

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Hearing : 7th January, 2011

Date of Decision : 13th January, 2011

+ **CRL. A. 4/2002**

GANESH

...APPELLANT

Through: Mr.Sumeet Verma, Advocate
with Appellant in person.

Versus

STATE

...RESPONDENT

Through: Mr. Jaideep Malik, APP.
HC Rajbir Singh, PS Geeta
Colony.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | No. |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

J U D G M E N T

G.P. MITTAL, J.

1. This is an Appeal against the judgment dated 6th July, 2001 and order on sentence dated 9th July, 2001 whereby the Appellant Ganesh was convicted for the offence punishable under Section 302 of the Indian Penal Code (for short 'the Code') and was sentenced to undergo rigorous imprisonment for life with fine of Rs.2,000/- and

in default to undergo Simple Imprisonment for three months.

2. On receipt of DD No.11-A dated 22.03.2000 recorded at Police Station Geeta Colony that dead body of a woman was lying in house No.15/28, Geeta Colony, SI Satender Mohan reached the spot alongwith Const. Sheikh Sazid. He found that dead body of a woman aged 26-27 years was lying in the room/shop on the First Floor of the aforesaid house. Saliva was found to have come out of the mouth of the deceased.
3. Inspector T.R. Mudgal, SHO Police Station Geeta Colony and the Assistant Commissioner of Police also reached the spot. Sub-Divisional Magistrate, Gandhi Nagar was informed and he also reached there. Inquiries were made from Mr. Sharvan Kumar son of Laxman Das, r/o 15/2, Geeta Colony, who was the landlord of the premises as also from the neighbours. It was revealed that the deceased was the wife of one Ganesh (the Appellant), resident of Village Lanhua, District Badayun, U.P.
4. It was found that the Appellant was working as a rickshaw- pullar in the area. He was staying in the shop/room along with his wife, three children and his Nephew Kuldeep. The crime team was called at the spot. The scene of the crime was got photographed.
5. Inquest proceedings were conducted and the dead body was sent to Subzi Mandi Mortuary to be preserved for 72 hours. (as no person had come forward to identify the deed body). Inquiries were made from Village Lanhua. It

transpired that the Appellant had left the village 15 years back and the villagers had no knowledge about the Appellant. Since nobody came forward to claim the dead body for 72 hours, autopsy on the dead body was got conducted from Dr. Sarvesh Tandon PW-1 on 28.3.2000. Vide Postmortem Report Ex.PW-1/A, Dr. Tandon opined the cause of death to be asphyxia due to ante-mortem smothering.

6. All the injuries were found to be ante-mortem in nature. Injuries to the neck tissues was opined due to attempt at throttling. There was obstruction of respiratory passages by blockage of mouth and nostrils which was sufficient to cause death in the ordinary course of nature.
7. During further investigation of the case it was revealed that there was a quarrel between the Appellant and his Nephew Kuldeep 2/3 days prior to the incident (22.03.2000). According to the prosecution, cause of quarrel was illicit relationship of the deceased with Kuldeep. The Appellant, it is alleged had seen Kuldeep in an objectionable position with the deceased, his wife, on 09.03.2000 when he had returned from the village. On 19.03.2000, the Appellant had given beatings to Kuldeep on this count.
8. It is further the case of the prosecution that on 20.03.2000 (the day of festival of Holi) at about 11:00 P.M., the Appellant had gone to PW-12 Santosh Sharma and had made an extra judicial confession about the murder of his wife (deceased Rakhi).

9. During the course of investigation, the Appellant was arrested on 4.04.2000. It is alleged that he had made a disclosure statement regarding commission of the crime however, there was no discovery of any fact in pursuance of the said disclosure statement.
10. The Trial Court vide impugned order came to the conclusion that the circumstances proved during the trial established that the Appellant had committed murder of his wife. Para 18 of the impugned judgment regarding finding of the Trial Court is extracted hereunder for ready reference:-

“18. As already discussed the prosecution has proved beyond reasonable doubt on record that it was the accused who was living in the shop/house where the dead body of the deceased was found and on the fateful day of 20.03.2000 he smothered his wife whose dead body was found by the landlord of the house on 22.3.2000 which fact is also established beyond reasonable doubt that it was a case of Homicidal death committed by the accused as per opinion of the Dr. who conducted the Post Mortem that the time since death was about 6/7 days before conduct of Post Mortem which was conducted on 28.3.2000. It has been proved on record that only inference which can be drawn in respect of commission of the offence is towards the accused which is cogently established on record. There is a chain of events i.e. residing of the accused with the deceased and his leaving the house on that very day when the murder took place alongwith his children leaving behind his deceased murdered wife in the tenanted room and thereafter

absconding and was arrested later on. These facts goes (*sic*) against the accused to establish the commission of the offence by him beyond reasonable doubt. The motive as already discussed is also proved on record by the prosecution."

11. We have heard Mr. Sumeet Verma, learned counsel for the Appellant and Mr. Jaideep Malik, learned Additional Public Prosecutor for the State and have perused the record.
12. There is no direct evidence to connect the Appellant with the offence with which he was charged. The case rests solely on circumstantial evidence. The circumstances relied upon by the prosecution while sending the Appellant for trial are:-
 - A. Extra judicial confession.
 - B. Motive - illicit relationship between Kuldeep and the deceased.
 - C. Evidence of last seen.
 - D. Subsequent conduct in absconding after the offence.
13. The law regarding circumstantial evidence is well settled. When a case rests upon circumstantial evidence, such evidence must satisfy three tests:-
 - (1) The circumstances, from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

- 14. During the course of trial, the prosecution had examined as many as 19 witnesses. PW-3 Sharvan Kumar, the landlord and owner of the rickshaw which the Appellant used to ply; PW-10 Kuldep, the Nephew of the Appellant with whom the deceased was alleged to be having illicit relationship; PW-12 Santosh Sharma, to whom the Appellant had allegedly gone for shelter, with his children on 20.03.2000 at 11:00 P.M.; PW-16 Jogender Sharma are the witnesses examined by the prosecution to prove various circumstances against the Appellant.
- 15. PW-15 SI Satender Mohan had reached the spot on receipt of DD No.11-A along with other police officials and had carried out the initial investigation whereas PW-19 Insp. T.R.Mudgal, SHO Police Station Geeta Colony is the

Investigating Officer of the case. Rest of the witnesses are of a formal nature.

16. In his examination under Section 313 of the Code of Criminal Procedure, the Appellant admitted that he used to reside on the first floor of shop No.15/28, Geeta Colony along with his wife, three children and nephew Kuldeep. He also admitted to plying a rickshaw belonging to PW-3 Sharvan Kumar on hire basis for 1½ months prior to the alleged incident. The Appellant, denied that any quarrel had taken place on 10th March, 2000 or on 19th March, 2000. He, however, did not come out with any explanation as to when and how his wife Rakhi had died.
17. We shall be dealing with the circumstances relied upon by the prosecution one by one.

A. Extra Judicial Confession:-

18. According to the prosecution, the Appellant had made an extra judicial confession of his guilt to PW-12 Santosh Sharma. During his examination-in-chief Santosh Sharma simply deposed that the Appellant was the maternal uncle of one Kamal. He (the witness) used to visit said Kamal. On the day of festival of Holi the Appellant along with his two children had come to his house (In fact, as per the case of the prosecution the Appellant had three children i.e. however not very significant for the purpose of appreciating this argument) and requested PW-12 Santosh Sharma for shelter. He, however, did not allow the Appellant to stay there. The witness stated that he did not enquire from him about his wife nor did the Appellant tell

him anything about the same. The witness was permitted to be cross examined by the learned APP. The witness denied that the Appellant had informed him that he had killed his wife or that there was illicit relation between Kuldeep and Rakhi, his wife. The witness was confronted with his statement Ex.PW-12/A portion A to A and B to B. However, nothing could be elicited during his cross examination which could be of any help to the prosecution. There is no other evidence on this circumstance led by the prosecution. On the basis of testimony of PW-12 Santosh Sharma it cannot be said that any extra judicial confession was made by the Appellant to him.

B. Motive – Illicit Relationship between Kuldeep and the deceased.

19. To prove this circumstance, the prosecution examined PW-3 Sharvan Kumar, PW-10 Kuldeep, PW-12 Santosh Sharma and PW-16 Jogender Sharma. PW-3 Sharvan Kumar was completely silent on this aspect of the case of the prosecution. He was not even cross examined on behalf of the State nor confronted with his statement under Section 161 Cr.P.C. PW-10 Kuldeep, PW-12 Santosh Sharma and PW-16 Jogender Sharma did not support the case of the prosecution on the factum of alleged illicit relationship between Kuldeep and the deceased. They were allowed to be cross examined by the learned Additional Public Prosecutor for the State. However, nothing could be brought out in their cross examination which suggested that these witnesses had told a lie on this count. In any case, the factum of illicit relationship

between the deceased and Kuldeep could not be proved. There is no manner of doubt that the prosecution has utterly failed to prove that there was any illicit relationship between Kuldeep and deceased.

20. Normally, there is a motive behind every criminal act. However, where there is direct ocular evidence to prove the charge of murder against the accused, the question of establishing motive becomes merely academic. Motive, however, assumes importance in a case where the evidence is only of circumstantial nature. The absence of motive is a circumstance in faovur of the accused. The absence of motive coupled with the fact that there is no circumstance against the Appellant except that he is husband of the deceased takes out the bottom of the prosecution case.

C. Evidence of “last seen”.

21. The prosecution cited Sharvan son of Laxman Das, the landlord and the rickshaw owner, as a witness to prove this circumstance; he was examined as PW-3. This witness deposed that the Appellant Ganesh used to ply his rickshaw on hire basis. 1½ months prior to the incident, the Appellant used to live on the first floor of Shop no.15/28, Geeta Colony along with his wife, three children and his Nephew named Kuldeep. 2/3 days prior to the incident (the incident he was referring is discovery of the dead body on 22.03.2000) some altercation/quarrel had taken place between the Appellant and his Nephew Kuldeep. He wanted to know the reason for the same and was informed that it was a domestic problem and they

would solve the same. Since the Appellant had not paid the hire charges for using the rickshaw for 3-4 days, he went to the shop/room on 22.03.2000 at about 9:00 A.M.. He noticed the shutter of the shop to be partially open. He opened it and found the Appellant and his children missing. He further noticed that the Appellant's wife was lying on the floor and some foam was coming out of her mouth. He suspected foul play and therefore informed the police.

22. Thus, this witness is categorical that he had seen the Appellant's wife alive and the Appellant as well as his wife together in the shop/room 2/3 days prior to 22.03.2000 and that the wife was found to be dead on 22.03.2000 at 9:00 A.M.
23. In this regard, the testimony of PW-1 Dr. Sarvesh Tandon becomes quite relevant. He had performed autopsy on the dead body of a female, aged about 25-30 years (which was later identified to that of the Appellant's wife) on 28.03.2000 at 2:30 P.M. The cause of death as stated hereinbefore was found to be asphyxia due to ante-mortem smothering. The time since death was given to be 6-7 days approximately. If we go back by six days from the date of the postmortem examination the date of death comes to 22nd March and if we go back by seven days, then the date of death would be 21st March, 2000. Of course, this witness had given the time of death by approximation. Therefore, it was essential for the prosecution to elicit from this witness, if the time could be between 6-7 days or it could be 8 days or 9 days: which has not been done by the prosecution. It, therefore,

remains in the realm of speculation as to when the death of Smt. Rakhi (wife of the Appellant) had taken place and whether the same coincided with the time when the deceased and the Appellant were seen together on 19.03.2000, or immediately thereafter.

24. As per case of the prosecution itself the deceased, the Appellant and Kuldeep (PW-10) were residing in the room / shop aforesaid along with the Appellant's children. On 19th PW-3 Sharvan Kumar had seen all the three when there was a quarrel/giving of beatings by the Appellant to Kuldeep. The prosecution has not produced any evidence that after the quarrel Kuldeep had left the room where he was staying (with the Appellant and the deceased) and the only two i.e. the Appellant and the deceased remained there, along with the children. PW-3 Sharvan Kumar was a witness on this aspect as per the prosecution case; yet during his statement in the Court he was completely silent on this point. The prosecution did not make any attempt to examine PW-3 Sharvan Kumar on this aspect.
25. Similarly, according to the prosecution PW-10 Kuldeep had also left the room on 19.03.2000 and deposited the cycle rickshaw with Sharvan Kumar but a different story was given by Kuldeep when he was examined as PW-10. He deposed that on 19th (March, 2000), the Appellant had forced him to drink liquor and thereafter he started quarreling with him as well as with his wife. During the quarrel the Appellant bit his left wrist and thereafter called his brother and sister from Ghaziabad. They also gave beatings to him and threatened him with imprisonment. After two days he went to Moradabad and

before this he left the house and went to Ghaziabad. Therefore, even according to PW Kuldeep he had not left the room which was being shared by him along with Appellant and the deceased on 19th March, 2000. In these circumstances, there is no reliable evidence of the Appellant and the deceased being last seen together. Instead, what can be inferred from the statement of PW-10 is that he had left the room on or about 21st March, 2000.

26. As discussed earlier, the date of death of the deceased as per the post mortem is 21st or 22nd of March, 2000. No evidence has been produced that the Appellant and deceased Rakhi were seen together either on 20th, 21st or 22nd of March, 2000. On the other hand, the statement of PW-12 Santosh Sharma is to the effect that the Appellant, with his children had approached him to stay there. Thus, it cannot be said that the deceased and the Appellant were last seen together just before the time of the death (of the deceased).

D. Subsequent conduct in absconding after the offence.

27. We have already discussed above, that exact or even the approximate time and date of death has not been proved on record. Of course, the Appellant has not explained as to what had happened to his wife after 19th and why and when he had left the shop / room where he was residing with his wife, children and Nephew Kuldeep. In his examination under Section 313 Cr.P.C., the Appellant has simply taken up the stand that he was not aware as to how

his wife died. The police had picked him up from Bharatpur, Rajasthan and had implicated him in this case falsely. It may at the most raise some suspicion against the Appellant. Suspicion, however strong, cannot, take the place of proof.

28. In ***Subramaniam vs. State of Tamil Nadu & Ors., (2009) 14 SCC 415***, it was held that when it will be for the husband to explain the circumstances in which his wife died when a homicidal death of a wife takes place within four walls of a house. However, that circumstance by itself is not sufficient to prove the guilt of an accused. It would be worthwhile to extract Para 23 of the report hereunder:-

“23. So far as the circumstance that they had been living together is concerned, indisputably, the entirety of the situation should be taken into consideration. Ordinarily when the husband and wife remained within the four walls of a house and a death by homicide takes place it will be for the husband to explain the circumstances in which she might have died. However, we cannot lose sight of the fact that although the same may be considered to be a strong circumstance but that by alone in the absence of any evidence of violence on the deceased cannot be held to be conclusive. It may be difficult to arrive at a conclusion that the husband and the husband alone was responsible therefor.”

29. Where a case rests on circumstantial evidence it is bounden duty of the prosecution to establish that from the circumstances which should have been proved on record

the only conclusion that can be drawn is the guilt of the accused and the circumstances established must be inconsistent with the innocence of the accused. The observation of the Supreme Court in a recent judgment in ***G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593*** are quite apposite. We would like to extract Para 23 and 24 hereunder:-

“23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applied. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose

of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

30. In the instant case, the prosecution has failed to prove the extra judicial confession purported to have been made to PW-12 Santosh Sharma. There is no reliable evidence of the deceased and the Appellant being last seen alive together in as much as the exact date and time of the death is not known rather there is a gap of about two days in the time of death as per the report of the postmortem examination and when the Appellant was last seen together with the deceased on 19.03.2000. Moreover, one

more person i.e. Kuldeep who was examined as PW-10 was also present with the deceased and the Appellant at that time and thus, he (the Appellant) was not alone in the company of the deceased on 19.03.2000. Absolutely, no evidence has been produced to prove the alleged motive i.e. the illicit relationship between Kuldeep and the deceased. The only thing that remains is the subsequent conduct which by itself is insufficient to prove that it could only be the Appellant who was responsible for the murder of his wife, the deceased, particularly, when according to the prosecution there was one more person with them i.e. PW-10 Kuldeep.

31. There is one more material aspect in this case. The prosecution has led evidence on the record to show that the Appellant and the deceased had three children. PW-12 Santosh Sharma has testified that the Appellant had visited his house on the day of Holi at 11:00 P.M. along with his children. The minimum age of the eldest child must be 7-8 years. In any case, it was for the prosecution to have found out the age of the children and either to examine a child who could have testified to the incident or the prosecution ought to have produced evidence that none of the children were old enough to understand the act alleged to have been committed by their father. In similar circumstances, an adverse inference was drawn against the prosecution in terms of the illustration G appended to Section 114 of the Evidence Act by a Division Bench of this Court in ***Mukesh vs. State, 2010 (2) Crimes 441.***

32. The Trial Court had erred in coming to the conclusion that the circumstances established on record would lead to only one hypothesis i.e. the guilt of the Appellant and that every other hypothesis except the one i.e. the guilt of the accused is excluded or that the circumstances were incompatible with the innocence of the Appellant. The impugned judgment and order therefore, cannot be sustained. The Appeal is accordingly allowed and the impugned judgment and order of the Trial Court are set aside.
33. Bail Bonds and Surety Bonds of the Appellant are hereby discharged. Copy of the order be sent to the Trial Court.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

January 13, 2011
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