JABIR & ORS.

v.

THE STATE OF UTTARAKHAND

(Criminal Appeal No. 972 of 2013)

JANUARY 17, 2023

[S. RAVINDRA BHAT AND PAMIDIGHANTAM SRI NARASIMHA, JJ.]

Penal Code, 1860 – ss.302, 364, 201 – The prosecution case was that the victim 'H', aged about 7 years, went missing on 8.10.1999 – On 10.10.1999, his dead body was found in the sugarcane field of 'Y' in Village – The victim's father (PW-1) filed an application u/s. 156(3) Cr.P.C. on 19.11.1999 – FIR was recorded on 21.11.1999 – In the FIR, the informant alleged that he was told by PW-3 and PW-2 that they had seen A-3 taking deceased boy 'H' into her house on 08.10.1999 – PW-4 told him that on 09.10.1999 at about 6 AM, he had seen 'H' standing along with A-1 and A-2 on the road near Y's sugarcane field – In the trial, the prosecution relied on the testimony of 12 witnesses – The trial court convicted the appellants u/s. 302 IPC and sentenced them to life imprisonment as well as 7 years u/s.364, IPC and imprisonment for 5 years u/s. 201, IPC – The High court affirmed the trial court's findings – On appeal, held: The prosecution was not able to prove its case as there were serious flaws in the testimonies of two sets of witnesses (PWs 2 & 3 and PW- 4 & 5) who deposed to seeing the deceased with A-3 and the first two accused, on 08.10.1999 and 09.10.1999, respectively – PW-1's conduct, in not stating anything during inquest proceedings, despite being informed about seeing the boy in the company of A-3 on 08.10.1999, and later, on the early morning of 09.10.1999, by PW-2, PW-3 and PW-4, undermines the prosecution story – In the present case, save the "last seen" theory; there is no other circumstance or evidence – The time gap between when the deceased was seen in the company of the accused and the probable time of his death, based on the post mortem report, is not narrow – Therefore, solely relying on the "last seen" circumstance to convict the accused-appellants is unjustified.

Allowing the appeals, the Court

HELD: 1. The conviction is solely based on the testimonies of two sets of witnesses, PW-4 and PW-5. PW-5 is a cousin of PW-

A **1, and his behaviour in not interceding upon seeing the 7-year-old crying boy in the company of the accused, away from his house and despite knowing about the previous enmity between the parties, is unnatural. The police statement of PW-5 was recorded more than two months after the start of investigation, and the application under Section 156(3) CrPC does not mention that he had witnessed the boy with the accused despite the witness's statement that he informed PW-1 about what he saw. [Para 18][977-F-G; 978-B]**

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2. PW-4's testimony that he saw the deceased in the company of first two appellants is unreliable, as him being a resident of Akbarpur, went out to answer the call of nature at 6 AM to another village as Y's field was located at village Narayanpur and returned home immediately, then, there is no explanation how he knew that the accused were standing at a specific spot. Besides this, it is unnatural and improbable that one as close a neighbour of PW-1 living 8-10 paces away would not be aware that the boy went missing on 8.10.1999. [Para 19][978-E-G]

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3. There is no explanation why PW-1, despite being told by PW-2 and PW-3 that they had seen A-3 taking victim 'H' in her house holding his hand, did not mention the involvement of A-3 in the inquest proceedings. PW-7, who is witness to inquest, deposed about the presence of PW-1 to PW-5 during the inquest renders suspect the deposition of PW-2 and weakens the testimony of PW-5, who claims to have left the village on 09-10-1999 and returned only on 12-10-1999. [Para 20][979-E-G]

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4. In circumstantial evidence cases, to sustain conviction, the panchsheel principles laid down in *Sharad Birdichand Sarda v. State of Maharashtra* must be fulfilled. However, in present case, prosecution is not able to prove the case beyond reasonable doubt. There are serious flaws in the testimonies of two sets of witnesses (PW-2, PW-3 & PW-4, PW-5) who deposed to seeing the deceased with A-3 and the first two accused (A-1 and A-2), on 08.10.1999 and 09.10.1999, respectively. There are flaws in their testimonies regarding their presence at the place and time and with respect to the knowledge of PW-1. PW-1's conduct, in not stating anything during inquest proceedings, despite being

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informed about seeing the boy in the company of A-3 on 08.10.1999, and later, on the early morning of 09.10.1999, by PW-2, PW-3 and PW-4, undermines the prosecution story. The conduct of PW-4 and PW-5 in not taking any steps to ensure the safety of the child despite knowing the previous enmity or grudge on the part of the accused is unnatural. [Paras 21-22][980-C; 987-C-F]

Sarad Birdichand Sarda v. State of Maharashtra **[1985] 1 SCR 88– relied on.**

6. The "last seen" doctrine has limited application, wherein the time lag between the time the deceased was seen last with the accused and the time of murder, is narrow; furthermore, the court should not convict an accused only on that basis. In the present case, save the "last seen" theory, there is no other circumstance or evidence. The time gap between when the deceased was seen in the company of the accused on 09-10-1999 and the probable time of his death based on the post mortem report is not narrow. Given this fact, and the serious inconsistencies in the depositions of the witnesses, and the fact that the FIR was lodged almost 6 weeks after the incident, the sole reliance on the "last seen" circumstance to convict the accused-appellants is not justified. [Paras 23, 25][981-H; 982-A; 984-D-E]

Jaswant Gir v. State of Punjab **(2005) 12 SCC 438;** *Rambraksh @ Jalim v. State of Chhattisgarh* **[2016] 2 SCR 599;** *Nizam & Ors. v. State of Rajasthan* **[2015] 10 SCR 786 – relied on.**

Hanumant v. The State of Madhya Pradesh **[1952] 1 SCR 1091;** *Tanviben Pankajkumar Divetia v. State of Gujarat* **(1997) 7 SCC 1 – referred to.**

Case Law Reference

[1952] 1 SCR 1091	**referred to**	**Para 12, 21**
[1985] 1 SCR 88	**relied on**	**Para 12, 21**
(2005) 12 SCC 438	**relied on**	**Para 23**
[2016] 2 SCR 599	**relied on**	**Para 24**
[2015] 10 SCR 786	**relied on**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.972 of 2013.

A From the Judgment and Order dated 05.10.2012 of the High Court of Uttarakhand at Nainital in Criminal Appeal No.358 of 2004.

J. C. Gupta, Sr. Adv., Vikrant Singh Bais, Yogesh Tiwari, Advs. for the Appellants.

Vikas Negi, Sudarshan Singh Rawat, Sunny Sachin Rawat, Advs.
B for the Respondent.

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.

1. The appellants were convicted under Sections 302 of the Indian Penal Code, 1860 (hereinafter "IPC") and sentenced to life imprisonment
C as well as 7 years under Section 364, IPC and imprisonment for 5 years under Section 201, IPC. Their conviction and sentence was upheld by the Uttarakhand High Court.[1]

2. Haseen, aged about 7 years, was the son of Bisarat, (PW-1), a resident of Village age Akbarpur. He went missing on 08.10.1999. On
D 10.10.1999, at about 16:30, the dead body of Haseen was found in the sugarcane field of Yaqub in Village Narayanpur, situated at a distance from Akbarpur, Haseen's village. Information was sent to the Police Station Manglor. Inquest proceedings were held by ASI Dalchand, PW-6. The post-mortem was conducted on 11.10.1999 by Dr. A.K. Jain
E (PW-9). According to his statement, death had occurred about two days before the post-mortem examination.

3. PW-1, Bisarat moved an application under Section 156(3) Code of Criminal Procedure (hereinafter "Cr. PC") on 19.11.1999. Based on the order of the magistrate concerned, the first information report (FIR)
F was recorded on 21.11.1999. In the FIR, the informant alleged that his son Haseen was missing since 3 PM on 08.10.1999 and that despite search, he could not be found. He went to PS Manglor on 10.10.1999 on the day dead Haseen's body was found. He also narrated about the post-mortem examination on 11.10.1999. PW-1 stated that he was busy in making inquiries. He was told by Sayeed Ahmad (PW-3) and Murad
G Ali (PW-2) that they had seen A-3 Husn Jahan taking deceased boy Haseen into her house on 08.10.1999 at about 3.30 PM. Suleman (PW-4) told him that on 09.10.1999 at about 6 AM he had seen Haseen standing along with A-1 Jabir and A-2 Jakir on the road near Yaqub's sugarcane filed. He (PW-1) immediately went to PS Manglor to lodge the report on

[1] By judgment and order dated 05.10.2012 in Crl. No. 358/2004
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the morning of 12.10.1999, but his report was not recorded. He then met S.P., Haridwar on the same day, but police did not interrogate him or his witnesses nor take any action against the accused persons. Based on these allegations, the police investigated the incident, and during the course of those proceedings, arrested the accused- appellants.

4. After investigations were completed, the police, in their final report, alleged that the appellants were guilty of the offences. Charges were framed against them, by the court. The prosecution, to establish its allegations, relied on the testimony of 12 witnesses. The defence did not examine any witness. Based on the materials placed before it, the trial court convicted the appellants, who then appealed to the High Court. The impugned judgment affirmed the trial court's findings.

Appellants' contentions

5. It is argued, on behalf of the appellants, that the conviction and sentence imposed in this case, is unsustainable. It was argued that no reason was given why the FIR was lodged almost five weeks after the deceased boy went missing and after his body was found on 10.10.1999. The complainant stated that on 12.10.1999, he was told by the witnesses that on 8.10.1999, the third appellant, A-3 Husn Jahan, was seen taking the child inside her house, and on 9.10.1999 at 6 AM, the child was seen along with accused Jabir and Jakir. The application under section 156(3) Cr. P.C. was moved on 19.11.1999, i.e., after more than one month. In the mean-time no application was sent to any officer. There is no explanation for a delay of more than a month.

6. It was urged that there is discrepancy in the testimonies of various witnesses, particularly that of PW-1 (father of the deceased) and the others, particularly PW-4 and PW-5, as to whether the suspicion of the accused's involvement was, in fact, reported within a couple of days after the boy's body was found. Counsel especially highlighted that the police witnesses did not support the version of PW-1 that he had voiced suspicions contemporaneously. Further, it was submitted that the testimonies of witnesses were that the accused's role was not known to PW-1 and others on 10.10.1999, but this was not reflected in the inquest report.

7. Learned counsel submitted that the prosecution witnesses are untrustworthy since they appear to have been added as after thoughts. It was submitted that the appellants' consistent case was that they were named much after the incident, on account of enmity with the deceased

A father's family. It was pointed out that in the testimony of the first IO, (PW-8) that PW-2 did not mention about the role and involvement of A-3 and that she was with the deceased on 8th October, 1999. Further, that witness (PW-8) also testified that the villagers had initially suspected Saleem and Mansoor, and not the present accused.

B 8. Learned counsel highlighted that P-4 and PW-5 are wholly unreliable witnesses. In fact, the police statement of PW-4 was recorded much after the incident in December, 1999. This witness, as indeed PW-5, were introduced to somehow implicate the first two appellants (A-1 and A-2) since there was no other witness who supported the prosecution with respect to their alleged involvement or presence. The idea of C introducing them was to link them with the deceased. It was submitted that PW-4's testimony was unreliable, because he recorded his police statement after two months, and as per his admission, though he had seen the deceased in the first two appellants' company and informed PW-1 about this as early as on 12.10.1999. Likewise, PW-5 deposed D having informed PW-1 on 12.10.1999 about witnessing the boy in the company of the first two appellants on (09.10.1999). No explanation was given by the prosecution why he was examined so late. Furthermore, the deceased's father, PW-1, did not mention having been told about the involvement of the first two appellants by PW-5 in his written complaint.

E 9. It is argued that the "last seen" theory is, on the face of it, an after- thought and concocted in as much as PW7 Mansab stated before the court that PW2 Murad Ali, Sayeed Ahmad PW3, and PW4 Suleman, who all were closely related to the deceased child, were present at the time of inquest proceedings held on 10.10.1999, yet they for the reasons best known to them kept silent for 2 days and for the first time informed F Bisarat PW1, only on 12.10.1999. Yet, that witness PW-1 did not mention these facts in his written version.

10. It was contended that all prosecution witnesses were of the same family, as complainant Bisarat PW1 is the nephew of Murad Ali PW2; Sayeed Ahmad (PW-3) is son of Sharif, PW-1's cousin, and PW4 G Suleman as well as PW5 Munfaid too belonged to PW-1's family. It was urged that there was reason for the witnesses to cook up a false story against the appellants because in the year 1996, Munfaid, father of the appellants had lodged an FIR against Murad Ali (PW-2), Phurkan and Shamshad under Section 307, 452, 504, 506 IPC and they were prosecuted. This clearly established their motive to falsely implicate the H appellants.

11. Counsel highlighted that according to Mansab's (PW-7) deposition (who was a witness to establish the Inquest Report) Munfaid, Sayeed, and Murad Ali were also present at the time of inquest. It is unimaginable that had they seen the deceased in the company of accused persons, they would not disclose the same even after seeing the dead body of their kith and kin. This incongruity went to the root of their credibility, falsifying the prosecution version.

12. Learned counsel relied on *Hanumant vs. The State of Madhya Pradesh,*[2] *Sharad Birdhi Chand Sarda vs. State of Maharashtra,*[3] and *Tanviben Pankajkumar Divetia vs. State of Gujarat*[4] to contend that in circumstantial evidence-based cases, each incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances proved must form a chain of events from which the irresistible conclusion of the accused's guilt can be safely drawn; no other hypothesis is possible. It was submitted that this court has cautioned that in a case depending upon circumstantial evidence, there is a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly, and such a completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped, and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. Counsel also stated that this court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this court that there is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. It was contended that in the present case, the prosecution was unable to prove beyond reasonable doubt, every circumstance, and the courts below erred in treating suspicion as proof, leading to the appellants' conviction.

State/Prosecution's contentions

13. Learned counsel appearing on behalf of the state argued that this court should not disturb the concurrent findings of the trial court and

[2] 1952 (1) SCR 1091
[3] 1985 (1) SCR 88
[4] 1997 (7) SCC 156

A the High Court. He first dealt with the issue of delayed lodging of the FIR and relied on the trial court's reasoning, as well as the testimony of PW-1. He argued that when the deceased went missing, there was nothing unnatural on the part of PW-1, his father, in not reporting the absence immediately and instead searching for him. It was only when he was informed that the dead body was found, that he approached the police;
B the post mortem corroborated that the boy died due to shock on account of injuries caused due to violence and injuries caused on his person. Learned counsel submitted that all the eyewitnesses who deposed to having seen A-1 to A-3, clearly stated that they had seen the boy in the company of the said appellants. Therefore, the last seen theory was
C correctly applied. Furthermore, PW-1 in fact, sought to complain to the police, but without avail. Eventually, he approached the magistrate under Section 156 (3) Cr. PC, which was allowed.

14. It was also submitted that the cumulative effect of the depositions of PW- 4 and PW-5 was that the deceased boy was seen last, in the company of the first two accused, early morning near the
D place where his body was discovered subsequently. Given that the report of this was made immediately after discovery of the body, on 10.10.1999, the informant could not be faulted for not taking prompt action. The inquest, which was held the next day, also concluded that death occurred under suspicious circumstances, having regard to the nature of injuries
E on the deceased's body.

15. It was submitted that the trial court and the High Court both correctly inferred that the informant's complaint was not entertained by the police, and he could not become a victim of that inaction. Investigations that took place after 21.11.1999, no doubt resulted in statements of some
F witnesses, but the investigation was not conducted satisfactorily. Therefore, it was directed to be taken over by PW-12, after which it was conducted properly and a charge sheet accusing all the appellants was filed. Counsel for the state relied on the testimonies of PWs 2 and 3 to contend that they had deposed convincingly that the third appellant was last seen holding the deceased boy's hands on 8.10.1999. PWs 4
G and 5 deposed to having seen the deceased boy the next day, early morning, in the company of the first two appellants. These facts, conclusively established the appellants' guilt.

Analysis and Findings

16. As may be gathered from the previous discussion, that the
H concurrent conviction of the appellants rests entirely on the "last seen"

theory, upheld by the courts below. The deceased- it has been held, was seen by PW-2 and PW-3 with the third appellant, Husn Jahan, on the afternoon of 8th October, 1999; she was holding his hand. The boy went missing; his father, PW-1, and other family members searched for him. No report was lodged at that time, and the search continued. The boy's body was discovered, partly buried, on 10th October, in an open agricultural field, in another village (Narayanpur). Post mortem was conducted the next day, i.e., on 11th October, 1999; the inquest proceedings too were held that day. PW-1 stated that he attempted to lodge an FIR on 12th October, 1999, against the present appellants, but without success. The FIR was eventually lodged, pursuant to an order under Section 156 (3) Cr. PC. upon an application dated 19.11.1999. Investigations were conducted by PW-8 and, later, from 2.12.1999, by PW-12. The appellants were arrested and charged for the offences, and later convicted.

17. The testimonies of PW-2 and PW-3 were relied upon to prove that Husn Jahan, the third appellant and sister of the first two appellants, was seen in the company of the deceased on 8th October, 1999 at 3:30 p.m. PW-2 claims to have informed this to PW-1 on 10-10-1999 at 12:00 p.m., before the deceased's body was found (i.e., at 01:00 p.m.). On the other hand, PW-3, who claimed to have witnessed Husn Jahan holding the deceased's hand on 8.10.1999, informed PW- 1 about noticing this on 12.10.1999, (since he had gone to visit his son to Bijnor, during the intervening period). The other circumstance is that the boy was seen last, in the company of the first two appellants, by PWs-4 and 5.

18. For the moment, if the delay in recording the FIR (which is 42 days) is ignored, the salient fact which stares at one's face is that the conviction is solely based on the testimonies of these two sets of witnesses. PW-4 Sulaiman deposed to having seen the deceased with the said appellants, early morning on 09.10.1999. He claims to having informed the boy's father, PW-1 about this fact, after discovery of the body, on 12.10.1999. PW-5's deposition seeks to corroborate that of PW-4. This witness also claimed to having seen the boy on the morning of 09.10.1999. However, intriguingly, despite noticing him in the company of two accused and despite having heard a cry from the boy, this witness did not look back. In terms of his admission, PW-5 is a cousin of PW-1. Therefore, his behavior in not interceding upon seeing the boy in the company of the accused, early morning, away from his house – given that the boy was only 7 years, is unnatural. It is also unnatural that since the prosecution-and PW-1's allegation is that the accused had a previous enmity with

A him, PW-5, a close relative, was neither surprised nor did anything to intervene when he saw the boy in the company of the first two appellants. Another important aspect is that the police statement of PW-5 was recorded more than two months after the start of investigation; even the application under Section 156 (3) Cr. PC does not mention that he had witnessed the boy with the accused despite the witness's statement that
B he informed PW-1, the boy's father on 12.10.1999 about what he saw on 9.10.1999.

19. PW-4 Sulaiman deposed that his house was 8-10 paces to the north of Bisarat's house, and that he was in his house the whole of the night of 8th October, 1999. He also deposed to going out in the morning
C of 09-10-1999 to answer the call of nature, at around 6 AM when he noticed that the deceased was with Jakir and Jabir, the first two appellants. In cross examination, he admitted to not going out of his house on 9th October, 1999. He also deposed to having not been in the village when the boy's body was found. Interestingly, in his cross
D examination, he stated that:

> *"I did not show the place to the IO at which the accused Jabir and Jakir were standing with Haseen, on the other hand I told to the IO that the accused were standing in the field of Yaqoob with Haseen. The accused Jabir and Jakir*
E *were standing in the northern side of the field of the field of Yaqoob."*

This statement renders PW-4's testimony unreliable, because Yaqoob's field was located at Narayanpur. PW-4 was a resident of Akbarpur; if he went out to answer the call of nature, at 6 AM or so in the morning, and returned home immediately, there is no explanation
F how he knew that the accused were standing at a specific spot, in another village, Narayanpur, with the deceased. Besides this glaring discrepancy, it is unnatural and improbable, that one as close a neighbour of PW-1 living 8-10 paces away would not be aware that the boy went missing on 8th October, 1999. In fact, the improbability of the witness's ignorance
G of the fact (that Haseen was missing) is evident, if one considers the testimony of PW-1 who deposed:

> *"Firstly, we searched him in the village, we also got made proclamation on the same day in the evening."*

20. PW-2 Murad Ali's father was the brother PW-1 Bisarat.
H Likewise, Sayed, PW3 is also related; he is PW-1's second cousin, and

like him, similarly related to PW-2. In his testimony, PW-2 deposed he had seen the boy with Husn Jahan, the third accused. He also stated that the dead body was found at about 1 PM and

> *"I told the Bisarat on that very day when the dead body of Haseen was found that perhaps Husn Jehan has kidnapped the child."*

He further deposed to telling Bisarat "at about 12 in the noon" that he saw Husn Jehan taking Haseen in her house holding his hand. He again deposed that:

> *"I told this fact to Bisarat at the place where the dead body was found. I told this fact to Bisarat 2-4 minutes before the arrival of the police. When the police came near the dead body of Haseen, then I did not tell the police regarding the fact that I saw Husn Jehan taking Haseen holding his hand. I told to the police that "that I had suspicion that perhaps the child Haseen has been disappeared. I cannot tender any explanation if this fact is not written in my statement.*

If these facts are true, there is no explanation why PW-1 (as well as other witnesses, such as PW-2, and PW-3) did not mention about the involvement of Husn Jahan, at least in the inquest proceedings. PW-7 Mansab, deposed that many family members of PW-1, as well as he, were present during the inquest proceedings:

> *"At the time when the inquest was being prepared many persons of the village were collected there. At that time the complainant of the case Bisarat, Suleman s/o Bashir Jhoja, Munfait s/o Mohd. Ali, Sayeed s/o Sharif and Murad Ali s/ o Ali Hasan were also present."*

PW-7's testimony, (about the presence of PW-1 to PW-5 during the inquest) not only renders suspect the deposition of PW-2, but also fatally weakens the testimony of PW-5 who claims to have left the village, on 09-10-1999 and returned only on 12-10-1999. This aspect assumes importance, because PW-7 was not declared hostile, and he is a witness to the inquest proceedings.

21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between

A all circumstances; such circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else; further, the facts so proved should unerringly point towards the guilt of the accused. The circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other
B hypothesis than that of the guilt of the accused, and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.[5] These were so stated in *Sarad Birdichand Sarda* (supra) where the court, after quoting from *Hanumant*, observed that:

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> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an Accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> D *It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao*
> E *Bobade v. State of Maharashtra (1973) 2 SCC 793 where the following observations were made: [SCC para 19, p. 807: SCC (Cri.) p. 1047]*
>
> *Certainly, it is a primary principle that the Accused must be and not merely may be guilty before a court can convict and*
> F *the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.*
>
> *(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,*
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> G
>
> *(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*

H [5] *Ibid* 3

(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."

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

These *panchsheel* precepts, so to say, are now fundamental rules, iterated time and again, and require adherence not only for their precedential weight, but as the only safe bases upon which conviction in circumstantial evidence cases can soundly rest.

22. This court is of the opinion that given the testimonies of two sets of witnesses (PWs2 &3 and PW-4 &5) who deposed to seeing the deceased with Husn Jahan and the first two accused, on 8th October 1999 and 9th October 1999, respectively, and also given the serious flaws in their testimonies, with respect to the knowledge of PW-1, the flaws in their testimonies regarding their presence at the place and time, deposed to by them, as well as other glaring inconsistencies, the prosecution cannot be said to have proved its case. If benefit were to be given to PW-1's statement, and he were to be believed that the police did not take any action, till he applied under Section 156 (3) his conduct, in not stating anything during inquest proceedings, despite being informed about the facts, by PW-2, PW-3 and PW-4, that about seeing the boy in the company of A- 3 Husn Jahan, on 08-10-1999, and later, on the early morning of 09-10-1999, undermines the prosecution story. Likewise, if the prosecution version that there was a previous enmity or grudge on the part of the accused, which constituted a motive to kill the child, is correct, the conduct of PW-4 and PW-5 in not taking any steps to ensure the safety of the child, when they saw him in the company of the accused, is unnatural. This is more so, because PW-5 is admittedly related to PW-1. As discussed previously, the testimony of PW-5 with respect to the circumstances under which he saw the deceased early morning of 09-10-1999, renders it untrustworthy and unbelieved.

23. This court is also of the opinion that apart from the above serious infirmities, there is no evidence, oral or any material object, which connects the appellant-accused with the crime. It has been repeatedly emphasized by this court, that the "last seen" doctrine has limited application, where the time lag between the time the deceased was seen

A last with the accused, and the time of murder, is narrow; furthermore, the court should not convict an accused only on the basis of the "last seen" circumstance. In *Jaswant Gir vs. State of Punjab,*[6] this court explained the soundness of such a rule:

> *"Without probing further into the correctness of the "last-seen" version emanating from P.W. 14's evidence, even assuming that the deceased did accompany the accused in their vehicle, this circumstance by itself does not lead to the irresistible conclusion that the Appellant and his companion had killed him and thrown the dead body in the culvert. It cannot be presumed that the Appellant and his companions were responsible for the murder, though grave suspicion arises against the accused. There is considerable time-gap between the deceased boarding the vehicle of the Appellant and the time when P.W. 11 found the dead body. In the absence of any other links in the chain of circumstantial evidence it is not possible to convict the Appellant solely on the basis of the "last-seen" evidence, even if the version of P.W. 14 in this regard is believed. In view of this, the evidence of P.W. 9 as regards the alleged confession made to him by the Appellant assumes importance.*

24. Recently, in *Rambraksh vs. State of Chhattisgarh,*[7] this court after reviewing previous decisions, stated as follows:

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

[6] 2005(12) SCC438
[7] 2016 (12) SCC 251

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 (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 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.

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."

A Again, in *Nizam & Ors. v State of Rajasthan,*[8] it was held as follows:

> *"Courts below convicted the Appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the Appellants on 23.01.2001. Undoubtedly, "last seen theory"*
> B *is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the*
> C *conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."*

D 25. In the present case, save the "last seen" theory, there is no other circumstance or evidence. Importantly, the time gap between when the deceased was seen in the company of the accused on 09-10-1999 and the probable time of his death, based on the post mortem report, which was conducted two days later, but was silent about the probable time of death, though it stated that death occurred approximately two
E days before the post mortem, is not narrow. Given this fact, and the serious inconsistencies in the depositions of the witnesses, as well as the fact that the FIR was lodged almost 6 weeks after the incident, the sole reliance on the "last seen" circumstance (even if it were to be assumed to have been proved) to convict the accused-appellants is not justified.

F 26. For the above reasons, the conviction and sentence of the appellant- accused cannot be sustained. The impugned judgment is hereby set aside; the appellants shall be released forthwith unless required in any other case. The appeal is allowed, but without order on costs.

Ankit Gyan Appeal allowed.
(Assisted by : Veda Singh, LCRA)

[8] 2016 (1) SCC 550