A CHANDRAPAL

v.

STATE OF CHHATTISGARH (EARLIER M.P.)

(Criminal Appeal No. 378 of 2015)

B MAY 27, 2022

[DR. DHANANJAYA Y CHANDRACHUD AND BELA M. TRIVEDI, JJ.]

Penal Code, 1860: ss. 302 and 201/34 – Murder – Prosecution case that a girl and a boy having a love affair went missing and ten C *days later their dead bodies found hanging on the tree in decomposed state – Allegations of murder against the appellant-accused and other co-accused – Conviction u/ss. 302/34 and 201/34 and sentenced accordingly – In appeal, the High Court upheld the order of conviction and sentence as regards the appellant,* D *however, set aside the conviction of co-accused u/s. 302/34, but upheld for the offence u/s. 201/34 – On appeal, held: If the evidence of prosecution falls short of proof of homicidal death of the deceased, and if the possibility of suicidal death could not be ruled out, the appellant could not have been convicted merely on the basis of the theory of "last seen together" –Having regard to the totality* E *of evidence on record, the High Court erred in convicting the appellant for the alleged charge u/s. 302/34, relying upon a very weak kind of evidence of extra judicial confession allegedly made by the co-accused, and relying upon the theory of "last seen together" propounded by the prosecution witness – Also, no evidence* F *as to how and by whom the deceased girl was allegedly murdered, was produced by the prosecution – Thus, the prosecution failed to prove the charges levelled against the appellant beyond reasonable doubt – Suspicion howsoever, strong cannot take place of proof – Appellant acquitted from the charges levelled against him – Evidence –Extra judicial confession – Last seen theory.*

G *Evidence: Extra-judicial confession – Evidentiary value – Held: Extra-judicial confession is a weak kind of evidence – Unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for offence of murder should not be made only on the basis of extra-judicial confession –*

H

Extra-judicial confession made by the co-accused can be admitted in evidence only as a corroborative piece of evidence.

Allowing the appeal, the Court

HELD: 1.1 It may be stated that undisputedly the entire case of the prosecution rested on the circumstantial evidence, as there was no eye witness to the alleged incident. In order to convict an accused under Section 302 IPC, the court is required to first see as to whether the prosecution has proved the factum of homicidal death. The evidence of PW-13 doctor, who had carried out the post-mortem of the two deceased, would be most relevant in this regard. He had stated in his deposition before the court, *inter alia*, that on 12.12.1994, he had carried out the post-mortem of the two deceased. The dead bodies of both the deceased were in decomposed state; that the knot mark present on the neck of the deceased B was ante-mortem; that the cause of death appeared to be Asphyxia due to hanging; and that the death had taken place within 8 to 10 days and the nature of death was Suicidal. The said Doctor had stated similar facts for K. He could not express any opinion whether it was a homicidal death. In the cross- examination by counsel for the accused, he had categorically admitted that he did not find any symptom of homicidal death, nor he had opined in his report given on 12.12.1994 that the deaths of the deceased were homicidal. Of course, he had stated that on the basis of the report submitted on 30.04.1995, an inference could be drawn that the deaths could be homicidal deaths. [Para 7, 8][374-C; 375-E-G; 376-B-C]

1.2 The High Court in the impugned judgment did not consider at all the evidence of doctor to come to the conclusion whether the deaths were homicidal deaths, before confirming the conviction of the appellant for the offence under Section 302 IPC. Unfortunately, the Sessions Court also observed that the statement of doctor was not important because he had expressed an opinion which was neither beneficial to the prosecution nor to the defence. When the case of the prosecution rested on circumstantial evidence, it was imperative for the prosecution to prove beyond reasonable doubt that the deaths of the deceased were homicidal deaths and not suicidal, more particularly when the line of defence of the accused was that the B and K had

committed suicide, and when doctor who had carried out their post-mortems had also opined that the nature of their deaths was Suicidal. [Para 9][376-C-F]

1.3 As per Section 30 of the Evidence Act, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. However, an extra judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra judicial confession. The extra judicial confession made by the co- accused could be admitted in evidence only as a corroborative piece of evidence. In absence of any substantive evidence against the accused, the extra judicial confession allegedly made by the co-accused loses its significance and there cannot be any conviction based on such extra judicial confession of the co-accused. [Para 11][377-A-D]

State of M.P. Through CBI & Ors. Vs. Paltan Mallah & Ors. **(2005) 3 SCC 169 : [2005] (1) SCR 710;** *Sahadevan & Anr. Vs. State of Tamil Nadu* **(2012) 6 SCC 403 : [2012] (4) SCR 366;** *Jagroop Singh Vs. State of Punjab* **(2012) 11 SCC 768 : [2012] (7) SCR 91;** *S.K. Yusuf Vs. State of West Bengal* **(2011) 11 SCC 754 : [2011] (8) SCR 83;** *Pancho Vs. State of Haryana* **(2011) 10 SCC 165 : [2011] (12) SCR 1173 – referred to.**

1.4 In the instant case, it is true that the co- accused V had allegedly made self-inculpatory extra judicial confession before the PW-4, and had made extra judicial confession before the other witnesses i.e., PW-5, PW-6 and PW-7 stating, *inter alia,* that the other three accused had committed the murder and he-V was asked to assist them in disposing the dead bodies and concealing the evidence. Though the Sessions Court relying upon the said evidence of extra judicial confession of V convicted all the four accused, however, the High Court, considering the inconsistency

between the said two extra judicial confession made by the co-accused V, acquitted the three accused i.e., B, M and V from the charges levelled against them, however considered the said extra judicial confession made by V as an incriminating circumstance against the appellant C for convicting him for the offences charged against him. If such weak piece of evidence of the co-accused V was not duly proved or found trustworthy for holding the other co-accused guilty of committing murder of the deceased B and K, the High Court could not have used the said evidence against the present appellant for the purpose of holding him guilty for the alleged offence. [Para 12][378-B-F]

1.5 As per the case of prosecution, PW-1 had seen the accused C calling the deceased K and taking him inside his house on the fateful night. Apart from the fact that the said D had not stated about the time or date when he had lastly seen K with C, even assuming that he had seen C calling K at his house when he was sitting at the premises of village panchayat, the said event had taken place ten days prior to the day when the dead bodies of the deceased were found. The time gap between the two incidents- the day when D saw C calling K at his house and the day K's dead body was found being quite big, it is difficult to connect the appellant with the alleged crime, more particularly when there is no other clinching and cogent evidence produced by the prosecution. [Para 13][378-F-H; 379-A]

1.6 In order to convict an accused under Section 302 IPC the first and foremost aspect to be proved by prosecution is the factum of homicidal death. If the evidence of prosecution falls short of proof of homicidal death of the deceased, and if the possibility of suicidal death could not be ruled out, in the opinion of this court, the appellant- accused could not have been convicted merely on the basis of the theory of "Last seen together". [Para 18][379-F-G]

1.7 Having regard to the totality of evidence on record, the High Court committed gross error in convicting the appellant-accused for the alleged charge of 302 read with 34 of IPC, relying upon a very weak kind of evidence of extra judicial confession allegedly made by the co-accused V, and relying upon the theory of "Last seen together" propounded by the PW-1. It is also

A **significant to note that no evidence worth the name as to how and by whom the deceased B was allegedly murdered was produced by the prosecution. Under the circumstances, it is required to be held that the prosecution had miserably failed to bring home the charges levelled against the appellant-accused beyond reasonable doubt. The suspicion howsoever strong cannot take place of proof.The appellant is acquitted from the charges levelled against him. [Paras 19, 20][379-G; 380-A-C]**

Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra **(1973) 2 SCC 793 : [1974] (1) SCR 489;** *Sharad Birdhichand Sarda Vs. State of Maharashtra* **(1984) 4 SCC 116 : [1985] (1) SCR 88;** *Bodhraj & Ors. Vs. State of Jammu and Kashmir* **(2002) 8 SCC 45 : [2002] (2) Suppl. SCR 67;** *Jaswant Gir Vs. State of Punjab* **(2005) 12 SCC 438;** *Arjun Marik & Ors. Vs. State of Bihar* **1994 Supp (2) SCC 372 : [1994] (2) SCR 265 – referred to.**

Case Law Reference

[1974] (1) SCR 489	**referred to**	**Para 7**
[1985] (1) SCR 88	**referred to**	**Para 7**
[2005] (1) SCR 710	**referred to**	**Para 11**
[2012] (4) SCR 366	**referred to**	**Para 12**
[2012] (7) SCR 91	**referred to**	**Para 12**
[2011] (8) SCR 83	**referred to**	**Para 12**
[2011] (12) SCR 1173	**referred to**	**Para 12**
[2002] (2) Suppl. SCR 67	**referred to**	**Para 15**
(2005) 12 SCC 438	**referred to**	**Para 16**
[1994] (2) SCR 265	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.378 of 2015.

From the Judgment and Order dated 25.03.2014 of the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No.1812 of 1998.

Akshat Shrivastava, Ms. Pooja Shrivastava, Satvik Mathur, Advs. for the Appellant. A

Sourav Roy, Dy AG, Mahesh Kumar, Kaushal Sharma, Ms. Devika Khanna, Mrs. V. D. Khanna, Advs. for the Respondent.

The Judgment of the Court was delivered by B

BELA M. TRIVEDI, J.

1. The instant appeal is directed against the judgment and order of conviction and sentence passed by the High Court of Chhattisgarh at Bilaspur in Criminal Appeal No. 1812 of 1998.

2. As per the case of prosecution, the deceased Kumari Brindabai C was the daughter of Bhagirathi Kumhar who belonged to the caste Kumhar. The deceased Kanhaiya Siddar was the resident of village Panjhar and belonged to the caste Siddar (Gaur). There was a love affair going on between Kumari Brindabai and Kanhaiya Siddar, which the said Bhagirathi and his brother Chandrapal did not approve. On D 02.12.1994, both Kumari Brinda and Kanhaiya went missing. A search was made, however, no missing report was lodged. On 11.12.1994, at about 09:00 am, Lodhu (PW-2) went to Kajubadi (Cashew Nursery) and saw that the dead bodies of the deceased Kumari Brinda and Kanhaiya were hanging on a cashew tree. He therefore came back and informed the Sarpanch Baran Singh Thakur. Their bodies were in E decomposed state and were not identifiable, however the informant Chandrapal identified the dead bodies. Thereafter, Merg intimations were lodged by Chandrapal and Bholasingh (PW-4) at about 16:00 hrs. and 16:05 hrs. on 11.12.1994, which were registered at no. 67/94 and 68/94 respectively. The dead bodies were sent for postmortem. In the F postmortem report of the deceased Kumari Brinda (Ex. P/22), conducted by Dr. R.K. Singh (PW-13), it was opined that the ligature mark over her neck was antemortem in nature, and the cause of death appeared to be Asphyxia due to hanging. In the postmortem report (Ex. P/23) of the deceased Kanhaiya also, it was opined that the cause of death appeared G to be Asphyxia due to hanging. In both the postmortem reports, it was stated that the death had occurred within 8 to 10 days and the nature of the death was suicidal. As per the further case of the prosecution, on 02.12.1994, the deceased Kanhaiya was sitting at the premises of village Panchayat, where some TV programme was going on. He, thereafter, left the said place and went to the hand pump for rubbing his axe H

A (gandasu). At that time the accused Chandrapal called Kanhaiya and took him to his house, shut him down in the room and all the accused i.e., Bhagirathi, Chandrapal, Mangal Singh and Videshi in furtherance of their common intention pressed his neck and committed his murder. Thereafter, the accused Mangal Singh and Videshi committed the murder of Kumari Brinda. After committing their murders, they kept the dead bodies of B Kanhaiya and Brinda in the house upto 04.12.1994 and then took the dead bodies to Kajubadi. The accused thereafter hanged the dead bodies of both the deceased by tying the noose in their necks with the tree of cashew in the Kajubadi and attempted to give it the shape of their having committed suicide.

C

3. The Sessions Court framed the charge against the four accused i.e., Bhagirathi, Chandrapal, Mangal Singh and Videshi, for the offence under section 302, in the alternative under section 302 read with section 34 of IPC. Each of the accused was also separately charged for the offence under section 201 read with section 34 of IPC, as also for the D offence under section 3(2)(v) of the Schedule Caste and Schedule Tribe (Prevention of Atrocities), Act, 1989. The prosecution to bring home the charges levelled against the accused had examined 16 witnesses and also adduced documentary evidence. The First Additional Sessions Judge, Raipur (Chhattisgarh), after the appreciation of the evidence on record, vide the judgement and order dated 03.08.1998, acquitted all the accused E from the charges levelled against them under section 3(2)(v) of the SC ST Act, however, found them guilty of the offences under section 302 and 201 read with section 34 of IPC. They all were sentenced to imprisonment for life for the offence under section 302 read with section 34 of IPC, and were directed to undergo rigorous imprisonment for a F period of two years for the offence under section 201 read with section 34 of IPC.

4. Being aggrieved by the judgement and order passed by the Sessions Court, the accused Bhagirathi, Chandrapal and Mangal Singh preferred an appeal being the Criminal Appeal No. 1812 of 1998 and the G accused Videshi preferred an appeal being Criminal Appeal No. 2005 of 1998 before the High Court of Chhattisgarh at Bilaspur. The High Court vide the impugned judgement and order, confirmed the conviction and sentence imposed on the accused no. 2 Chandrapal for the offence under section 302 read with section 34, and under section 201 read with section 34 of IPC and accordingly dismissed the Criminal Appeal No. 1812 of

H

1998 qua the said accused Chandrapal. However, the High Court set aside the conviction and sentence imposed on the accused Bhagirathi Kumhar, Mangal Singh and Videshi for the offence under section 302 read with section 34 of IPC, nonetheless confirmed their conviction for the offence under section 201 read with section 34 of IPC, and sentenced all of them to the period already undergone by them. Accordingly, the Criminal Appeal No. 1812 of 1998 and 2005 of 1998 stood partly allowed. The present appellant-accused Chandrapal being aggrieved by the said judgement and order passed by the High Court has preferred the present appeal.

5. The learned counsel Mr. Akshat Shrivastava appearing for the appellant taking the Court to the evidence of the witnesses examined by the prosecution, more particularly of PW-2, PW-4, PW-5 and PW-6, submitted that there were major contradictions in their evidence as regards the alleged extra judicial confession made by the accused Videshi before them. Relying upon various decisions of this Court, he submitted that conviction cannot be based on the extra judicial confession made by the co-accused, which is of a very weak kind of evidence. Repelling the theory of 'Last seen theory', he submitted that the statement of PW1 Dhansingh who had allegedly last seen Kanhaiya, having been called by the present appellant, was recorded after 4 months of the incident. Even as per the case of the prosecution, the said incident of calling Kanhaiya by the appellant was 10 days prior to the date on which the dead bodies were found in the Kajubadi, and there being long time gap between the day the deceased was allegedly last seen with the appellant and the day when his dead body was found, it was very risky to convict the appellant solely on such evidence. He further submitted that the doctor who had performed the postmortem had also opined that the cause of death was asphyxia as a result of hanging and the nature was suicidal. Thus, in absence of any clear or cogent evidence against the appellant, both the courts had committed gross error in convicting the appellant.

6. However, the learned counsel appearing for the respondent State submitted that there being concurrent findings recorded by the Sessions Court as well as High Court with regard to the guilt of the appellant, the Court may not interfere with the same. While fairly agreeing that an extra judicial confession would be a weak piece of evidence, he submitted that there was other corroborative evidence adduced by the prosecution which conclusively proved the entire chain of circumstances

A leading to the guilt of the present appellant. According to him, after the alleged incident on 02.12.1994, till the dead bodies were recovered on 11.12.1994, nobody had seen the deceased Brinda and Kanhaiya in the village, and therefore the evidence of PW-1 Dhansingh who had seen Kanhaiya lastly with the present appellant was required to be believed, as believed by the courts below. According to him, the concerned doctor
B who had carried out the postmortem had also opined that the death of the deceased could be homicidal death also.

7. At the outset, it may be stated that undisputedly the entire case of the prosecution rested on the circumstantial evidence, as there was no eye witness to the alleged incident. The law on the appreciation of
C circumstantial evidence is also well settled. The circumstances concerned "must or should be" established and not "may be" established, as held in ***Shivaji Sahabrao Bobade & Anr.*** **Vs.** ***State of Maharashtra***[1]**.** The accused "must be" and not merely "may be" guilty before a court can convict him. The conclusions of guilt arrived at must be sure conclusions
D and must not be based on vague conjectures. The entire chain of circumstances on which the conclusion of guilt is to be drawn, should be fully established and should not leave any reasonable ground for the conclusion consistent with the innocence of the accused. The five golden principles enumerated in case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra***[2] laid down in para 152 may be reproduced herein for
E ready reference:

> ***"152.*** *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*
F *be drawn should be fully established.*
>
> *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*
G *be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]*

[1] (1973) 2 SCC 793
H [2] (1984) 4 SCC 116

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and 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,

(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."

8. It is also needless to reiterate that for the purpose of proving the charge for the offence under Section 302, the prosecution must establish "homicidal death" as a primary fact. In order to convict an accused under Section 302, the court is required to first see as to whether the prosecution has proved the factum of homicidal death. So far as the facts of present case are concerned, the evidence of PW-13 Dr. R.K. Singh, who had carried out the post-mortem of the deceased Brinda and Kanhaiya, would be most relevant in this regard. He had stated in his deposition before the court, *inter alia,* that on 12.12.1994, he had carried out the post-mortem of Kumari Brinda, daughter of Bhagirathi, and of Kanhaiya alias Chandrashekhar Gaur. The dead bodies of both the deceased were in decomposed state. He had further stated that the knot mark present on the neck of the deceased Brinda was ante-mortem, and that the cause of death appeared to be Asphyxia due to hanging. The death had taken place within 8 to 10 days and the nature of death was Suicidal. The said Doctor had stated similar facts for Kanhaiya that the dead body of Kanhaiya was found bent towards left side from his neck and a ligature mark having size 10" x 5" was present on the neck. The cause of death appeared to be Asphyxia due to hanging and the death appeared to have taken place within 8 to 10 days. He had further

A stated that there was neither fracture found on the dead bodies of the deceased, nor any blood clots were found, nor any injuries were found, and therefore he had opined that the cause of death was hanging which normally is found in case of suicide. He specifically stated that as the dead bodies were decomposed, he could not express any opinion whether it was a homicidal death. In the cross-examination by the learned counsel B for the accused, he had categorically admitted that he did not find any symptom of homicidal death, nor he had opined in his report given on 12.12.1994 that the deaths of the deceased were homicidal. Of course, he had stated that on the basis of the report submitted on 30.04.1995, an inference could be drawn that the deaths could be homicidal deaths.

C

9. It is worth noting that the High Court in the impugned judgment has not considered at all the evidence of Dr. R.K. Singh to come to the conclusion whether the deaths were homicidal deaths, before confirming the conviction of the appellant for the offence under Section 302 IPC. Unfortunately, the Sessions Court also in para 23 of its judgment observed D that the statement of Dr. R.K. Singh was not important because he had expressed an opinion which was neither beneficial to the prosecution nor to the defence. In our opinion, when the case of the prosecution rested on circumstantial evidence, it was imperative for the prosecution to prove beyond reasonable doubt that the deaths of the deceased were homicidal deaths and not suicidal, more particularly when the line of E defence of the accused was that the Brinda and Kanhaiya had committed suicide, and when Dr. R.K. Singh who had carried out their post-mortems had also opined that the nature of their deaths was Suicidal.

10. This takes the court to examine the incriminating evidence relied upon by the prosecution, that is the extra judicial confession made F by the co-accused Videshi. According to the prosecution, the accused Videshi had made self-inculpatory confession before the PW-4 Bhola Singh and also made confession before the PW-5 Chandrashekhar, PW-6 Baran Singh and PW-7 Dukaluram, involving the other accused including the present appellant. The prosecution had also produced an affidavit of G Videshi (Ex-P/11) allegedly affirmed before the Notary. Though the Sessions Court relying upon the said evidence of extra judicial confession of Videshi convicted all the four accused, the High Court partly believing the said extra judicial confession, acquitted the three accused i.e., Bhagirathi, Mangal Singh and Videshi from the charges levelled against them under Section 302 read with 34 of IPC, however convicted them

H

for the offence under Section 201 read with 34 by holding that the said accused had tried to cause disappearance of the evidence.

11. At this juncture, it may be noted that as per Section 30 of the Evidence Act, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. However, this court has consistently held that an extra judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra judicial confession. As held in case of ***State of M.P. Through CBI & Ors. Vs. Paltan Mallah & Ors.***[3], the extra judicial confession made by the co-accused could be admitted in evidence only as a corroborative piece of evidence. In absence of any substantive evidence against the accused, the extra judicial confession allegedly made by the co-accused loses its significance and there cannot be any conviction based on such extra judicial confession of the co-accused.

12. In ***Sahadevan & Anr. Vs. State of Tamil Nadu***[4]**,** it was observed in para 14 as under:

> ***"14.*** *It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration."*

The said ratio was also reiterated and followed by this court in cases of ***Jagroop Singh Vs. State of Punjab***[5]**, *S.K. Yusuf Vs. State of***

[3] (2005) 3 SCC 169
[4] (2012) 6 SCC 403
[5] (2012) 11 SCC 768

West Bengal[6] and ***Pancho Vs. State of Haryana***[7]**,** wherein it has been specifically laid down that the extra judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution. It should be truthful and should inspire confidence. An extra judicial confession attains greater credibility and evidentiary value if it is supported by chain of cogent circumstances and is further corroborated by other prosecution evidence. In the instant case it is true that the co-accused Videshi had allegedly made self-inculpatory extra judicial confession before the PW-4 Bhola Singh, and had made extra judicial confession before the other witnesses i.e., PW-5 Chandrashekhar, PW-6 Baran Singh Thakur and PW-7 Dukaluram stating, *inter alia,* that the other three accused i.e., Bhagirathi, Chandrapal and Mangal Singh had committed the murder and he (i.e. Videshi) was asked to assist them in disposing the dead bodies and concealing the evidence. However, the High Court, considering the inconsistency between the said two extra judicial confession made by the co-accused Videshi, did not find it safe to convict the other accused i.e., Bhagirathi, Mangal Singh and Videshi himself, and the High Court surprisingly considered the said extra judicial confession made by Videshi as an incriminating circumstance against the appellant Chandrapal for convicting him for the offences charged against him. In our opinion if such weak piece of evidence of the co-accused Videshi was not duly proved or found trustworthy for holding the other co-accused guilty of committing murder of the deceased Brinda and Kanhaiya, the High Court could not have used the said evidence against the present appellant for the purpose of holding him guilty for the alleged offence.

13. This takes the court to examine the theory of "Last seen together" propounded by the prosecution. As per the case of prosecution, PW-1 Dhansingh had seen the accused Chandrapal calling the deceased Kanhaiya and taking him inside his house on the fateful night. Apart from the fact that the said Dhansingh had not stated about the time or date when he had lastly seen Kanhaiya with Chandrapal, even assuming that he had seen Chandrapal calling Kanhaiya at his house when he was sitting at the premises of village panchayat, the said even had taken place ten days prior to the day when the dead bodies of the deceased were found. The time gap between the two incidents i.e., the day when Dhansingh saw Chandrapal calling Kanhaiya at his house and the day

[6] (2011) 11 SCC 754

[7] (2011) 10 SCC 165

Kanhaiya's dead body was found being quite big, it is difficult to connect the present appellant with the alleged crime, more particularly when there is no other clinching and cogent evidence produced by the prosecution.

14. In this regard it would be also relevant to regurgitate the law laid down by this court with regard to the theory of "Last seen together".

15. In case of ***Bodhraj & Ors. Vs. State of Jammu and Kashmir***[8]***,*** this court held in para 31 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…."*

16. In ***Jaswant Gir Vs. State of Punjab***[9]***,*** this court held that in absence of any other links in the chain of circumstantial evidence, the accused cannot be convicted solely on the basis of "Last seen together", even if version of the prosecution witness in this regard is believed.

17. In ***Arjun Marik & Ors. Vs. State of Bihar***[10]***,*** It was observed 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.

18. As stated hereinabove, in order to convict an accused under Section 302 IPC the first and foremost aspect to be proved by prosecution is the factum of homicidal death. If the evidence of prosecution falls short of proof of homicidal death of the deceased, and if the possibility of suicidal death could not be ruled out, in the opinion of this court, the appellant-accused could not have been convicted merely on the basis of the theory of "Last seen together".

19. Ergo, having regard to the totality of evidence on record, the court is of the opinion that the High Court had committed gross error in convicting the appellant-accused for the alleged charge of 302 read with

[8] (2002) 8 SCC 45
[9] (2005) 12 SCC 438
[10] 1994 Supp (2) SCC 372

A 34 of IPC, relying upon a very weak kind of evidence of extra judicial confession allegedly made by the co-accused Videshi, and relying upon the theory of "Last seen together" propounded by the PW-1 Dhansingh. It is also significant to note that no evidence worth the name as to how and by whom the deceased Brinda was allegedly murdered was produced by the prosecution. Under the circumstances, it is required to be held B that the prosecution had miserably failed to bring home the charges levelled against the appellant-accused beyond reasonable doubt. The suspicion howsoever strong cannot take place of proof.

20. For the reasons stated above, the appeal deserves to be allowed and is accordingly allowed. The appellant-accused Chandrapal is acquitted C from the charges levelled against him. He is directed to be set free forthwith.

21. Office is directed to do the needful and to send the copy of the order to the concerned jail authority at the earliest.

Nidhi Jain Appeal allowed.