

Ningesh @ Ningappa Vs. State Of Karnataka

Ningesh @ Ningappa Vs. State Of Karnataka

SooperKanoon Citation : sooperkanoon.com/1231966

Court : Karnataka Dharwad

Decided On : Apr-20-2021

Judge : K.Somashekar and M.I.Arun

Appeal No. : CRL.A 100296/2018

Appellant : Ningesh @ Ningappa

Respondent : State Of Karnataka

Judgement :

- 1 - IN THE HIGH COURT OF KARNATAKA R DHARWAD BENCH DATED THIS THE 20TH DAY OF APRIL 2021 PRESENT THE HONBLE MR. JUSTICE K.SOMASHEKAR AND THE HONBLE MR. JUSTICE M.I.ARUN CRL.A. NO.100247 OF 2018C/W CRL.A. NOS.100240, 100261, 100291 & 100296 OF 2018 CRL.A. NO.100247/2018: BETWEEN:

1. ASHOK @ MADIWALAPPA, S/O. BASANAGOUDA SIBARGATTI, AGE:

31. YEARS, OCC. AGRICULTURE, 2. MANJUNATH @ MANJU, S/O. BASANAGOUDA SIBARGATTI, AGE:

30. YEARS, OCC. AGRICULTURE, BOTH ARE R/O. DUMMAWAD, TQ. KALAGHATAGI, DIST. DHARWAD.

3. PRAKASH S/O. BASAPPA BENNALE, AGE:

29. YEARS, OCC. PRIVATE WORK, R/O. TERDAL, TQ. JAMAKHANDI, DIST. BAGALKOT, NOW AT BRAHMA CHAITANYA NAGAR, DHARWAD. APPELLANTS (BY SRI.K.L.PATIL, ADV.) - 2 - AND: THE STATE OF KARNATAKA, THROUGH SUB-URBAN P.S., DHARWAD, REP. BY STATE PUBLIC PROSECUTOR, HIGH COURT OF KARNATAKA, DHARWAD BENCH, DHARWAD. RESPONDENT (BY SRI.V.M.BANAKAR, ADDL. S.P.P.) THIS CRIMINAL APPEAL IS FILED UNDER SECTION 3742) OF CR.P.C. PRAYING TO SET ASIDE THE

JUDGMENT
AND

ORDER

OF CONVICTION DATED 30.07.2018 PASSED BY THE IV ADDL. DISTRICT AND SESSIONS JUDGE, DHARWAD, IN S.C. NO.47/2016, THEREBY CONVICTING APPELLANTS FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 120, 109, 302 AND 201 OF IPC READ WITH SECTION 149 OF IPC AND ACQUIT THE APPELLANTS OF THE OFFENCES PUNISHABLE UNDER SECTIONS 120, 109, 302 AND 201 OF IPC READ WITH SECTION 149 OF IPC. CRL.A. NO.100240/2018: BETWEEN: VEERESH S/O. BASAVARAJ HEERA @ SAHUKAR, AGE:

31. YEARS, OCC. BUSINESS, R/O. HAVAVI TQ. MANAVI, DIST. RAICHUR, NOW AT DHARWAD C.B. NAGAR, DHARWAD. APPELLANT (BY SRI.K.L.PATIL, ADV.-. PHYSICALLY PRESENT, SRI.RAVI B. NAIK, SENIOR COUNSEL - PRESENT THROUGH V.C.) AND THE STATE OF KARNATAKA THROUGH SUB-URBAN P.S., DHARWAD, REP. BY STATE PUBLIC PROSECUTOR, HIGH COURT OF KARNATAKA, DHARWAD BENCH. RESPONDENT (BY SRI.V.M.BANAKAR, ADDL. S.P.P.) - 3 - THIS CRIMINAL APPEAL IS FILED UNDER SECTION 3742) OF CR.P.C., PRAYING TO CALL FOR THE RECORDS AND TO ALLOW THIS CRIMINAL APPEAL BY SETTING ASIDE THE

JUDGMENT
AND

ORDER

OF CONVICTION DATED 30.07.2018 AND

ORDER

OF SENTENCE DATED 31.07.2018 PASSED BY THE IV ADDL. DISTRICT AND SESSIONS JUDGE, DHARWAD, IN S.C.NO.47/2016, THERE BY CONVICTING THE APPELLANT FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 120, 109, 302 AND 201 OF IPC READ WITH SECTION 149 OF IPC AND ACQUIT THE APPELLANT OF THE OFFENCES PUNISHABLE UNDER SECTIONS 120, 109, 302 AND 201 OF IPC READ WITH SECTION 149 OF IPC. CRL.A. NO.100261/2018: BETWEEN: SAGAR S/O ANNASU SALUNKE @ PATIL, AGE:

27. YEARS, OCCUPATION: PRIVATE WORK R/O KUPPAWAD VILLAGE, ULLASANAGAR TQ. MIRAJ, DIST. SANGLI, STATE. MAHARASHTRA. ...APPELLANT (BY SRI.T.R.PATIL, ADV.) AND: THE STATE OF KARNATAKA, BY DHARWAD SUB-URBAN P.S. REP. BY SPECIAL PUBLIC PROSECUTOR HIGH COURT OF KARNATAKA, BENCH DHARWAD. RESPONDENT (BY SRI.V.M.BANAKAR, ADDL. S.P.P.) THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CR.P.C., SEEKING TO SET ASIDE THE

JUDGMENT

AND

ORDER

OF CONVICTION DATED 30.07.2018 AND 31.07.2018 PASSED IN S.C. NO.47/2016 (IN DHARWAD SUB-URBAN PS CRIME NO.210/2015) BY THE IV ADDL. DISTRICT AND SESSIONS JUDGE, DHARWAD AND ACQUIT THE APPELLANT/ACCUSED OF FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 302 109 AND 120(B) READ WITH SECTION 149 OF IPC HE HAS BEEN CONVICTED AND SENTENCED.-. 4 - CRL.A. NO.100291/2018: BETWEEN RAJU S/O VENKATRAO DESAI AGE:

44. YEARS, OCC: AGRICULTURE, R/O: MALLUR VILLAGE, TQ: SAUNDATTI, DIST: BELAGAVI. ...APPELLANT (BY SRI.SHRIHARSH A. NEELOPANT FOR SRI.ARUN L. NEELOPANT, ADVS.) AND THE STATE OF KARNATAKA CIRCLE POLICE INSPECTOR, SUB-URBAN POLICE STATION, DHARWAD, THROUGH

STATE PUBLIC PROSECUTOR, HIGH COURT OF KARNATAKA, DHARWAD BENCH, DHARWAD. RESPONDENT (BY SRI.V.M.BANAKAR, ADDL. S.P.P.) THIS CRIMINAL APPEAL IS FILED UNDER SECTION3742) OF CR.P.C., SEEKING TO SET-ASIDE THE

JUDGMENT
AND

ORDER

OF CONVICTION DATED3007.2018 PASSED BY THE IV ADDL. DISTRICT AND SESSIONS JUDGE, DHARWAD IN SESSIONS CASE NO.47/2016 THEREBY SENTENCING THE APPELLANT/THE ACCUSED NO.7 TO UNDERGO RIGOROUS IMPRISONMENT FOR LIFE AND TO PAY FINE OF RS.50,000/- FOR THE OFFENCE PUNISHABLE UNDER SECTIONS302 109 READ WITH SECTION149OF IPC AND RIGOROUS IMPRISONMENT FOR A PERIOD OF2YEARS AND TO PAY FINE OF RS.5,000/- FOR THE OFFENCE PUNISHABLE UNDER SECTION120 READ WITH SECTION149OF IPC AND ETC. CRL.A. NO.100296/2018: BETWEEN NINGESH @ NINGAPPA S/O YALLAPPA OLEKAR AGED ABUT26YEARS, OCC:COOLIE, R/O:SRINAGAR, BHAVIKATTI PLOT, DHARWAD. ...APPELLANT (BY SRI. ANIL KALE, ADV.) - 5 - AND STATE OF KARNATAKA THROUGH SUBURBAN POLICE STATION REP. BY STATE PUBLIC PROSECUTOR HIGH COURT OF KARNATAKA, DHARWAD. RESPONDENT (BY SRI.V.M.BANAKAR, ADDL. S.P.P.) THIS CRIMINAL APPEAL IS FILED UNDER SECTION3742) OF CR.P.C., SEEKING TO CALL FOR RECORDS AND ALLOW THE APPEAL AND SET ASIDE

JUDGMENT
DATED3007.2018 AND

ORDER

OF CONVICTION DATED3107.2018 AS AGAINST THE APPELLANT/ACCUSED NO.6 PASSED BY THE IV ADDL. DISTRICT AND SESSIONS JUDGE, DHARWAD IN S.C. NO.47/2016, CONVICTING THE APPELLANT AND SENTENCING HIM FOR LIFE IMPRISONMENT AND FINE FOR THE OFFENCE PUNISHABLE UNDER SECTIONS302 109, 201, 120(B) READ WITH

SECTION 149 OF IPC AND THE APPELLANT BE ACQUITTED OF THE CHARGES FRAMED AGAINST THEM. THESE CRIMINAL APPEALS COMING ON FOR HEARING, THIS DAY, M.I. ARUN J., DELIVERED THE FOLLOWING: COMMON

JUDGMENT

Aggrieved by the Judgment of conviction and order of sentence passed in Sessions Case No.47/2016 by the IV Additional District and Sessions Judge, Dharwad (for short the Trial Court for the sake of brevity) the accused therein have preferred the above appeals.

2. In Sessions Case No.47/2016 the accused Nos.1 to 7 are convicted for the offences punishable under - 6 - Sections 120B, 109, 302 and 201 read with Section 149 of IPC and they have been sentenced as under : The accused Nos.1 to 7 shall undergo rigorous imprisonment for life and pay fine of Rs.50,000/- each for the offences punishable under Sections 302 and 109 read with Section 149 of IPC. In default of payment of fine, shall undergo rigorous imprisonment for one year. Further, the accused Nos.1 to 7 are sentenced to undergo rigorous imprisonment for 2 years and pay fine of Rs.5,000/- each for the offence punishable under Section 120B read with Section 149 of IPC. In default of payment of fine, shall undergo R.I. for six months. Further, the accused Nos.1 to 4 are sentenced to undergo rigorous imprisonment for 2 years and pay fine of Rs.5,000/- each for the offence punishable under Section 201 of IPC. In default of payment of fine, shall undergo rigorous imprisonment for six months.

3. Aggrieved by the same, accused Nos.1, 2 and 4 have preferred Criminal Appeal No.100247/2018, accused No.3 has preferred Criminal Appeal No.100240/2018, accused No.5 has preferred Criminal Appeal No.100261/2018, accused No.7 has preferred - 7 - Criminal Appeal No.100291/2018 and accused No.6 has preferred Criminal Appeal No.100296/2018.

4. The case of the prosecution is that the complainant by name Smt.Shaila wife of deceased-Sachin Nikkam resident of Santosh Nagar Dharwad lodged a complaint on 16.11.2015 alleging that about 3 years back she fell in love with the deceased and thereafter she married him and was residing with him in a rented house at

Santosh Nagar, Dharwad. It is stated that the deceased was doing real estate business. On 15.11.2015, her husband after having lunch had gone out of the house at about 5. p.m. Thereafter, he came back along with accused Nos.2 and 3 at about 10.30 p.m. and was standing in front of his house. The complainant came out and saw that her husband and accused Nos.2 and 3 were talking loudly. Then she called her husband, who replied that he will come shortly as he has some work. Thereafter, he left place along with accused Nos.2 and 3 in a motorcycle bearing registration No.KA-25/ES-6278. At about 11.00 p.m., the complainant telephoned her husband to come early, for which, he stated that he will - 8 - back in 10 minutes. Thereafter, at about 11.40 p.m. one- Pavan Kulkarni came to her house and informed that somebody has assaulted her husband near Vinayak Nagar cross road. Immediately, she along with the said Pavan Kulkarni rushed to the spot and saw her husband had sustained bleeding injuries and was in semiconscious state. Police came and shifted her husband to the District Hospital at Dharwad, wherein the doctor declared that he was dead.

5. Based on the said complaint, the criminal law was set into motion. The complaint is marked as Ex.P.3. It is the case of the prosecution that upon investigation it is revealed that the deceased had financial transaction with accused Nos.1, 2 and 3, wherein the deceased had lent a sum of Rs.9,00,000/- to accused No.1 and 2 together and a sum of Rs.17,000/- to accused No.3. That the said persons were known to both deceased and his wife, the complainant herein. As the accused Nos.1, 2 and 3 failed to repay the said amount, there was quarrel between them, which led to murder of the deceased, for which all the accused are responsible.-. 9 - 6. To prove its case, the prosecution has examined 31 witnesses and got marked Exs.P.1 to 61 and have produced M.Os.1 to 18. No witnesses have been examined on behalf of the accused. Ex.D1, the denial portion of P.W.17 in his statement, has been marked on behalf of the accused. The statement of accused, as contemplated under Section 313 Cr.P.C. has been recorded and they have denied the allegations made against them. Based on the evidence adduced, the trial Court came to be conclusion that accused Nos. 1 to 7 are guilty of the offences punishable under Sections 120B, 109, 302 and 201 R/w. Section 149 of the IPC and has convicted them accordingly. Aggrieved by the same, the accused have preferred the above appeals.

7. PW8 - Smt. Shaila Sachin Nikham is the wife of the deceased and is the complainant. She has turned hostile. In her evidence, she has stated that on 16.11.2015 at about 3.00 am in the morning, the police along with PW1 - Pavan Kulkarni came to her house and informed her that her husband had met with an accident and he was admitted to hospital and that she accompanied - 10 - them to the hospital. In the hospital, she saw her husband and he was dead and that she identified her husband. That she does not know who had murdered him. She has stated that she did not know accused Nos. 1 to 3 or 4 to 7. She has further stated that she complained with the police to investigate into the cause of death of her husband. She has identified her signature on the complaint. She has further stated that one Pavan Kulkarni is the scribe of the complaint. She has also stated that she was in distress as on that day and she does not know what was written in the complaint at Ex.P3. She has denied the suggestions put to her by the prosecution including the fact that accused Nos. 1 to 3 were known to her husband and herself. She has also denied any knowledge about her husband having any kind of financial transaction with accused Nos. 1 to 3. Her evidence is of no use to the prosecution, but for establishing the unnatural death of the deceased.

8. Ex.P38 is the post mortem report. The same has been conducted by PW21, who is the doctor. Ex.P39 is the report of weapon examination. M.Os.3 to 6 are the alleged weapons used to kill the deceased. Ex.P38 - post- - 11 - mortem report states that the cause of death of the deceased is due to hemorrhage and shock due to multiple injuries on the body and injury to vital organ. The same has been spoken to by PW21 in her evidence and she has opined the same can be caused by M.Os.3 to 6.

9. The aforementioned evidence goes to prove the homicidal death of the deceased Sachin Nikham.

10. The prosecution initially has tried to prove homicidal death of the deceased and the guilt of the accused by way of eyewitnesses, for which it relied on the evidence of PWs.5, 20 and 29. All the three witnesses have turned completely hostile and their evidence is of no help to the prosecution. Having failed to prove its case by way of eyewitnesses, the prosecution has tried to establish the same

by circumstantial evidence.

11. As already stated, according to the prosecution, the motive for the crime was the financial transaction of the deceased with accused Nos. 1, 2 and 3. In this regard, it has sought to rely upon the evidence of PWs. 1, 5, 8, 15 and 20. PWs. 5, 8 and 20 have turned - 12 - completely hostile. Their evidence is of no help to the prosecution to prove the alleged motive.

12. PW1 in his examination in chief has identified the accused. He has stated that he knows them. He has further stated that the marriage between the deceased and his wife was one of love marriage and accused Nos. 1 to 3 had together helped in the said marriage. That after their marriage, the wife of the deceased - PW8 had got Rs.15,00,000/- from her house. That as accused Nos.1 to 3 had sustained loss in business, accused Nos. 1 and 2 had together borrowed a sum of Rs.9,00,000/- from the deceased and accused No.3 had borrowed Rs.17,000/- from the deceased. However, as they were unable to repay the money, they had quarreled with the deceased. That on 15.11.2015, the deceased called PW1 and told that accused Nos. 1, 3 and 7 had informed him that they would come and talk about the money. He has further deposed that the deceased had told them that he would get the accused to the house of PW1 and the financial transactions would be closed there. He has further deposed, subsequent to the phone call, he was waiting for - 13 - their arrival, but while waiting, he drifted away to sleep and when he woke up, it was 11.30 pm and he started walking from his house towards Vaidyamath complex. When he was near Vaidyamath complex, he saw accused No.1 and 3 passing in front of him in a motorcycle and behind the motorbike couple of others came holding koyta and talwars. In spite of him signaling accused Nos. 1 to 3 to stop, they did not stop. After going further, he saw that the deceased was lying on the road in semiconscious stage only in an underwear with multiple injuries to his body. At that time, he got a doubt that the accused had assaulted the deceased. He speaks about the deceased being shifted to the hospital thereafter and himself going to the house of the deceased and informing about the same to his wife and bringing her to the hospital. He also speaks about drafting the complaint as stated by the wife of the deceased i.e., PW8 and signing the same. He has been considered as partly hostile and has been cross-examined by

the prosecutor. He has also been cross-examined by the advocates for the accused. In the cross-examination, - 14 - nothing worthwhile has been elicited. He has turned hostile to the story of the prosecution.

13. It is contended by the prosecution that, though PW1 has turned partly hostile in the examination-in-chief and completely hostile in cross-examination, he has partly supported the case of the prosecution and as per Section 154 of the Indian Evidence Act, the statement made by PW1 in the examination-in- chief should be relied upon. On the said premise, the prosecution has sought to establish the motive for the murder of the deceased by the accused.

14. No doubt, PW1 speaks about the financial transaction between accused Nos. 1 to 3 and the deceased and also the fact that he saw accused Nos.1 to 3 going on the bike near the place where the deceased was lying in a pool of blood with injuries and that couple of other persons went behind them brandishing koyta and talwars. However that does not establish the fact that accused committed the murder of the deceased, beyond all reasonable doubt.-. 15 - 15. PW15 is the neighbor of the deceased. He has stated that he knew the deceased and his wife - PW8. He has also stated that he knew accused Nos. 1 and 2, as they used to be with the deceased. However, with regard to the financial transaction that the deceased had with accused Nos. 1 and 2, he states he knew it by hearing the same from others. Insofar as the financial transaction is concerned, PW15 becomes a hearsay witness. He further states that on 15.11.2015 at about 10.30 pm, in the night, he was going on his bike from Vaidyamath Complex to his house. At that time, he saw that the deceased along with accused Nos.1, 2 and two others were taking to each other near Vaidyamath complex. Thereafter he received the information about the death of the deceased. Based on the said statement of PW15, the prosecution has contended that it establishes the fact that the deceased was last seen in the company of accused Nos. 1 and 2 and as per Section 106 of the Indian Evidence Act, the accused are required to state as to what happened to the deceased and how he died.-. 16 - 16. No doubt it is the settled legal position that the law presumes that the person who has last seen the deceased would have killed the deceased and burden to rebut the same lies on the deceased to prove that they had departed. Undoubtedly, the last seen theory

is an important event in the chain of circumstances that completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone cannot discharge the burden of establishing the guilt of the accused beyond reasonable doubt and it requires corroboration.

17. The Honble Supreme Court of India in the case of Navaneethakrishnan V. State by Inspector of Police reported in AIR 2018 SC2027 in paragraphs 18, 23 and 24 has held as under: 18) PW-11 was able to identify all the three accused in the Court itself by recapitulating his memory as those persons who came at the time when he was washing his car along with John Bosco and further that he had last seen all of them sitting in the Omni van on that day and his testimony to that effect remains intact even during the cross - 17 - examination in the light of the fact that the said witness has no enmity whatsoever against the appellants herein and he is an independent witness. Once the testimony of PW-11 is established and inspires full confidence, it is well established that it is the accused who were last seen with the deceased specially in the circumstances when there is nothing on record to show that they parted from the accused and since then no activity of the deceased can be traced and their dead bodies were recovered later on. It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone cant discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration.

23) The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved - 18 - must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always 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 must be such as to rule out a reasonable

likelihood of the innocence of the accused. 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 doubt. The 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. There is a long mental distance between may be true and must be true and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the - 19 - necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence, which in the present case, the prosecution has failed to prove. Conclusion:-

24) In view of the foregoing discussion, we are of the considered opinion that both the courts below have erred in relying that part of the statement which can be termed as confession which were given to the police officer while they were in custody and it will be hit by Section 26 of the Indian Evidence Act, 1872 and only that part of the statement which led to the discovery of various materials would be permissible. Hence, in the absence of any other material evidence against the appellants-accused, they cannot be convicted solely on the basis of evidence of last seen together with the deceased.

18. The deposition of PW1 and PW15 establishes the fact that the deceased knew accused Nos. 1, 2 and 3 and that he had financial transaction with them and there were certain disputes regarding the same also. It also establishes that fact that the deceased was seen with accused Nos. 1 and 2 at about 10.30 pm on 15.11.2015 - 20 - near Vaidyamath complex, Dharwad. PW1 has seen the deceased lying injured in a semi-conscious state at about 11.30 pm near Vaidyamath complex.

19. The Honble Supreme Court in the case of Nizam and another V. State of Rajasthan reported in (2016) 1 SCC550 in paragraphs 14, 16 and 18, has held as under: 14. 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 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 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.-. 21 - 16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, whether the courts below were right in invoking the last seen theory. From the evidence discussed above, deceased- Manoj allegedly left in the truck DL-1GA- 5943 on 23.01.2001. The body of deceased- Manoj was recovered on 26.01.2001. The prosecution has contended the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

18. In view of the time gap between Manoj left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that appellants and deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are - 22 - responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the last seen theory; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.

20. To rely upon the last seen theory, the prosecution has to prove the remaining chain of circumstances that would point towards the guilt of the accused with

certainty. Then such theory permits the Court to shift the burden of proof to accused and then he must offer reasonable explanation for cause of death of deceased. But it is not prudent to pass conviction solely based on the last seen theory. The entirety of circumstances should be kept in mind while convicting the accused. If there is any possibility of any other event, in that event, the benefit of doubt would go to the accused.

21. In the instant case, no doubt at 10.30 pm, the deceased was found along with accused Nos. 1 and 2. However, by about 11.30 pm, he was found in semi-conscious state in the middle of the road only in his underwear. The road is a public place. It is not the house belonging to the accused, where the deceased alone would have access. The prosecution has not established as to the reason for the deceased being found in a particular state injured in an underwear lying in a pool of blood. As stated above, if it were to be in a private place like home of the deceased, the burden as per Section 106 of the Indian Evidence Act would have been shifted on the accused to offer necessary explanation. But in the instant case, as it is a public place with many people walking around, anything might have happened as several persons would have access to the said place. It is not a private field also where no one would go to that place during the said period. Just because accused Nos. 1 and 2 were found in the company of the deceased about one hour earlier to the deceased being found injured, is not a ground to hold them guilty for his death in the instant case.

22. All panch witnesses to the case i.e., PWs.4, 6, 12, 18, 19, 22 and 23 to spot panchanama at Ex.P5, - 24 - inquest panchanama at Ex.P9, seizure panchanamas at Exs. P16, P22 to P26, have turned hostile and have not supported the case of the prosecution.

23. The prosecution has placed much reliance upon the video recordings in M.Os.7 to 9 and also M.O.2, which are CDs with photos. The said recordings are taken from the CCTV footage installed in three different places, namely, near Vaidyamath Complex, near Sai Temple and Srirangamarga. The said CC TVs have been installed by the police.

24. They constitute secondary evidence. P.W.17 is the Software Engineer who has testified as to the genuineness of contents of M.Os.7 to 9. He has also issued the necessary certificate as per Ex.P.21 as contemplated under Section 65B of the Indian Evidence Act, 1872. P.W.24 is the Head Constable, who collected the M.Os.7 to 9 along with certificate from P.W.17 and handed it over to P.W.31 the Investigating Officer. Both P.Ws.17 and 31 have deposed extensively as to the contents of the M.Os.7 to 9 and the said M.Os.7 to 9 and the depositions of - 25 - P.Ws.24 and 31 reveals that the deceased was present with accused No.3 at 10.30 p.m. in the night and that he was talking with accused Nos.2, 3 and 7 from 10.20 p.m. to 11.30 p.m. In all, it records the presence of the accused Nos.2 to 5 and 7 and also the deceased in and around the place where the deceased was found lying injured. As already observed above, all the said places are public places having access for the general public. That many people being around there, it is not that the accused and the deceased exclusively were there. The said DVDs (M.Os.7 to

9) do not reveal the actual assault on the deceased or the accused brandishing or carrying any weapons in which they have assaulted on the deceased.

25. M.Os.3 to 6 are the weapons, according to the prosecution used to assault the deceased. It is relevant to note that all the pancha witnesses to seizing the said M.Os have turned hostile and prosecution has not been able to establish the fact that any of the accused used the said weapons to assault the deceased or the fact that the deceased was indeed assaulted by the said weapon. In short, the prosecution has failed to establish that the - 26 - assault on the deceased took place with the said weapons by the accused. Furthermore not an iota of evidence is let in to establish the criminal conspiracy to eliminate the deceased as required under Section 120B of the IPC.

26. The prosecution, upon the eyewitnesses turning hostile, has sought to establish the guilt of the accused by way of circumstantial evidence. For that, it is required to prove the entire chain of circumstances as canvassed by it. Firstly, the prosecution has stated that the money transaction between the deceased and accused Nos.1 to 3 is the reason for the murder. The same has been sought to be

established by deposition of mainly P.W.1. Thereafter, in respect of repayment of money, the deceased had met up with the accused in the vicinity where he was found injured and dead. The same is a public place with many people moving around. The same is said to be proved by video records in MOs.7 to 9. The link in the chain which is not established is that the accused assaulted the deceased with MOs.3 to 6. This aspect, the prosecution has failed to prove. There is no evidence in support of the prosecution establishing the fact - 27 - that the accused used the said weapons and that the deceased was assaulted by the said weapons which resulted in grievous injuries to him because of which he died. This aspect has been sought to be covered up by the prosecution by using the last seen theory by invoking the provision of Section 106 of the Evidence Act, which shifts the burden on the accused in respect of the fact especially within their knowledge. It is true that the deceased was seen along with some of the accused in the vicinity in the last hour where he was found lying injured. But, however, the event has taken place in the public place where many people can be present and it is possible that the deceased could have been assaulted by some other persons also and that being the case, the prosecution cannot rely upon Section 106 alone and without any other corroborative evidence. Similarly, last seen theory also does not come to the rescue of the prosecution because the place is such that any other person could have assaulted the deceased. The prosecution not being able to prove beyond reasonable doubt that the accused used the weapons mentioned at MOs.3 to 6 and that MOs.3 to 6 has been used to kill the - 28 - deceased, raised a doubt in the mind of the Court and the benefit of doubt has to be given to the accused. Conviction cannot be based on conjectures or surmises or possibility of the events having happened without certainty. The prosecution has to prove its case beyond all reasonable doubt. This break in the chain of events in the instant case has not been properly appreciated by the trial Court. Hence, for the above reasons, the appeal requires to be allowed and the order of conviction be set aside. Hence, we proceed to pass the following:

ORDER

i) The appeals are allowed. ii) Consequently, the judgment of conviction and order of sentence passed against accused Nos.1 to 7 in S.C.No.47/2016 dated 30/7/2018 on the file of the IV Additional District and Sessions Judge, Dharwad, is

hereby set aside. iii) The accused are acquitted of the offences charged under Sections 120(B), 109, 302 and 201 r/w 149 of IPC. iv) Accused Nos.1 to 3 who are in custody are ordered to be set at liberty forthwith, if they are not required in any other case.-. 29 - iv) A copy of this order shall be communicated to the Superintendent of Dharwad Central Jail, forthwith for information and needful action. v) The fine amount if any paid by the accused shall be returned back with due identification. vi) The bail bonds, if any, stands cancelled. Sd/- JUDGE Sd/- JUDGE Ckk/gab/Vmb

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com