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IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON: 31.10.2011
PRONOUNCED ON: 21.11.2011**

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CRL.A. 661/2011

BACHA RAM

..... Appellant

Through: Sh. Sumeet Verma, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Through: Sh. M.N. Dudeja, APP.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT

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1. The Appellant has impugned a judgment and order of the learned Additional Sessions Judge, dated 18-12-2010, and the order dated 21-12-2010, in SC No. 122/2010, convicting him to undergo life imprisonment, and also pay fine.

2. Briefly, the prosecution alleged that the police received intimation, through DD No. 4A on 30-9-2003, about a murder, of a woman Kusum (hereafter referred to by her name or as “the deceased”). They went to the spot, i.e. H. No. 18, L-Extension, Rama Park Road, Mohan Garden, Uttam Nagar, and found that her husband had run away, after killing her. The Additional SHO too reached the spot, and found Kusum lying dead, and considerable bleeding from her nose and mouth. Kusum had married the Appellant on 20-06-2002; however, they had a strained family life. The SDM was called, as well as the Crime team; the crime team got the scene photographed, and also examined the scene and conducted inquest proceedings. The police recorded the statement of Krishna @ Babby, the deceased’s sister; she mentioned about the latter’s marriage with Bacha Ram. She stated that soon after the marriage, the Appellant started ill treating the deceased, and demanded dowry in the form of items such as TV, fridge, scooter, etc. As a result of the failure to comply with dowry demands, he used to beat Kusum daily. In August, 2003, he sent Kusum to her parental house, and in her absence, sent dowry items to his village, in Kasganj, UP. She had tea with the Appellant and Kusum in her place on 29-09-2003, at 05:00 PM. The next morning at 08:30 AM, Prem Lata, the daughter of the Appellant’s landlord, told her (Babby) that Kusum was not responding; she therefore went to see her. On lifting the blanket spread over Kusum, she saw her bleeding from the mouth; her body had gone cold. She raised a cry, and the neighbours gathered there. She also noticed a piece of paper, and saw that the deceased had throat injuries, as well as injuries on her hand, and her bangles were broken.

3. The police carried out investigation, after recording the FIR; the Appellant was arrested on 02-10-2003. It was alleged that as a result of investigations and the disclosures made, certain articles were recovered, and

seized, including the weapon of offence. The Appellant was charged with committing offences punishable under Sections 498-A IPC and also committing the offence punishable under Section 302 IPC; an alternative charge, for committing offence punishable under Section 304-B too was framed. He entered the plea of not guilty, and claimed trial. The prosecution examined 33 witnesses, and material exhibits. The Trial Court, by the impugned judgment, convicted the Appellant for committing the offence punishable under Section 302 IPC; however the court acquitted the Appellant for committing the other offence. The prosecution principally relied on the testimonies of PW-3 Krishna, and PW-13 Prem Lata – these were believed by the Trial Court. Their depositions were relied on to say that the deceased was “last seen” in the company of the Appellant, her husband.

4. Mr. Sumeet Verma, the Appellant’s counsel argued that a careful reading of the evidence would demonstrate that prosecution failed to prove the “last seen” theory propounded by it. In this context, it was submitted that all that PW-3 could say in her testimony, was that the deceased and the Appellant had visited her house the previous evening, where they had tea. Thereafter, she was called by PW-13 Prem Lata, the daughter of the Appellant’s landlord, the next morning, i.e. 30-09-2003. PW-13 reportedly told PW-3 that Kusum was not responding, and had not woken up, in the morning. PW-3 therefore, went to Kusum’s room, found her under a blanket, unresponsive, and felt her. She discovered that Kusum’s body was cold, and upon throwing open the blanket, she discovered that her sister was dead, and bleeding. PW-13, the landlord’s daughter, did not support the prosecution, and was declared hostile. She deposed to having seen the Appellant on 29-09-2003 at around 8-9 PM. In the cross-examination she denied having seen the Appellant at that time on that day; she also denied that the Appellant had quarrelled with the deceased. In view of this state of evidence, submitted

learned counsel, there was no irrefutable or conclusive evidence about the Appellant's presence in the premises, along with the deceased, the night prior to 30-9-2003. This aspect was highlighted by counsel, who urged that being a circumstantial evidence based case, the prosecution had to establish its allegation beyond reasonable doubt. In the case, it has the added responsibility of proving that the accused alone could have been the author of the crime, and none else.

5. Learned counsel faulted the Trial Court's findings, and urged that impugned judgement relied on what would have normally been a reasonable inference, but in the peculiar facts of this case, could not apply, i.e., that when a husband and wife are together in a room, and one of them is found dead, the surviving spouse is under a duty to explain the special facts, provided his presence is proved. In this case, submitted counsel, the premise for convicting the appellant was his presence, which was not established at all. It was urged that additionally, the Trial Court overlooked a very material factor, i.e., that the premises in this case constituted a room in a house. The Appellant and the deceased were tenants, almost in the nature of licensees, occupying just a part of the residence; the other occupants were the landlord and members of his family. The prosecution did not prove that the premises or room occupied by the Appellant was exclusively accessible to him, and his wife, alone and none else. The entry to the house, was through a common entrance door.

6. Learned counsel urged that the impugned judgment acquitted the Appellant for the charge of having committed the offence punishable under Section 498-A IPC; this was based on the allegation that he had ill-treated the deceased with cruelty, and even given her beatings, on account of dowry demand. This was to a large extent based on the testimony of PW-3, the

deceased's sister, as well as that of PW-13, who is alleged to have stated (during investigation) having seen the deceased and the Appellant quarrelling the night previous to the 30-09-2003, when the body was found. However, in view of PW-13 comprehensively failing to support the prosecution version, there was no question of any motive.

7. Counsel next submitted that there was doubt about the manner in which the Appellant was arrested. It was argued, here, that according to the prosecution, he was arrested in the morning of 02-10-2003, from the same premises. Reliance was placed on the memo PW-5/B which mentioned the date of arrest as 02-10-2003. However, PW-3, who had signed the arrest memo, denied that the Appellant was arrested in her presence; similarly, PW-7 said that a search was conducted for the Appellant and he was found in his maternal aunt's house, where he was arrested. This conflicting evidence, according to counsel, cast a suspicion on the prosecution allegations, about his complicity in the crime.

8. It was next urged that the second prosecution story about the Appellant being motivated to kill the deceased, Kusum, for which purpose the testimony of PW-25 Ram Prakash was sought to be pressed into service. It was argued that this witness did not support the prosecution, though its effort was to show that the Appellant suspected that his wife had an affair with him, or harboured feelings for him. Counsel argued that in his examination-in-chief, the witness clearly did not support the prosecution evidence. Therefore, there was no proof of motive, so essential in cases based on circumstantial evidence.

9. It was argued next that the evidence of PW-22 established that there was some discord between the Appellant and the deceased; however the cause was not inadequate dowry, or any other reason, but that Appellant

used to sometimes beat her, and go to his village, without telling her. She had visited the witness, a counsellor in an NGO called Vikasini, (recognised and funded by the Government) on 22-07-2003. She again visited the organization on 16-09-2003 complaining that the Appellant wanted her to go with him to his village. Learned counsel submitted that this evidence gave a complete lie to the prosecution story, and in fact corroborated the Appellant's defence that he had gone away from the premises, on a visit to his village at Aligarh.

10. Learned counsel submitted that besides, the prosecution had placed on record a bus ticket, and a train ticket, for journey from Aligarh to Delhi, on 01-10-2003, for a train departing at 01:14 PM, bought from Aligarh (Ex. P-4). This supported his version that he had gone to the village, at Aligarh, on the night of 29-09-2003, and was therefore, unaware about what transpired during the intervening night. Not only did the Prosecution not have any explanation to this, but had placed the tickets on record. This established that the Appellant had in fact arrived in Delhi on 01-10-2003. Furthermore, argued counsel, the prosecution had relied on the deposition of PW-27 to say that the Appellant had given him an extra-judicial confession; however the witness turned hostile.

11. It was argued that the death report (Ex. PW-26/A) as well as the brief facts, given by the police for the purpose of post-mortem examination, nowhere mentioned that a hammer was found near the body; despite this, the prosecution sought to introduce the hammer, and urged that it was the murder weapon. Furthermore, as far as the letter or confessional statement made by the Appellant, in writing was concerned, there was no evidence suggesting that it was seized and a Recovery Memo prepared. In view of these glaring deficiencies, the theory of the Appellant's specimen

handwriting matching the handwriting on the note allegedly seized, is unbelievable.

12. Mr. Dudeja, Learned APP for the state, urged that the Trial Court's findings do not call for interference. It was submitted that the prosecution had proved that the Appellant had indeed been seen by PW-13, around 9:00 PM of the night previous to the death of Kusum. According to the post-mortem report, death took place at 02:00 AM on 30-09-2003. The evidence also pointed out to the Appellant and the deceased living together, in the room, in the premises. It was not as if any other person had entered their premises. These essential facts were proved. Therefore, the court correctly inferred, on a combined application of Section 106 and Section 114 of the Evidence Act, that the Appellant ought to have given a reasonable explanation how Kusum's death occurred. His failure to do so, on the one hand, and his absence (leading to the inference that he had absconded) converted the strong suspicion, into a certainty, about his involvement in the crime.

13. It was argued that the Appellant could not claim to have been out of the city, at the night of the occurrence, because both the prosecution witnesses, i.e. PW-3 and PW-13 had clearly stated that he was present the day prior to the discovery of Kusum's dead body. Mr. Dudeja relied on the following observations of the Supreme Court, in *Trimukh Maroti Kirkan v. State of Maharashtra*, (2006) 10 SCC 68:

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a

guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecutions¹ — quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh².) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

14. It was argued next that the doctor's evidence (PW-23, Dr. L.K. Barua) showed that death could be the result of pressure on the neck by a blunt object, such as the steel hammer found at the spot, which he saw. The opinion was sought on 01-10-2003, (Ex. PW-7/C). The seizure of hammer was supported by PW-3; it was seized from the spot, by Memo Ex. PW-3/B. Similarly, the confession letter was seized by Memo Ex. PW-3/H, and again witnessed by PW-3. It also found mention in the rough and scaled sketch map prepared by the police about the crime scene. Most importantly, the Crime Team report (Ex. PW-19/A) showed that the police team had reached the spot, at the earliest, and conducted inspection between 11:00 AM and

12:30 AM; the report clearly mentioned that a hammer and confessional letter were seen, at the spot. Having regard to these circumstances, argued the APP, the Trial Court did not commit any error in returning the Appellant's conviction; the report of the handwriting expert corroborated that the specimen handwriting given by him, tallied in material particulars with the handwriting in the letter found at the crime scene, and recovered during investigation.

The circumstance of last seen

15. PW-3 Krishna, the deceased's sister deposed that the Appellant and her sister had visited her house at 5 PM and that he had left her house at about 7 PM on 29.9.2003. PW-13 Prem Lata had stated in her original statement under Section 161 that she had seen the Appellant and the deceased in the tenanted premises at 9.00 PM on 29.9.2003 and that they were quarrelling. Later in examination- in- chief, she stated that she had not seen any quarrel between the husband and wife. In her cross-examination, however, she admitted that she had last seen the accused with his wife in the tenanted premises at 9 PM, but she denied having seen them quarrel at such time. This witness was consistent about the fact that she saw the Appellant with the deceased at 9 PM. The further issue is whether this by itself can be considered as an incriminating circumstance. Here, the Appellant's counsel had urged that the premises were unlike other tenanted premises, and the couple stayed in one room, and shared a common access as well as common amenities with other inmates of the house, i.e. the landlord and his family.

16. The Appellant's arguments appear to be attractive. There is no doubt some difference between premises, to which a couple has exclusive possession, on the one hand, and another, which shares common access and amenities with other inmates of a house. Yet, a deeper analysis would

reveal that too much cannot be read into this distinction. Often, in India, couples live in a joint family, and can call their bedroom as their own; other facilities such as the kitchen, etc are part of the shared household. The courts do not differentiate between such premises, and those in which spouses live independently, as long as it is proved that a crime was committed in the privacy of the bedroom. Here, too, the court sees no reason to give special importance to the fact that the Appellant and the deceased had rented only one room, where they lived, and that others lived in the same house or premises. It has not been suggested at any time during the trial that there was some other access to the room, or that the landlord or any member of his family was hostile or had inimical terms with the Appellant or his wife. In these circumstances, it can safely be concluded that the Appellant was last seen with the deceased at around 9 PM on 29.9.2003. Having regard to this, the court is of the opinion that the burden of proving this circumstance had been discharged by the prosecution; the Appellant was under the obligation, by reason of Section 106, Evidence Act, to give his explanation to the special circumstance within his knowledge. This was highlighted by the Supreme Court, in *Ram Gulam Chaudhary & Ors. v. State of Bihar* [(2001) 8 SCC 311], this Court upheld the conviction of the appellants who were alleged to have brutally assaulted the boy. Finding him still alive, a *chhura* blow was inflicted on his chest and then he was carried away. The Court, holding that the onus to prove was on the accused, stated:

"Even otherwise, in our view, this is a case where Section 106 of the Evidence Act, would apply. Krishnanand Chaudhary was brutally assaulted and then a Chhura blow was given on the chest. Thus Chhura blow was given after Bijoy Chaudhary had said "he is still alive

and should be killed". The Appellate then carried away the body. What happened thereafter to Krishnanand Chaudhary is especially within the knowledge of the Appellant. The Appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary had not been since seen live. In the absence of an explanation, and considering the fact that the Appellants were suspecting the boy to have kidnapped and killed the child of the family of the Appellants. It was for the Appellant to have explained what they did with him after they took him away. When the abductors withheld that information from the Court there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The Appellant by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra."

The appellant's abscondence

17. All witnesses at the time of discovery of the body of the deceased have deposed that the accused was not present at the time the deceased's body was discovered. PW-3 Krishna (the sister of the deceased), PW-13 Premlata (the landlady of the premises) and PW- 9 Ghanshyam (the landlord) have testified that the Appellant was not present at the spot when the fact of the death of his wife had come to light through the discovery of her dead body. Since the accused has been unable to prove that he was travelling to Etah at such time, and the prosecution has established beyond doubt that he was not present at the time when his wife's body was discovered, the fact of his absconding has been proved. The law in this regard can be found in this judgment of this Court, in ***Kalloo Passi v State*** (MANU/DE/0695/2009)

“It is settled law that mere absconding by itself does not necessarily lead to a conclusion of a guilty mind. The act of self-preservation is such that even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime. The act of absconding is no doubt a relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. For instance, the circumstance of abscondence can be extremely fatal if the prosecution is able to prove that the victim was last seen in the company of the accused and that the accused is absconding after the death of the victim. Normally, the courts are disinclined to attach much importance to the act of absconding, treating as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. (See the decision of Supreme Court reported as Matru v. State of U.P. 1971CriLJ913)”

18. The Appellant, in his statement under Section 313, has stated that he was on his way to Etah, in Uttar Pradesh, on the day of the incident at about 7 PM. However, he has not been able to lead any evidence to prove this fact. The tickets which were seized from him, would show that he was in Aligarh on 1st October, 2003. It is no doubt true that the prosecution did not offer any explanation on this score; its case regarding the arrest of the Appellant, appears to be conflicting. Memo PW-5/B mentions the date of arrest as 02-10-2003. PW-3, who had signed the arrest memo, denied that the Appellant was arrested in her presence; similarly, PW-7 said that a search was conducted for the Appellant and he was found in his maternal aunt's house, where he was arrested. These aspects no doubt alert the court into scrutinizing the evidence with care. Now, PW-27 had been relied on by the prosecution to establish an extra judicial confession by the Appellant. He however, turned hostile. Significantly, he deposed having seen the Appellant on 30-9-2003 at the bus stand, Amapur, near his village, at 09-30 AM. This was apparently at variance with the time mentioned in his police statement;

he allegedly mentioned the time as 03-30 PM that day, during investigation. This aspect assumes significance. Although the time of his being spotted is unclear, what is apparent is that the Appellant went away abruptly leaving his wife, after being seen with her at 09-00 PM the previous evening. The fact that he was seen next morning, therefore, becomes important.

Recovery of hammer

19. A blood stained iron hammer with an iron handle, was recovered from the scene of crime on 30.09.2003 by seizure memo Ex. PW 3/B to which the public witness PW-3 Smt. Krishna (the sister of the deceased); and police men were witnesses, and which they have proved in Court. The Crime Team report (Ex. PW-19/A) prepared at 11:00 AM on 30-9-2003, also shows that the hammer was present at the spot. Though recovery of the hammer from the scene of the crime is not a very strong circumstance pointing towards the guilt of the appellant, since it was not recovered from his possession, or at his instance, it serves as a corroborative piece of evidence since it was recovered from the tenanted premises where he was residing with the deceased and importantly, where he had been last seen with her. The post mortem report, stated that injuries on the neck of the deceased were caused by a heavy, blunt object (See Ex. PW-23/A). The doctor who performed the post-mortem PW-23, also asserted the same in his examination in Court. When shown the hammer recovered from the scene of crime, he opined that this injury could have been caused by it. The fact that the inquest report did not mention the presence of the hammer at the spot does not weaken the prosecution's case as it is not necessary that the inquest report should contain each and every detail or fact.

Recovery of confessional letter

20. The prosecution alleged that a confessional letter (Ex. P1, seized under memo Ex. PW 3/H) was proved by PW-3 and police witnesses; it was found on the cot near the leg of the deceased wherein he has explained the circumstances which compelled him to kill his wife. The Crime Team report (Ex. PW-19/A) also mentioned that this letter had been found, on the deceased's cot itself. This letter was proved to be in the handwriting of the Appellant by PW-20 Mr. Rajak Khan, who was a previous employer (of the Appellant) and under whom the accused had worked as a *kabari* seller. The pocket diary of the Appellant had also been recovered from the scene of the crime, (Ex PW 3/E) . During the course of the investigation, the letter and the admitted handwriting (specimen handwriting) of the Appellant were sent for handwriting analysis. The Handwriting Expert, PW-28, through his report (Ex. 28/A, 28/B) opined that the two had common authorship. Therefore, the letter, in which the Appellant detailed his motives for killing his wife, is an important piece of evidence. This, to some extent finds corroboration in the deposition of PW-25, the Appellant's cousin. He deposed to having resided with the Appellant and his wife (the deceased) for a few months after their marriage, and having been asked by the Appellant to reside separately. According to the witness, though he had a filial relationship with the deceased, the Appellant thought otherwise, and suspected them and had his doubts. In view of the Appellant's handwriting on the letter found on the cot of the deceased, having been proved, which clearly pointed to existence of motive, i.e. his suspecting his wife of infidelity, the prosecution had been able to successfully show that the Appellant had some motive. This aspect is also supported, somewhat, by the testimony of PW-25. PW-4, the husband of the deceased's sister, in his examination in chief stated that there used to be frequent quarrels between

the Appellant and the deceased because she used to speak to Ram Prakash (PW-25). He also recalled the incident PW-25 had spoken of, wherein they (the deceased and Ramprakash) were at his and PW-3's house, when the Appellant saw them and lost his temper.

21. In a case like the present one, where there is eyewitness testimony to the Appellant having been last seen with the deceased the night before the occurrence; the death having occurred (according to the post-mortem report, 2-1/2 days before the time the procedure was started, i.e. 2 PM on 2-10-2003) around 2 AM on 30-09-2003. The Appellant asserted that he was not present, and had left for his village. The confessional statement in the letter found near the body, matched the handwriting sample secured from him by the police. The testimony of PW-25 corroborates the existence of motive, i.e. the Appellant suspected his wife's fidelity. He did not produce any evidence, though he could have explained his absence, in the form of testimonies of his family members who saw him in his village. On the other hand, the testimony of PW-27 shows that he went near his village late in the morning of 30-09-2003.

22. In the present case, the time of death fixed by the post-mortem report was approximately 4 hours from the time the Appellant and the deceased were seen together. The circumstance that they were seen normally at 09.00 PM on 29th September, 2003, after which the deceased was discovered dead in the morning the next day, and the appellant was missing from the premises, were such that he and he alone would have been in a position to have committed the crime. As stated earlier, nothing was shown from the record to the effect that there was another entry to the tenanted room, where Appellant lived with the deceased. The time gap of 4 hours cannot be

considered as too wide, as to admit the possibility of someone else being the author of the crime.

23. In view of the above discussion, this court is of opinion that the prosecution had proved its allegations about the Appellant being the offender, having committed his wife's murder. The Trial Court's findings and sentence, therefore cannot be faulted. The Appeal consequently fails; it is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATIBHA RANI
(JUDGE)**

NOVEMBER 21, 2011