

# A Legal Critique of the Offence of Murder Arising from the Doctrine of Last Seen

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DOI: [10.36348/sijlcj.2023.v06i08.003](https://doi.org/10.36348/sijlcj.2023.v06i08.003)

| Received: 30.06.2023 | Accepted: 07.08.2023 | Published: 15.08.2023

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## Abstract

Man is a social animal that interacts and associates with other people in his environment. But there are situations where his human relationship may be negatively impacted. One of such instances is a situation where the person who was last seen with the accused dies and the accused is presumed to be liable for the death of the person. The doctrine of last seen is often relied upon by the prosecution in such circumstance. The doctrine of last seen is a principle in the offence of homicide particularly murder. It is one of the concept or principles that points to the accused person as the culprit responsible for the death of the deceased/victim. For an accused person to be held liable and convicted for the death of the deceased, the evidence of the prosecution must be compelling, irresistible and point to the accused person. This study examined and carried out a critique of the doctrine of last seen as one of the principles of murder with particular reference to an examination of the concept of murder, the doctrine of last seen, the exceptions thereto and the consideration of the doctrine of last seen in India. This study adopted doctrinal research methodology and also placed reliance on both primary and secondary sources. This study concluded that this doctrine should be painstakingly applied to avoid a hasty and erroneous or fatal conclusion as to the cause of death of a person who was last seen with the accused person.

**Keywords:** Accused Person, Doctrine of Last seen, Circumstantial Evidence, Murder.

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## INTRODUCTION

In criminal trial, the accused person is generally presumed innocent until he is found guilty by the court of competent jurisdiction.<sup>1</sup> It is the duty of the prosecution to rebut this presumption of innocence of the accused person beyond reasonable doubt. For the prosecution to secure a conviction against the accused person while relying on the doctrine of last seen, he must provide convincing evidence that shows that the accused person who was last seen with the deceased caused the death of the deceased.<sup>2</sup> The guilt of the accused person may be established through direct evidence of eye witness, circumstantial evidence (which must be direct, cogent without any iota of doubt) and confessional statement of accused person.<sup>3</sup> One of these

methods suffices in establishing criminal charge against an accused person. In the case of the doctrine of last seen, circumstantial evidence is often relied on because direct eye witness evidence and confessional statement of the accused person are often difficult to come by. The doctrine of last seen is intertwined with the offence of murder. This doctrine of last seen is one of the principles that make an accused person liable for a crime without being caught in the act. It is based on the presumption of the law which can rightly ground a conviction of an accused person if found guilty or responsible for the death of the deceased. This study does not consider all the concepts or principles or doctrines that may be a necessary justification for murder. Its specific reference is in relation to the doctrine of last seen. It examines the concept of murder, what the doctrine of last seen implies, exceptions to the doctrine of last seen and the consideration of the doctrine of last seen in India.

## CONCEPT OF MURDER

Murder is an offence that involves taking the life another as a result of act or grievous harm caused

<sup>1</sup>Constitution of the Federal Republic Nigeria (CFRN) 1999 (amended), s36(5).

<sup>2</sup>Evidence Act 2011, s135 (1); *Alabi v. State* (1993) 7 NWLR (Pt 307) 511. *Osetola v. State* (2012) 17 NWLR (Pt1329) 251.

<sup>3</sup>*Adamu v. State* (2019) LPELR-46902 (SC)

by the accused person.<sup>4</sup> Murder is an unlawful act with malice aforethought. It is a willful and deliberate act of the accused person. Section 315 Criminal Code Act provides that any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter. Section 316 Criminal Code further provides an elaborate meaning of murder as stated below:

Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say-

1. If the offender intends to cause the death of the person killed or that of some other person;
2. If the offender intends to do to the person killed or to some other person grievous harm;
3. If death is caused by means of an act done in the prosecution of an unlawful purpose which act is of such a nature as to be likely to endanger human life;
4. If the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;
5. If death is caused by administering any stupefying or overpowering things for either of the purpose last aforesaid;
6. If death is caused by willfully stopping the breath of any person for either of such purpose.

In *Ayedatiwor v. State*<sup>5</sup> the crime of murder was referred to as: the taking of human life by a person who either (a) has a malicious and willful intent to kill or do grievous bodily harm or (b) is wickedly reckless as to the consequences of his act upon his victim. Therefore, for murder, the suspect must have an evil intent, that is a criminal intent, although, it is not necessary that there should be an intent to kill. The offence of murder must point the accused person directly to the crime. But where there is no direct evidence against the accused person, the confessional statement and/or circumstantial evidence may sufficiently ground the conviction of the accused person.<sup>6</sup> The accused person must play a central role in the death of the deceased and must foresee his action as the probable consequence of his actions.<sup>7</sup> For the accused person to be held liable or convicted for the death of the deceased, the injury on the deceased victim must not be self-inflicted but caused by the accused person act. In order to secure a conviction of murder,

<sup>4</sup>*Nasiru v. State* (2022) ALL FWLR (Pt. 1155) 477 at 481.

<sup>5</sup>(2018) LPELR-43847 (SC)

<sup>6</sup>*Igbele v. State* (2004) 15 NWLR (Pt. 896) 314; *Idiok v. State* (2008) ALL FWLR (Pt. 421) 797

<sup>7</sup>*Ibikunle v. State* (2007) ALL FWLR (Pt. 3540) 209

the prosecution must establish beyond reasonable doubt that the accused person willfully committed the crime. In other words, the prosecution is expected to prove that the act or omission of the accused person is responsible for the death of the victim. The burden of proof on the prosecution does not shift because an accused person is presumed innocent until proved guilty. The prosecution must establish the following essential ingredients as stated in *Oladapo v. State*.<sup>8</sup>

- a. The victim must die;
- b. The death of the victim was caused by the accused person;
- c. The accused person had the intention to either cause grievous bodily harm or kill the victim.

Similarly, in *Ogbeifun v. State*<sup>9</sup> the Court of Appeal held that the following elements must be established beyond reasonable doubt in the charge of murder.

- a. That the deceased had died;
- b. That the death of the deceased had resulted from the act of the accused and;
- c. That the act of the accused person caused the death of the deceased and death was the probable consequence of his act.

The above elements must be sufficiently proved by the prosecution with convincing and overwhelming evidence. In order to establish the cause and manner of death of the deceased victim, the prosecution may produce medical report such as autopsy report (though not compulsory).<sup>10</sup> Medical evidence of the medical officer who performed the autopsy report is also not mandatory when proving the charge of murder and it is not compulsory for the medical officer to be in court before the report can be tendered, it can be tendered by either party.<sup>11</sup> Also, the prosecution need not tender the weapon used to perpetrate the unlawful act. In other words, failure to produce the weapon used by the accused person is not fatal, the gravity of the action of the accused will always lead to the conviction of the accused person.<sup>12</sup> The accused person can only be discharged if the evidence of the prosecution is not compelling or convincing to the judge. The Court is expected to also consider all the defences raised by the evidence before it, whether the accused person specifically put up such defence or not. The defences of the accused person must be considered by the court no matter how stupid or weak such defence or evidence may be.<sup>13</sup>

<sup>8</sup>(2020) ALL FWLR (1045) 715 at 717; *Oketalegun v. State* (2015) LPELR-24836 (SC); *Anjola v. State* (2012) LPELR-19669 (CA)

<sup>9</sup>(2022) ALL FWLR (Pt. 1154) 447 at 450 CA

<sup>10</sup>*Egharevba v. State* (2016) LPELR-40029 (SC)

<sup>11</sup>*Edoho v. State* (2010) ALL FWLR (Pt.530) 1262 (SC)

<sup>12</sup>*Karbaka v. The State* (2011) ALL FWLR (Pt. 574) 192 at 204-205

<sup>13</sup>*Ashare Ayaba v. State* (2018) LPELR-44495 (SC)

### Doctrine of Last Seen

The doctrine of last seen is a principle in the offence of murder that presupposes that the accused person is responsible for the death of the victim or deceased where the accused person and the deceased were last seen together.<sup>14</sup> In other words, the doctrine of last seen is a presumption that states that the person who was last seen with the deceased is presumed to be the person responsible for the death of the deceased provided the circumstantial evidence of the case is overwhelming and points to no other person than the person who was last seen with the deceased.<sup>15</sup> In *Anyasodor v. State*<sup>16</sup> the court stated that:

*The doctrine of last seen simply means that the law presumes that the person last seen with the deceased bears full responsibility for his death, if it turns out that the person last seen with him is dead...where it was established by an eye witness account that the deceased was last seen in appellant's company before the attack on his person that led to his death, the trial court rightly applied the doctrine of last seen, a stance upheld by the appellate courts.*

This doctrine is a rebuttable presumption. In *Tajudeen Iiyasu v. The State*<sup>17</sup> the court stated that the doctrine of last seen connotes that the law presumes that the person last seen with the deceased is fully responsible for the death of the deceased where the deceased happens to be dead and the circumstantial evidence against the person is overwhelming and there is no safe conclusion that could exonerate him, then he will be held liable for the murder of the deceased. This doctrine is an exception to the doctrine of presumption of innocence of the accused person; as the accused person is obligated in the circumstance to prove his innocence. It is a rebuttable presumption.<sup>18</sup> The doctrine of last seen has been statutorily supported by Section 167 Evidence Act, 2011 which provides that the court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of nature of event, human conduct and public and private business, in their relationship to the

fact of the particular case and in particular the court may presume that:

- a) A man who is in possession of stolen goods soon after is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
- b) A thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence;
- c) The common course of business has been followed in particular cases;
- d) Evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it; and
- e) When a document creating an obligation has been discharged.

The time lapse between when the accused person and the deceased were seen together and when the deceased died must be short; there must be no likelihood or situation where someone else is seen with the deceased. Where there is a long-time lapse, the evidence of the prosecution must connect the accused person directly to the crime. The Supreme Court in *Madu v. State*<sup>19</sup> established the doctrine of last seen and held that

*The doctrine of last seen postulates that if a person who was last seen alive in the company of another is found dead, that other in whose company the deceased was last seen alive in law is presumed to bear full responsibility of the death of the deceased. The last seen theory comes into play when the time gap between the point of time when the accused and the deceased is found is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Where there is a long-time gap between period they were last seen together and the crime and there is possibility of other persons intervening, it is hazardous to rely on the theory of last seen together. Even if time gap is less and there is no possibility of others intervening, it is safe to look for corroboration.*

The doctrine of last seen does not mean that the accused person must give explanation as to how the deceased died but he must explain what happened while they were together or the circumstances surrounding the death of the deceased. The explanation offered by the accused person must be believable and must disclose the circumstances surrounding the death of the deceased. Where there is no direct evidence that points the accused person to the cause of death of the deceased, the court would always rely on circumstantial

<sup>14</sup>*Ogbeifun v. State* (2022) ALL FWLR (Pt.1154) 447 at 454.

<sup>15</sup>*Oladapo v. State* (2020) ALL FWLR (1045) 715 at 717

<sup>16</sup>(2019) ALL FWLR (PT 982) 936 AT 964-965

<sup>17</sup>(2013) AELR 1857 (CA); *State v. Sunday* (2019) ALL FWLR (Pt. 1006) 570 at 584-585; *Owobu v. State* (2015) ALL FWLR (Pt. 762) 1668 at 1685.

<sup>18</sup>O. M. Atoyebi., Application of the Doctrine of Last Seen in Homicide Trials in Nigeria Criminal Justice System(2023)

<https://www.thenigerialawyer.com/application-of-the-doctrine-of-last-seen-in-homicide-trials-in-nigeria-criminal-justice-system/> accessed 23 June 2023.

<sup>19</sup>(2012) ALL FWLR (641) 1416 at 1420

evidence. This circumstantial evidence must be convincing and connect the accused person to the crime that no other person other than the accused person killed the deceased. Where the circumstantial evidence is overwhelming and connects the accused person to the crime, the medical report of the cause of death of the deceased may not be necessary.<sup>20</sup>

Circumstantial evidence is the evidence of the surrounding circumstances which by coincidence is capable of proving a proposition with the precision of mathematics.<sup>21</sup> The Court of Appeal in *Alatise v. State*<sup>22</sup> held that

*Circumstantial evidence is the proof of circumstances from which according to ordinary course of human affairs, the existence of some facts may reasonably be presumed. In other words, it is the evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is the narration of surrounding circumstances which by undersigned coincidence is capable of proving with clear-cut accuracy the guilt of the person. For it to support a conviction in criminal trial, particularly in murder cases, such circumstantial evidence must be cogent, complete and unequivocal. It must be compelling and must be such that leads to only one irresistible conclusion that it is the prisoner and no one else who is the murderer.*

Also, in *Oketaolegun v. State*<sup>23</sup> the court held that:

*...it is the combination of evidence of circumstances against an accused when taken together, creates strong conclusions of his guilt with high degree of certainty. It is very often the best evidence sparingly applied because of possibility of fabrication, which may cast suspicion on an innocent person. For circumstantial evidence to ground a conviction, it must lead to one irresistible conclusion, that is, the guilt of the accused.*

For circumstantial evidence to ground a conviction, the whole evidence must be cogent, unequivocal, compelling and point to no other person than the accused person.<sup>24</sup> The circumstantial evidence must also be conclusive and must tie the accused person to the death of the deceased.<sup>25</sup> In *Igabele v. The State*

where the prosecution stated that both driver and deceased conductor went out with their vehicle but did not return home. The owner of the vehicle reported the matter to the police. This led to the subsequent arrest of the driver who denied knowing the whereabouts of the deceased conductor. Upon further interrogation he stated that the deceased fell off the vehicle. He also stated that he got off the vehicle to see his brother. The inconsistent evidence of the accused person and circumstantial evidence were used against him. The court applied the doctrine of last seen in convicting the accused person (the driver) for the murder of the deceased conductor. The doctrine of last seen works against the duty imposed only on the prosecution to prove a case beyond reasonable doubt. The accused person does not have the duty to prove his innocence. However, in the doctrine of last seen, once the prosecution establishes his case beyond reasonable doubt, the burden shifts to the accused person to discredit the evidence of the prosecution and establish his innocence. The accused person must provide a reasonable and convincing explanation but where facts and evidence against him are strong he can be convicted for the charge of murder. The duty imposed on an accused person to prove his innocence when facing allegation of murder arising from the doctrine of last seen had been judicially emphasized in a number of cases some of which include the following:

In *Madasiru v. State*<sup>26</sup> the Court held that:

*...it is the duty of the accused person in such damnifying circumstances to give an explanation relating to how the deceased met his or her death. In the absence of such explanation, a trial court and even an appellate court will be perfectly justified in drawing the necessary inference that the accused person must have killed the deceased...*

Equally in *Idi v. State*<sup>27</sup> the Court held that:

*The doctrine of last seen requires that a person charged with murder, who was last seen with the deceased before his death should offer some explanation as to how the deceased met his death. Where such explanation is not forthcoming, the accused bears full responsibility for the death of the deceased.*

Also, *Ekaidem v. State*<sup>28</sup> the Court held that:

<sup>20</sup> *Amos v. State* (2018) LPELR-44694 (SC)

<sup>21</sup> *Odogwu v. State* (2013) LPELR-42802 (SC), (2014) ALL FWLR (Pt. 719) 997

<sup>22</sup> (2013) ALL FWLR (Pt 686) 552 at 554 (CA); *Mudasiru v. State* (2012) ALL FWLR (Pt 626) 583 at 587.

<sup>23</sup> (2015) ALL FWLR (Pt. 797) 677 at 692-693

<sup>24</sup> *Nasiru v. State* (1999) 2 NWLR (Pt. 589) 247 (SC)

<sup>25</sup> *Idowu v. State* (1998) 11 NWLR (Pt. 574) 354 (SC)

<sup>26</sup> (2012) ALL FWLR (Pt 626) 583 at 587 (CA); *Esseyin v. State* (2019) ALL FWLR (Pt. 985) 378 at 398

<sup>27</sup> (2020) ALL FWLR (Pt 1072) 749 at 755 (SC); *Godsgift v. State* (2016) ALL FWLR (Pt 848) 580 at 608

<sup>28</sup> (2012) ALL FWLR (Pt 631) 1587 at 1591 (CA); *Haruna v. Att. Gen. Federation* (2012) ALL FWLR (Pt 632) 1617 at 1631-1632.

...under the doctrine of last seen, it behooves the accused person to give explanation and establish on the balance of probability that there was a parting of the ways between himself and the person who alleged to have been seen with him. Put differently, it must be shown on the preponderance of evidence that when they parted ways or became separated, the person was still alive and they were not seen together again until the person turned-up dead.

Where an accused person fails to offer any explanation or fails to provide a reasonable explanation to the strong evidence against him, then he will be deemed to have committed the crime and would be convicted accordingly.<sup>29</sup> In other words, the burden will always shift to the accused person to discountenance this presumption of last seen.<sup>30</sup> To avoid inappropriate conviction and miscarriage of justice, the doctrine of last seen must be applied with utmost caution and restraint.

#### EXCEPTIONS TO THE DOCTRINE OF LAST SEEN

Where the evidence surrounding the death of the deceased is clear and not in dispute, the doctrine of last seen might not be necessary because the person who caused the death is not in dispute.<sup>31</sup> Also, where there is doubt as to the guilt of the accused person, the doubt will be resolved in his favour. Doubt is often created where the evidence of the prosecution does not sufficiently point to the accused person as the killer of the deceased.<sup>32</sup> In this case, the evidence presented by the prosecution falls short of the standard required to ground the conviction of the accused person.

#### Consideration of the Doctrine of Last Seen in India

In India, the doctrine of last seen is also known as last seen theory or last seen together theory. This principle is often taken into consideration in establishing the guilt of the accused person and it shifts the burden of proof from the prosecution to the accused to explain how the incident happened and what

happened to the deceased.<sup>33</sup> The last person seen with the deceased is deemed to be the person presumed to have killed the deceased. This doctrine derives its origin from the 'Doctrine of Inductive Logic' which states that where any fact connected to the occasion, cause, or effect lead to the circumstance in which that thing occurred or it provided an opportunity for the occurrence of that thing, then, those facts will be relevant.<sup>34</sup> This theory has its basis in the principle of probability, cause and connection.<sup>35</sup> Just like Nigerian courts, Indian Courts have also recognized the importance of relying on circumstantial evidence in the doctrine of last seen because there is often no eye witness or direct evidence.<sup>36</sup> Circumstantial evidence is the inferences and presumptions drawn from the fact and circumstances of the case. This term was utilised for the first time in India by James Stephen who stated that facts depend on other facts where the other fact is deemed to have existed. In other words, last seen is based on the inference drawn by a reasonable man in respect of the pre-existing fact.<sup>37</sup> Circumstantial evidence is based on logical inference which must be against the accused person. Where there is any element of doubt in the evidence presented or the chain of event is incomplete or vague, then the accused person would be given the benefit of doubt by relying on the presumption of his innocence.<sup>38</sup> Where other facts are proved to be existing in the cases of natural event, human conduct, public and private business, then the court can presume that certain facts exist.<sup>39</sup> Evidence in last seen theory needs to be corroborated with other facts because it is a weak evidence that may occasion miscarriage of justice. The accused person must be given the opportunity to rebut the presumption of the doctrine of last seen that ties the accused to murder of the deceased. Certain defences available to the accused person where the doctrine of last seen can be dismissed were established in the case of *Satpal Singh v. State of Haryana*,<sup>40</sup> they are:

- a) If the accused person can sufficiently rely and prove the defence of alibi (i.e. he was with another person at the time the crime was committed).
- b) If it can be proved that he was not the last person with the deceased and that there was an interference in between by another person. In this,

<sup>29</sup>*Archibong v. State* (2006) LCN/3473 (CA)

<sup>30</sup>B. G. Oringo., *Doctrine of Last Seen: Its Applicability in the Proof of Murder in Nigeria* (2020) <https://www.legalideasforum.com/doctrine-of-last-seen-its-applicability.html> accessed 29 June 2023

<sup>31</sup>M. O. Balogun., *Kwenev v. The State: On Purport and Application of Doctrine of 'Last Seen' in Proving Murder and its Exceptions thereto* (2022) <https://www.loyalnigerialawyer.com/kwenev-v-the-state-on-purport-and-application-of-doctrine-of-last-seen-in-proving-murder-and-its-exception-thereto> accessed 23 June 2023.

<sup>32</sup>*Bukola v. State* (2018) ALL FWLR (Pt. 943) 543 (CA)

<sup>33</sup>R. Sachdeva., *Doctrine of Last Seen Theory* (2020) <https://www.solegal.com> accessed 29 June 2023; *Woolmington v. DPP* (1935)1 AC 462.

<sup>34</sup>Indian Evidence Act 1872, s7.

<sup>35</sup>P. Aggarwal., *Last Seen Theory under Indian Evidence Law* (2021) <https://blog.pleaders.in/last-seen-theory-indian-evidence-law/> accessed 29 June 2023.

<sup>36</sup>*Reena Hazarika v. State of Assam* Criminal Appeal No.1330 of 2018.

<sup>37</sup>Aggarwal (n.34)

<sup>38</sup>*Ibid*

<sup>39</sup>Indian Evidence Act 1872, s114.

<sup>40</sup>Criminal Appeal No. 763 of 2008.

case the guilt will be shifted to the third party who interfered.

- c) If the accused person can prove that there was a reasonable time lapse between the commission of the crime and when they were seen together, the court can presume that there are chances of the intervention of any other factors.
- d) If it is proved by the accused person that the person who last saw him with the deceased is not a reliable witness because of reasons like being a child witness or stock witness which the court cannot rely on their statements.

Also, for the doctrine or theory of last seen to be established, the time when the deceased and the accused were last seen together and the recovery of the body of the deceased must be very short. This period of time is also considered under the Nigerian jurisprudence. The possibility of the interference of another person will be ruled out when the time is very short.<sup>41</sup> In other words, where there is a long-time lapse, the court will be reluctant in convicting the accused person unless the prosecution is able to prove that no other person interfered and the accused person was in exclusive possession of the place the incident occurred.<sup>42</sup> Unlike in Nigeria where the confessional statement of the accused person can sufficiently ground his conviction, the confessional statement of the accused cannot be reasonably relied upon in India as same must be corroborated.<sup>43</sup>

## CONCLUDING REMARK AND RECOMMENDATIONS

The doctrine of last seen is an important doctrine in criminal law and the law of evidence that is commonly associated with the offence of murder. It has to do with situations where it is extremely difficult to know who caused the death of a victim who was last seen with a person or certain individuals. Where situations like this arise, the doctrine of last seen would often be relied on by the prosecution. Once it is proved by the prosecution, it shifts the burden of proof from the prosecution (i.e., proof beyond reasonable doubt) to the accused person to establish his innocence since he was the last person seen with the deceased. The prosecution would always rely on circumstantial evidence because there is often no direct evidence or eye witness who saw the accused killing the deceased. The evidence must be cogent and must link the accused person to the crime because any doubt in the circumstantial evidence may lead to the acquittal of the accused person. In relying on the circumstantial evidence surrounding the case in the doctrine of last seen, the court must exercise caution for an innocent

person not to be unjustly punished. This study however recommends that in the interest of justice and fairness, courts should always exercise utmost caution when arriving at its decision. Courts should ensure that accused persons are convicted based on credible and extremely convincing circumstantial evidence. Since the burden of proof will always shift from the prosecution (after establishing its case beyond reasonable doubt) to the accused person, the accused person should be given adequate opportunity to offer explanation on the charge preferred against him. Conviction should not be based solely on circumstantial evidence most especially where there are elements of doubts in the evidence. Court should take into consideration evidence on record, the circumstances that precede and follow the time the accused and the deceased were last seen together.

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<sup>41</sup>Anjan Kumar Sharma v. State of Maharashtra (2017) 14 SCC 359.

<sup>42</sup>Digamber Vaishnav & Anor v. State of Chattisgarh (2019) SC 1367, (2019) 4 SCC 522.

<sup>43</sup>Jagroop v. Singh v. State of Punjab (2012) 4 RCR 543