

countrymade pistols at Roop Singh- deceased and Sheela (PW-2) respectively. The conduct of the appellants and the manner in which the crime has been committed is sufficient to attract Section 34 IPC as both the appellants acted in furtherance of common intention. The conviction of the appellant-Sanjay under Section 302 IPC read with Section 34 IPC is modified to conviction under Section 304 Part I IPC.

16. Conviction of the appellants-Narendra and Sanjay under Section 302 IPC and Section 302 IPC read with Section 34 IPC respectively is modified to Section 304 Part I IPC and Section 304 Part I IPC read with Section 34 IPC respectively and each of them are sentenced to undergo rigorous imprisonment for ten years and the same shall run concurrently alongwith sentence of imprisonment imposed on the appellants. Conviction of the appellants for other offences and the respective sentence of imprisonment imposed on the appellants and fine is affirmed. The appeals are partly allowed to the above extent.

Result:- Appeals partly allowed.

**ABC 2016 (I) 352 SC
ACQUITTAL & BAIL CASES
SUPREME COURT OF INDIA**

(Jagdish Singh Khehar & C. Nagappan, JJ.)

Criminal Appeal No. 462 of 2016 (Arising out of SLP(Crl.) No.1962 of 2015)

(From Chhattisgarh High Court)

Decided On 12 May, 2016

RAMBRAKSH @ JALIM

- Appellant(s).

Versus

STATE OF CHHATTISGARH

- Respondent(s).

Law Covered:- (A) Indian Penal Code, 1860 – Sections 302 & 201 – Conviction under – Circumstantial Evidence – Case based on – Delay in FIR – not explained – Independent witnesses – not supporting the case by – Human bones recovered – DNA analysis not conducted – Cause of death could not be ascertained – Held, prosecution has failed to prove that the death of the deceased was either homicidal or otherwise – Last seen theory – not established – Conviction set aside – Acquittal. (Para 8, 9 & 10)

a (B) *Indian Evidence Act, 1872 – Section 27 – Recovery – of bones of the deceased – Not seized/recovered pursuant to any information furnished by the accused – Held, the contention that prosecution has not even established the death of the deceased cannot be brushed aside. (Para 8)*

b (C) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Body parts of the human origin recovered – Identification not established – DNA Test not conducted – Fatal to prosecution. (Para 9)*

c (D) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Circumstantial Evidence – Last seen theory – Held, a conviction cannot be based on the only circumstance of last seen together – to record a conviction, the prosecution has to complete the chain of circumstances to bring home the guilt of the accused. (Para 10)*

d (E) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Circumstantial Evidence – Last seen theory – basing conviction on – Comes in to play where the time gap, between the point of time when the accused and the deceased were seen last alive – and when the deceased is found dead – is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. (Para 10)*

e **Facts:-** *As per the case of the prosecution appellant herein/accused No.2 went to the house of the deceased and asked to go with him to Ambikapur. The deceased went with him and did not return back. A week thereafter, the son of the deceased inquired about his father from his mother and she told him that he had gone with the accused to Ambikapur and then he informed her that he noticed clothes, gamcha and shoes of his father in the field. She, along with her son, went to the said place and found the articles of her husband. They also noticed birds flying nearby; they went there and found skeleton remains of the deceased. Thereafter, Morque was lodged as Police Station. The IO visited the scene of occurrence and conducted inquest on the scattered bones. He seized articles from the spot. In the medical examination of the bones they were found to be of human origin. No mark of injury was present at any of the bones and cause of death could not be ascertained. In the course of investigation both the accused were arrested and they made disclosure statements leading to recovery of the articles related to the deceased.*

h *The trial court acquitted accused No.1 and convicted and sentenced the present appellant. The appeal preferred by him before the High Court came to be dismissed and aggrieved by the same he preferred the present appeal.*

June 2016

It was observed by the Hon'ble Apex Court that the prosecution case rests only upon the circumstantial evidence. The Court observed unexplained delay in the FIR. It was further observed that contention of the defence counsel that prosecution has not even established the death of the deceased cannot be brushed aside. The last seen theory put forth by the prosecution was also found not established. Conviction was set aside.

Law of relief:- *In the case of unidentified body, non-conducting of DNA test is fatal to prosecution.*

Held:- There is absolutely no explanation given by the prosecution for the inordinate delay in lodging the complaint and registering the case. The independent witnesses examined by the prosecution have not supported the case. As per last seen theory projected by the prosecution the deceased Ramsevak was last seen alive in the company of the appellant on 7.10.1992 and after 7 days the bones and clothes allegedly belonging to Ramsevak came to be noticed and thereafter seized from the field. At this juncture, it is pertinent to point out that they were not seized/recovered pursuant to any information furnished by the accused. (Para 8)

The contention for the learned counsel for the appellant that the prosecution has not even established the death of Ramsevak cannot be brushed aside. Dr. Sapan Kumar Das examined them and gave Exh.P23 opinion stating that the bones are of human origin and they belonged to male aged between 25 to 40 years and there were no marks of injury in any of the bones and the cause of death cannot be said and the death could have occurred within 6 months prior to the date of examination. The Investigation Officer did not take any attempt to conduct DNA analysis of bones to prove that the skeleton seized was that of Ramsevak. In short the prosecution has failed to prove the death of Ramsevak either homicidal or otherwise. (Para 9)

10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would

not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused. (Para 10)

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Counsel:- For Appellant(s): Mr. Yogesh Tiwari, Adv. for Mr. Vikrant Singh Bais, AOR.

For Respondent(s): Mr. C. D. Singh, AAG & Ms. Sakshi Kakkar, Adv.

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Cases Referred:-

1. *Krishnan v. State of Tamil Nadu* [(2014) 12 SCC 279. (Para 11)
2. *Arjun Marik v. State of Bihar* (1994) Supp (2) SCC 372). (Para 11)
3. *Bodhraj v. State of J&K* (2002) 8 SCC 45). (Para 11)
4. *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438). (Para 11)

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JUDGMENT

C. NAGAPPAN, J.: - Leave granted. This appeal is preferred against the judgment dated 25.7.2014 of the High Court of Chhatisgarh at Bilaspur in Criminal Appeal No.470 of 2001.

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2. The appellant Rambraksh @ Jalim was accused No.2 and Bechan Ram was accused No.1 in the case in Sessions Trial No.133 of 1993, on the file of Additional Sessions Judge, Surajpur, and they were tried for the offences under Section 302 read with 34 and Section 201 of Indian Penal Code. The trial court acquitted accused No.1 Bechan Ram and at the same time convicted accused No.2 Rambraksh and sentenced him to undergo imprisonment for life and to pay a fine of Rs.500 and in default to undergo rigorous imprisonment for five months for the offence under Section 302IPC and further sentenced him to undergo two years rigorous imprisonment and to pay a fine of Rs.100 in default to undergo rigorous imprisonment for one month for the offence under Section 201 IPC and ordered the sentences to run concurrently. Aggrieved by the conviction and sentence accused No.2 Rambraksh preferred criminal appeal and the High Court dismissed the same. Challenging the said judgment the present appeal is preferred.

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3. The case of the prosecution in a nutshell is as follows: On 7.10.1992 appellant herein/accused No.2 Rambraksh went to the house of deceased Ramsevak at 12.00 noon and asked to go with him to Ambikapur. Ramsevak refused saying that he does not have money and accused No.2 assured that he has money and he would come at night and they would go to Ambikapur by the first bus in

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the early morning. Thereafter he along with accused No.1 came to the house of Ramsevak at 11.00 p.m. and told him that they will proceed towards chowki from where they will board the bus to Ambikapur. Ramsevak went with accused and thereafter did not return home. On 14.10.1992, Rajesh son of Ramsevak inquired about his father to his mother PW3 Dasmatiya Bai and she told him that his father had gone with accused to Ambikapur and then Rajesh informed her that he had gone with Kamlesh and PW5 Banshidhar to their field and he noticed clothes, gamcha and shoes of his father in the field. PW3 Dasmatiya Bai along with her son went to the said place and found the articles of her husband and on noticing birds flying near one place they went there and she found skeleton remains of her husband. She went to Chandni Police Station and lodged Exh.P2 morque and the police recorded Morque vide Exh.P1. The investigation officer visited the scene of occurrence and conducted inquest on the scattered bones vide Exh.P5. Report vide Exh. P4. He seized from the spot one bamboo stick vide Exh.P6, pair of shoes vide Exh.P7, towel, pant, shirt, banjan and underwear vide Exh.P8, Bloodstained and plain soil vide Exh.P9, Hairs found on the spot vide Exh.P10. The human bones i.e. skull, jaw, legs and ribs were seized from the spot vide Exh.P13. He sent the bones of dead body for autopsy and PW6 Dr. Arvind Bhat on examination found the following :

- “ 1 skull bone with 13 teeth.
- 2 humerus bones
- 1 vertebral column broken in three pieces each attached with each other with left femur attached with pelvis (detail of vertebral colum, sacrum, 5 lumber vertebrae, 12 thoracic vertebrae),
- One mandible attached 7 teech
- Two broken scapula
- Nine ribs
- Two broken long bones (one simulating to tibia and one simulating to femur)
- One radio ulna bones
- One broken ulna
- 3 vertebrae
- 2 detached tooth
- 4 pieces of broken bones.”

Thereafter, dehati nalishi was recorded and FIR was registered vide Exh.P.18. Spot map was prepared vide Exh. P19. Bones were sent to Medical College, Raipur and PW10 Dr. Sapan Kumar Das examined the bones vide Exh.P23 and opined as follows:

- a These bones are of human origin
- Sex-Male
- b Age-Between 25 to 40 years
- No marks of injury present to any of the bones
- Cause of death cannot be said
- c Time lapse since death-within 6 months of the date of examination.

4. In the course of investigation accused No.1 Bechan Ram was arrested and he made disclosure statement leading to recovery of banjan and towel vide Exh.P11, P16 and P17. The accused No.2 was arrested and he made disclosure statement leading to recovery of stick and clothes vide Exh.P12, P14 and P15. The seized articles were sent for chemical examination vide Exh.P19. On completion of investigation charge-sheet was filed against both the accused.

5. In the trial prosecution examined ten witnesses and the accused were examined under Section 313 of Cr.P.C. and their statements were recorded. No defence witness was examined. The trial court acquitted accused No.1 and convicted and sentenced accused No.2 as stated supra. The appeal preferred by him came to be dismissed and aggrieved by the same accused No.2 has preferred the present appeal.

6. The learned counsel for the appellant contended that it was alleged that deceased Ramsevak was last seen alive in the company of the appellant on 7.10.1992 and bones were noticed in the field and seized on 14.10.1992 namely 7 days after such last seen theory and there is long time gap and in the absence of any other corroborative piece of evidence the conviction of the appellant only on the basis of last seen theory is not sustainable law. It is his further submission that prosecution has not even established the death of Ramsevak and there is no evidence adduced by the prosecution to show that bones recovered were those of deceased Ramsevak and the medical evidence does not in any way advance the prosecution case. Lastly, it is contended that there was inordinate delay of 7 days in filing the

complaint and PW3 Dasmatiya Bai made material improvements in her testimony before the court and the testimony cannot be relied on. Per contra the learned counsel appearing for the respondent State contended that the prosecution has established through evidence of PW3 Dasmatiya Bai that her husband Ramsevak was taken from house by the appellant and in the absence of any explanation from the appellant as to when he parted company, the Courts below rightly convicted the appellant for the offence of murder and the judgment warrants no interference.

7. The prosecution case rests only upon the circumstantial evidence. The Sessions Judge as well as the High Court mainly relied upon the evidence of the wife of the deceased PW3 Dasmatiya Bai to hold the appellant guilty of the charges. PW3 Dasmatiya Bai in her complaint as well as in the statement given to the police during investigation has stated that on 7.10.1992 at about 12.00 noon the appellant/accused No.2 came to their house and told her husband Ramsevak to come with him to Ambikapur and left the place by saying that he would return with money in the night and they would leave by the early morning bus to Ambikapur. It is her further testimony that both the accused came to their house in the night at about 10.00 p.m. and took her husband Ramsevak with them at 11.00 p.m. for Ambikapur and after that her husband Ramsevak never returned home. She has further stated that on 14.10.1992 her son Rajesh inquired about the whereabouts of his father and informed her that he went to the field of Kamlesh where he saw gamcha, shirt, pant and shoes of his father. Thereafter, she went along with him and found the articles of her husband lying in torn condition in the field and on noticing the flying of birds near that place she went and saw the bones of dead body lying scattered and she identified the same as that of her husband and she went to the Police Station and lodged complaint. When she gave evidence as PW3 in the trial before the Court she testified that the accused came to their house at night and took her husband to Ambikapur and after they left she heard scream of her husband and she ran to the place and saw the appellant/accused No.2 Rambraksh and accused No.1 Bechan Ram assaulting her husband Ramsevak by lathi and Danda and when she tried to intervene, she was driven away and in the morning while going to police chowki she saw her husband Ramsevak lying dead in the field and she informed the Munshi at Chandni Police Station and she was asked to come later when called and thereafter she waited for 7 days

and then again went to the Police Station and lodged the complaint. As already stated PW3 Dasmatiya Bai in her complaint as well as her
a statement before the police has not told that she witnessed the occurrence during which both the accused assaulted her husband with lathi and Danda. Only in her testimony before the Court she claimed to have witnessed the occurrence. The High Court has rightly
b ignored the improved part of her testimony and placed no reliance on it.

8. The bones, articles, clothes and shoes allegedly belonging to Ramsevak were recovered on 15.10.1992. Exh.P2 Morque given by Dasmatiya Bai was recorded and the FIR came to be registered on
c 15.10.1992. There is absolutely no explanation given by the prosecution for the inordinate delay in lodging the complaint and registering the case. The independent witnesses examined by the prosecution have not supported the case. As per last seen theory projected by the prosecution the deceased Ramsevak was last seen
d alive in the company of the appellant on 7.10.1992 and after 7 days the bones and clothes allegedly belonging to Ramsevak came to be noticed and thereafter seized from the field. At this juncture, it is pertinent to point out that they were not seized/recovered pursuant to any information furnished by the accused.

9. The contention for the learned counsel for the appellant that
e the prosecution has not even established the death of Ramsevak cannot be brushed aside. The investigation officer seized the bones from the field vide Exh.P13 and sent them for autopsy. PW6 Dr. Arvind Bhat in his report Exh.P10 gave an account of the bones forming the skeleton. Thereafter they were sent to Medical College,
f Raipur, and PW10 Dr. Sapan Kumar Das examined them and gave Exh.P23 opinion stating that the bones are of human origin and they belonged to male aged between 25 to 40 years and there were no marks of injury in any of the bones and the cause of death cannot be said and the death could have occurred within 6 months prior to the
g date of examination. The Investigation Officer did not take any attempt to conduct DNA analysis of bones to prove that the skeleton seized was that of Ramsevak. In short the prosecution has failed to prove the death of Ramsevak either homicidal or otherwise.

10. It is trite law that a conviction cannot be recorded against
h the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the

only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

11. In a similar fact situation this Court in the case of *Krishman v. State of Tamil Nadu* [(2014) 12 SCC 279, held as follows:

“21. The conviction cannot be based only on circumstance of last seen together with the deceased. In *Arjun Marik v. State of Bihar* (1994) Supp (2) SCC 372)

“31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.”

22. This Court in *Bodhraj v. State of J&K* (2002) 8 SCC 45) held that:

“31. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime 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.

23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan

a was last seen on 4-4-2004 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 in the intervening period of seven days there was nobody in contact with the deceased.

b 24. In *Jaswant Gir v. State of Punjab (2005) 12 SCC 438*, this Court held that in the 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 12. In the present case as noticed above the Sessions Court as well as the High Court convicted the appellant/ accused No.2 on the basis of last seen evidence, the correctness of which is also doubtful. The High Court had failed to appreciate the aforesaid fact and erred in affirming the judgment of conviction passed by the Sessions Court. We are satisfied that the conviction of the appellant cannot be sustained in law and liable to be set aside.

d 13. The appeal is allowed and the impugned judgment of conviction and sentence imposed on the appellant is set aside. The appellant is ordered to be set at liberty forthwith if not required in any other case.

e **Result:-** Appeal allowed.

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