured froth coming out from the mouth and nostrils. There was a ligature mark of 53 cm x 8 cm around the neck, over the thyroid and hyoid cartilage. The base of the ligature mark was hard and the margins of the ligature mark were pale and parchment like. The post-mortem report further states that the ligature marks present on the body disclosed an ante-mortem strangulation. The Pericardium was found to be congested, with the left chamber of the heart to be empty and the right chamber of the heart

was found to have little blood. Ultimately the cause of death was asphyxia due to strangulation which was ante-mortem in nature.

The post mortem examination of the body shows that *rigor mortis* was present in all the four limbs of the body, but was not there in the neck. This was indicative of the fact that *rigor mortis* was receding from the body. Generally speaking, *rigor mortis* sets in one to two hours after the death, and develops from head to foot in about 12 hours. *Rigor mortis* then disappears in the same sequence i.e. first from the head, then neck and then to the lower part of the body. In northern India, *rigor mortis* lasts about 24 to 48 hours in winters and 18 to 36 hours in summers. All the same, there are many variables. The body structure, and the health of the deceased, the fact that it was kept in cold water and away from heat will all slow down the process of *rigor mortis*[1].

Rigor mortis disappears late in bodies which are immersed in cold water.[2] In the case at hand, the body of the deceased was recovered from a canal, and therefore the possibility that *rigor mortis* would still remain in the body cannot be entirely ruled out, but this has nowhere been explained. Although the exact time when the deceased died has not come out but the prosecution case is that he was murdered by the accused (Dinesh Kumar and Mange Ram) on 08.05.2000 itself. If this is so, then the *rigor mortis* has remained in the body for about 90 hours, which is unusual. Moreover, the prosecution has not explained this factor, and the defense has definitely not questioned Dr. Sumesh Garg (PW-4) on this aspect. But considering the importance of this aspect this question should have been put to the prosecution and particularly to the doctor who had done the post mortem. If not by the defense then this question ought to have been put to the witness by the Court under the powers vested with the Court under Section 165 of the Indian Evidence Act, 1872 (for short 'Act'). But we will come to this in a while.

4. Meanwhile the co-accused Mange Ram was arrested on 12.05.2000 and the next day i.e., 13.05.2000, on the information given by him to the police he was taken to the place which was disclosed to be the place where he and Dinesh Kumar had killed the deceased. From this place, two pairs of "chappals" (slippers) one belonging to the appellant (Dinesh Kumar) and the other, belonging to the co-accused Mange Ram,

[1] A textbook of Medical Jurisprudence and Toxicology by Modi (Chapter 15, Pg. 342)
[2] *Ibid* (Chapter 15, Pg. 342)

A were recovered. Some burnt hair of the deceased were also recovered from this place. Mange Ram then took the police party to the canal from where the dead body was dropped.

5. On 14.05.2000 (i.e., the next day) Mange Ram led the police party to the place where the tractor of the deceased was abandoned by
B him and Dinesh Kumar. All the same, by the time the police party reached that place, the tractor had already been discovered by the local Police, and was in their custody at Rampur Police Station, Saharnpur, Uttar Pradesh. The possession of the tractor was taken from the local police, by the Investigating Officer.

C 6. The present appellant was arrested on 14.05.2000, from 'Nandgarh' village. On his disclosure a wrist watch, 'Parna' (turban) and currency notes amounting to Rs. 250/- allegedly belonging to the deceased were recovered from his residence. He then took the Police to the same place as the co-accused Mange Ram had earlier taken them to the two places i.e., the place where the deceased was killed and
D the place where the tractor was abandoned[3].

7. The evidence of last seen is of Karanjit Singh (PW-10) who is the neighbour of the complainant (PW-11). PW-10 had seen the deceased along with the two accused i.e., Dinesh Kumar and Mange Ram at about 7:00 P.M. on 08.05.2000. According to the witness the deceased
E was driving the tractor and the two i.e., the appellant and Mange Ram were sitting on the mudguard of the tractor.

8. As we can see the case of the prosecution rests on two circumstantial evidences: (A) The disclosure given in the police custody and the discovery on its basis and (B) The evidence of last seen in the
F form of PW-10. In a case of circumstantial evidence, motive too is of significance. As far as motive is concerned, the prosecution case is that the two accused killed the deceased only to steal his tractor. The deceased in this case was a 42-year-old well-built man of 6 feet 2 inches in height (Post Mortem report dated 12.05.2000). The prosecution case is that
G the deceased was kidnapped and murdered by the two accused, for his tractor which they had robbed from the deceased, after putting him to death. Now this tractor the accused had in any case abandoned, and did nothing to recover it till one of them was caught on 12.05.2000. In short, the 'motive' is not very convincing.

H [3] Meanwhile S.392/394/302 along with S.34 were added in the F.I.R. (dated 11.05.2000)

The disclosure made by the appellant while in police custody, which led to certain discoveries, such as the place where the stolen tractor was abandoned, the place where the alleged crime was committed, and the place where the body was thrown in the canal, and also the discovery of 'Parna', burnt hair, wrist watch, and currency notes of Rs.250/-.

Section 27 of the Evidence Act reads as under :-

> *"How much of information received from accused may be proved—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

The above provision shows that discovery should be of a distinct fact, the fact which has been discovered by disclosure of the one in police custody. All the same, these facts were already in the knowledge of the police in the earlier discovery made by the co-accused Mange Ram. The co-accused Mange Ram was arrested on 12.05.2000 and had led to these discoveries on 12th, 13th& 14th May. The present appellant was arrested on May 14, 2000, and the alleged discoveries made by him were later in time. The discoveries which were made on the pointing out of co-accused Mange Ram cannot be read against the present appellant. If the disclosure has been made by the accused to the police while he was in their custody and such a disclosure leads to discovery of a fact then that discovery is liable to be read as evidence against the accused in terms of Section 27 of the Act. All the same, the distinguishing feature of such a discovery must be that such a disclosure must lead to the discovery of a "distinct fact". The recovery of the stolen tractor, the place where the murder was committed and the place where body was thrown in the canal were facts which were already in the knowledge of the police, since it is the case of the prosecution that the co-accused Mange Ram, who was arrested by the police 2 days preceding the arrest of the present appellant, had earlier led to the same discoveries on 12th, 13th & 14th of May, 2000. So, this disclosure and discovery made thereafter cannot be read against the present appellant. There cannot be a "discovery" of an already discovered fact! What remains is the discovery of currency notes, wrist watch, 'Parna' and hair. The forensic report of

A hair only says that it belongs to 'human'. The currency notes cannot be really identified with the deceased. What remains is the watch and the 'Parna', which has been identified with the deceased.

The second is the evidence of "last seen". This is in the form of PW-10 Kartar Singh who is the neighbour of the complainant and who B had seen the appellant along with co-accused Mange Ram with the deceased on 08.05.2000 at about 7.30 PM in the evening.

9. The admitted position is that the body of deceased was discovered from the canal four days later i.e. on 12.05.2000 in the afternoon and the post-mortem was conducted at about 4.15 PM on the C same day i.e.12.05.2000. According to Post-mortem report the death had taken place more than 48 hours prior to the post-mortem, which would mean that death took place approximately before 4.00 PM on 10.05.2000. Although the autopsy reports normally do not give precise time of death, but only indicate an approximate time or duration, yet under normal circumstances in the present case, death should have been D on May 10, 2000 or May 9, 2000. All the same, the case of the prosecution is that the deceased was killed on May 8, 2000 itself. If this be so then it was the duty of the prosecution to explain as to how *rigor mortis* remained present in the body, even after four days of the death. The possibility of the *rigor mortis* remaining in the body for 90 hours cannot E be ruled out completely, but this was never explained by the prosecution. It was the duty of the prosecution to explain the unusual circumstances under which *rigor mortis* remained present in the body, even for 90 hours, in the month of May.

The High Court has only relied upon the evidence of PW-4 Dr. F Sumesh Garg who had conducted the post-mortem, who gave his opinion that the death occurred more than 48 hours before the time of the post-mortem and therefore the deceased was killed by Mange Ram and present appellant on 08.05.2000 this is what has been said by the High Court: -

G *"According to PW-4 Dr. Sumesh Garg, who alongwith Dr. Ashok Kumar Sharma had conducted post-mortem examination on dead body of Gurmail Singh on 12.05.2000. The probable duration between injuries and death was within minutes and between death and post-mortem more than 48 hours. Thus, it comes out that Gurmail Singh was murdered* H *by accused-Mange Ram and Dinesh Kumar on 08.05.2000."*

10. The trial court was conscious of this aspect but then it did not go into this aspect for the reason that no question was put on this by the defense, this is what was said by the trial court: -

> *"I have gone through the post mortem report. Perusal of the same reveals that the rigor mortis was present in all the four limbs due to swelling and not in normal course. It was the duty of the defence to ask the doctor who had conducted post mortem on the dead body, whether the presence of rigor mortis was suggestive of the fact that the deceased was killed within thirty-six hours of his post mortem examination. But no such question was put to doctor. The doctor in his statement had stated that the time between death and post mortem examination was more than forty-eight hours and this statement of the doctor was not challenged in his cross-examination. Therefore, the plea of the ld. defence counsel cannot be accepted."*

11. We are afraid that by pointing out the weakness in the cross examination of the defense the presiding judge indirectly admits to the weakness in the trial itself. We say this for the reasons that under Section 165 of the Act, a trial judge has tremendous powers to *"ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant".* It is in fact the duty of the Trial Judge to do so if it is felt that some important and crucial question was left from being asked from a witness. The purpose of the trial is after all to reach to the truth of the matter. Section 165 of the Act reads as under:

> *"165.* ***Judge's power to put questions or order production.*** *— The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any*

A *document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of*
B *any document, except in the cases hereinbefore excepted."*

The powers of a presiding judge in a criminal trial and his duty to get to the truth of the matter have been laid down in a seminal judgement of this Court authored by Justice O. Chinnappa Reddy, which is **Ram Chander** v. **State of Haryana**[4]. Justice O. Chinnappa Reddy in the said
C judgment refers to his earlier Judgment[5] given by him as a Judge of the Andhra Pradesh High Court, where it was said :

"Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding judge to explore
D *every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties*
E *about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial."*

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The duty of the presiding judge of a criminal trial is not to watch the proceedings as a spectator or a recording machine but he has to participate in the trial *"by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."* While referring to a decision of Lord Denning in *Jones v. National Coal Board*[6] the
G learned Judge had said that it is the duty of the judge to ask questions to the witnesses when it becomes necessary to clear up any point that has been overlooked or left obscure, then he goes on to say as under:

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[4] 1981 AIR 1036

[5] Sessions Judge, Nellore v. Intha Ramana Reddy, ILR 1972 AP 683; 1972 Cri LJ 1485

H [6] (1957) 2 All ER 155: (1957) 2 WLR 760

"We may go further than Lord Denning and say that it is the duty of a judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant" (Section 165, Evidence Act). But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, 'like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (sic the) old'."

In our considered opinion the prosecution has failed to establish important links in this case, which is so vital in a case of circumstantial evidence. *Rigor mortis* present in the body after 90 hours is unusual, though possible under certain circumstances. It was the duty of the prosecution to explain it. The defense too failed to question it and the Court remained silent. Let us now revert to the evidence of last seen.

12. The evidence of last seen becomes an extremely important piece of evidence in a case of circumstantial evidence, particularly when there is a close proximity of time between when the accused was last seen with the deceased and the discovery of the body of the deceased, or in this case the time of the death of the deceased. This does not mean that in cases where there is a long gap between the time of last seen and the death of the deceased the last seen evidence loses its value. It would not, but then a very heavy burden is placed upon the prosecution to prove that during this period of last seen and discovery of the body of the deceased or the time of the death of the deceased, no other person but the accused could have had an access to the deceased. The circumstances of last seen together in the present case by itself cannot form the basis of guilt (See: **Anjan Kumar Sarma & Others** v. **State of Assam**[7]).

[7] (2017) 14 SCC 359 -para 19

A The circumstances of last seen together does not by itself lead to an irrevocable conclusion that it is the accused who had committed the crime. The prosecution must come out with something more to establish this connectivity with the accused and the crime committed. Particularly, in the present case when there is no close proximity between circumstances of last seen together and the approximate time of death, the evidence of last seen becomes weak (See: - **Malleshappa** v. **State of Karnataka**[8]).

In **Nizam & Anr.** v. **State of Rajasthan**[9] where the time gap between the last seen together and the discovery of the body of the deceased was long, it was held that during this period the possibility of some other interventions could not be ruled out. Where time gap between the last seen and time of death is long enough, as in the present case, then it would be dangerous to come to the conclusion that the accused is responsible for the murder. In such cases it is unsafe to base conviction on the "last seen theory" and it would be safer to look for corroboration from other circumstance and evidence which have been adduced by the prosecution. The other circumstances here is the so called discovery, and most of these, as we have already discussed, fail to meet the requirement of Section 27 of the Evidence Act.

As per the post-mortem which was conducted on 12.05.2000 at 4:15 P.M, the death was 48 hours prior to the post mortem, which means it was before 4:00 P.M. on 10.05.2000. Even assuming that the death has taken place, a day earlier i.e. 09.05.2000, still there is a long gap between the last seen which is at 7:00 pm on 08.05.2000 and the morning of 09.05.2000. In the case of ***State of Goa*** v. ***Sanjay Thakran***[10], where in the evidence of last seen, the recovery of dead body was only a few hours before "last seen", it was not considered reliable.

The same was again emphasized by this Court in ***Ajit Singh*** v. ***State of Maharashtra***[11] where it was emphasized that the time between victim last seen alive and the discovery of the body of the deceased has to be of close proximity, so that any other person being the author of the crime cannot be ruled out. In this case,even if we take the time between the last seen and the approximate time of death as per the post-mortem,

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[8] (2007) 13 SCC 399 – para 23
[9] (2016) 1 SCC 550
[10] (2007) 3 SCC 755
[11] (2011) 14 SCC 401

which would go beyond 48 hours preceding the time of post-mortem and the time of death can be stretched to the morning of May 9, 2000, which still begs an explanation from the prosecution as to the time gap, as the deceased was last seen with the two accused on 08.05.2000 at 7:00 P.M.

The trial court as well as the High Court have lost sight of the vital aspect of the matter. Both the Courts have relied on Section 106 of the Act and have held that since the accused was last seen with the deceased and he has not been able to give any reasonable explanation of his presence with the deceased in his statement under Section 313 of the Cr.P.C., it has to be read against the accused and therefore it has to be counted as an additional link in the chain of circumstantial evidence. In present case in the findings of the trial court and High Court this appears to be the most important aspect which weighed with the trial court as well as the High Court in establishing the guilt of the accused. We are, however, afraid this is a complete misreading of Section 106 of the Act.

Section 101 of the Act places the burden of proof on the prosecution. It reads as under :-

> ***101. Burden of proof*** *— Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Section 106 of the Act creates an exception to Section 101 and reads as under :-

> ***106. Burden of proving fact especially within knowledge*** *— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

Section 106 of the Act is an exception to the rule which is Section 101 of the Act, and it comes into play only in a limited sense where the evidence is of a nature which is especially within the knowledge of that person and then the burden of proving that fact shifts upon him that person.

The burden of proof is always with the prosecution. It is the prosecution which has to prove its case beyond a reasonable doubt.

A Section 106 of the Act does not alter that position. It only places burden for disclosure of a fact on the establishment of certain circumstances. We have no reason to doubt the testimony of PW-10 (Karanjit Singh), the sole witness of last seen. In his statement under Section 313 of the Code of Criminal Procedure, when the appellant was questioned about being in the company of the deceased on 08.05.2000 along with co-
B accused Mange Ram, no explanation was given by the appellant about his whereabouts. It is for this reason that it has been held that the accused has not been able to discharge his burden under Section 106 of the Act and therefore this has to be read as an additional link in the chain of evidence against the appellant. To our mind, however, Section 106 of the
C Act would not even come to play here under the facts and circumstances of the present case.

13. What has to be kept in mind is that Section 106 of the Act, only comes into play when the other facts have been established by the prosecution. In this case when the evidence of last seen itself is on a
D weak footing, considering the long gap of time between last seen by PW-10 and the time of death of the deceased, Section 106 of the Act would not be applicable under the peculiar facts and the circumstances of the case.

14. As far as the recovery is concerned, the recovery is again
E weak. The so-called alleged place of crime and the recovery of tractor or the place where the tractor was abandoned had already been disclosed by the co-accused by the time the present appellant was arrested. Therefore, making a disclosure about the place of occurrence or the place where the tractor was abandoned is of no consequence. As far as the recovery of watch, currency notes of Rs. 250/-, hair and
F 'Parna' from the residence of the appellant are concerned, the currency notes and hair have not been identified with the deceased. In a criminal trial, the prosecution has to prove its case beyond reasonable doubt. This heavy burden has to be discharged by the prosecution. It becomes even more difficult in a case of circumstantial evidence. In the present
G case, the nature of circumstantial evidence is weak. In order to establish a charge of guilt on the accused, the chain of evidence must be completed and the chain must point out to one and only one conclusion, which is that it is only the accused who have committed the crime and none else. We are afraid the prosecution has not been able to discharge this burden.

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The factors which have to be taken into consideration by the Court in a case of circumstantial evidence, are too well settled to be stated but nevertheless these factors which are being reproduced from **Anjan Kumar Sarma** (supra) are as under :-

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

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

15. In our considered view, in the present case the prosecution has not been able to prove its case beyond reasonable doubt. The evidence of last seen, only leads upto a point and no further. It fails to link it further to make a complete chain. All we have here is the evidence of last seen, which as we have seen looses much of its weight under the circumstances of the case, due to the long duration of time between last seen and the possible time of death. What we can call as discovery here under Section 27 of the Act, is the discovery of 'Parna' and watch of the deceased. This evidence in itself is not sufficient to fix guilt on the appellant.

In a case where there is no direct eye witness to the crime, the prosecution has to build its case on the circumstantial evidence. It is a very heavy burden cast on the prosecution. The chain of circumstances collected by the prosecution must complete the chain, which should point to only one conclusion which is that it is the accused who had committed the crime, and none else. Each evidence which completes the chain of

A evidences must stand on firm grounds. In our considered opinion, the evidence placed by the prosecution in this case does not pass muster- the standard required in a case of circumstantial evidence.

16. This appeal therefore succeeds. The orders of the trial court and the High Court dated 11.03.2007 and 31.05.2017, respectively are
B hereby set aside. Appellant is in jail shall now be released forthwith unless his presence is required in any other case.

Ankit Gyan Appeal allowed.
(Assisted by : Aarsh Choudhary, LCRA)