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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 03.02.2011

Decided on: 09.02.2011

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Crl. A. No.457/2008

VIKAS BANSAL

..... Appellant

Through : Shri D.B. Goswami, Advocate with Mr. S.S. Gaurav
Sasan, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through : Shri Lovkesh Sawhney, APP for the State

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE G.P. MITTAL

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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. This appeal is directed against a judgment and order dated 24th April, 2008, whereby the accused was convicted by the learned Additional Sessions Judge, under Section 302, IPC, and sentenced to undergo life imprisonment, with fine of ₹ 5,000/- on the charge of murdering his wife, Radha (hereafter “the deceased”).

2. The prosecution case was that on 22.10.2005 PW-17, SI Rajesh Dogra received intimation (DD No.7A, PS Khajoori Khas) regarding a theft and murder at House No.10/21, Gali No.10, Dayal Pur, A Block (hereafter “the premises”). He, along with PW-15 ASI Rajender Singh, Head Constable Keshav and Constable Jeet Pal reached the premises, and found it open. On inspection of the premises, inside, he found that the household goods were scattered; in the inner room he discovered the dead body of a lady (the deceased), the accused’s wife. There was a ligature mark on the deceased’s neck; an orange coloured chunni was lying on the bed. He did not find any eye witness on the spot. A First Information Report (FIR) was registered through Constable Jeet Pal, under Section 302 IPC and investigation was handed over to Station House Officer, (SHO), P.S. Khajoori Khas, viz. Inspector P.S. Chahal, who reached the spot and drew

the site plan, seized the exhibits viz. bed sheet, pillow and chunni, and recorded the statement of witnesses. It was learnt, during investigation that the marriage (between the appellant/accused and the deceased) was the second marriage -of the deceased, who had married the accused in 2003; she had secured divorce from her earlier husband. The deceased and the Appellant knew each other for a long time prior to their marriage. They had independent businesses; but the Appellant used to help the deceased, in her work. The prosecution alleged that the Appellant started suspecting the deceased's character. As a result, the two started quarrelling. According to the prosecution, which relied on the testimony of one Pradeep (PW-3), in the evening of the incident, (i.e. in the evening of 21.10.2005), the couple went to the deceased's rented godown and quarreled there. It was also alleged that after that, the deceased collected ₹13,000/- from the godown and returned home, with the Appellant. After that at about 10 PM, the Appellant left the house on his motor-cycle. The Appellant was subjected to sustained interrogation when he allegedly admitted to his guilt and was therefore arrested, and his disclosure statement was recorded. In this statement he disclosed that in order to mislead everyone, he gave the incident, the colour of loot and removed some jewelry and cash and kept it in his father's house (at Kanti Nagar). He then went to Meerut in the night. It was alleged that the Appellant's statement also led to seizure, (from his father's house) of jewelry, a mobile phone (make Nokia 1100) and cash worth ₹12,850/-.

Evidence led before the trial court

3. In support of its case the prosecution examined 19 witnesses. PW-1 Chandewati, the deceased's mother deposed with regard to marriage of couple in 2003. She stated that accused and the deceased quarreled with each other; and that the house at Bhajan Pura was in the name of the deceased; the accused wanted to get that house transferred to himself, to which the deceased did not agree. She was cross examined by the prosecution, as she did not state anything with regard to the accused doubting the deceased's character; she however maintained that she did not give any such statement to the police and she did not state that the Appellant suspected the deceased's character. According to her, on 22.10.2005 the appellant informed her on telephone that theft had taken place in his house and the deceased was murdered.

4. PW-2 Bhagwan Das, is a brother of the deceased. He testified that the accused suspected the deceased's character, and that the deceased used to confide in him about this. He stated that SI Rajesh Dogra had informed at the Police Station that the Appellant had confessed his guilt, and on the next day, i.e. 23.10.2005, when he went to the Police Station and inquired from the Appellant, he told him that the deceased used to receive telephone calls, and therefore, he had murdered her; and that the house-key and the deceased's *chunni* were taken into possession on 22.10.2005; he also identified the dead body of the deceased at GTB Hospital but he could not recollect about other articles, which were taken into possession by the police. He was, therefore, cross-examined by the prosecution with the Courts' permission. He deposed during cross

examination trying to support the prosecution case and proved the relevant documents viz. seizure memo of the *chunni* as Ex. PW2/A, seizure memo of bed sheet and pillow as Ex. PW2/B, seizure memo of articles recovered at behest of the accused by Ex. PW2/C, seizure memo of a key bunch, as Ex. PW2/D, inquest form as Ex. PW2/E, arrest and personal search memo of accused as Ex. PW2/F&G and the dead body identification statement as Ex. PW2/H. He identified the case property as Ex. P1 to P19. Ex. P1 was a Velvet Purse, six “pajeb” (anklets) were Ex. P2/1 to 6, 13 *bichuve* are Ex. P3/1 to 13, 4 rings- silver type- as Ex. P4/1 to 4, 2 *tagrinuma guchcha* being Ex. P5, gold chain Ex. P6, *mangal sutra*, silver type as Ex. P7, 3 Silver *Bichuve* as Ex. P8/1 to 3, a plastic box with two *karas* as Ex. P9, a chain as Ex. P10, three pair of tops as Ex. P11, one polythene with 2 necklace as Ex. P12, 14 ear rings as Ex. P13/1 to 14, 24 bangles of yellow metal as Ex. P14/1 to 24 (artificial jewelry); a mobile phone make Nokia 1100 as Ex. P15, cash ₹ 12,850/- as Ex. P16 (Collectively), a bed sheet as Ex. P17, a pillow as Ex. P18 and a *chunni* as Ex. P19.

5. PW-3 Pradeep, testified about working in the deceased’s ice-cream godown, and about frequent quarrel between the deceased and the accused since they got married. He deposed that on 21.10.2005 he had seen the appellant quarreling with the deceased in the godown with heated arguments on account of labour and learning the next day that the deceased had been murdered. According to him the deceased had taken ₹ 30,000/- from him on 21.10.2005. He was also cross-examined by the prosecution with permission of the Court where he stated that ₹ 30,000/- were the godown sale proceeds. He denied having stated to the police that the deceased had taken ₹13,000/- as godown sale proceeds and that he went away after locking the godown. In his cross-examination he stated that the deceased was his paternal Aunt (Bua). PW-4 Khem Chand, brother of deceased, testified about the accused suspecting the deceased’s character. He stated that the Appellant used to keep a track of the deceased’s activities. He also added that the appellant used to pressurize the deceased to get his name also included in the property ownership documents as co-owner. In the cross-examination he stated that the deceased had earlier married Kishan Singh in 1991 and about two months after marriage a quarrel started between the couple on account of dowry and a case of dowry harassment was filed against Kishan Singh and the couple were divorced in 2002. He also admitted that the appellant knew the deceased since 1993 and that he (PW-4) along with the deceased and accused had gone to Vaishno Devi. PW-5, Tulsi Prasad, was the Appellant’s neighbor. He stated that the couple (i.e. Appellant and the deceased) used to have scuffles. He could not give the reason for their altercations. According to him, on 22.10.2005 at about 9.20 AM, he saw the lock hanging outside the gate of the Appellant’s house in an unlocked position, whereas usually the gate remained open at that time. He placed a call on the deceased’s mobile number but without any response. According to him at about 11 AM, the Appellant came to him and asked for keys to his house, when he (PW-5) told him that he did not have the keys and that the house lock was in unlocked position. Thereafter, the Appellant opened

the door of the premises, and entered there; he (PW-5) went inside his house. After about 1-2 minutes he heard the Appellant screaming "*Main Lut Gaya, Barbad Ho Gaya*". On hearing this he (PW-5) went out and learnt that somebody had murdered the deceased after committing theft. On the appellant's request PW-5 informed the police's 100 telephone number. He was also told by the appellant that he had gone to Meerut the previous night. This witness was cross-examined by the prosecution, without much effect. PW-6 is Jeet Pal Singh, stated having accompanied SI Rajesh Dogra and others during the investigation. He also got the FIR registered and got the post mortem examination conducted on the dead body.

6. PW-7 Prabhat Kumar, did not support the prosecution version despite cross-examination by the Learned APP. He testified about receiving a call on 21.10.2005 from Meerut at about 3.30 PM, at his shop at Nabi Karim that his father was ill and his blood pressure had shot up. He therefore made a telephone call to the Appellant to reach his shop, as he (the Appellant) had a motor-cycle. The Appellant asked him to go to his house; therefore, at about 5.30 PM, PW-7 reached the Appellant's house, where he was served tea by the deceased. In the meanwhile PW-2 Bhagwan Das, the deceased's brother also reached there. At about 6/6.15 PM he, along with the Appellant, left for Meerut on his motor-cycle and on next day at about 10.30/10.45 PM, he along with the Appellant returned to the latter's house and found it locked. The appellant, on enquiry told him that the deceased might have gone to her brother and that he would collect the house-key from Tulsi Prasad (the neighbour's) house. Tulsi Prasad said that keys were not with him and that the door was closed but the lock was hanging in the door in the unlocked position. The Appellant opened the door and went inside and cried out, since he found household articles lying scattered and the deceased was lying dead. PW-8, HC Ravinder Kumar, was the duty officer who recorded DD No.7A on 22.10.2005 and proved it as Ex. PW8/A. He also proved the *rukka* as Ex. PW8/B and FIR as Ex. PW8/C. PW-9, Constable Sanjeev was from the mobile crime team. He deposed photographing the spot from different angles; the photos were proved and marked as Ex. PW9/19-36; their negatives were marked Ex. PW9/1-18. PW-11 SI Mukesh prepared the scaled site plan Ex. PW11/A. PW-12 Dr. S. Lal, had conducted the deceased's postmortem and proved the Postmortem report as Ex. PW12/A. While describing seven injuries on the deceased's person, he mentioned that there was no ligature mark seen around the neck. The cause of death was given as asphyxia as a result of ante-mortem manual strangulation and sufficient to cause death in ordinary course of nature. The time since death was about 2½ days. PW-13 HC Rishi Pal, was posted in the PCR on 22.10.2005; he said that at about 11.30 AM he received a wireless call about a theft and probable murder at the spot, upon which he reached the site and saw the dead body of the deceased and scattered household articles. PW-14, Ct. Luv Kesh Kumar, had received a telephonic message regarding incident and conveyed it on the PCR network and proved the endorsement in this regard as Ex. PW14/A and Ex. PW13/DA.

7. PW-15 ASI Rajinder Singh, had accompanied SI Rajesh Dogra during investigation. He supported the prosecution version and referred to the documents already exhibited by other

prosecution witnesses and also identified the case property. He proved disclosure statement of accused as Ex. PW15/A. PW-16 Inspector M.S. Shekhawat, had conducted the part investigation and got the scaled site plan prepared by SI Mukesh Jain. He recorded the statement of ASI Rajinder and SI Mukesh Jain and after collecting the postmortem report, filed the charge sheet. PW-17 SI Rajesh Dogra, supported the prosecution version. According to him apparently there was ligature mark around the neck of the deceased and it appeared as if she was strangled to death. He has also referred to the documents exhibited by the other Prosecution Witnesses and identified the recovered case property. He admitted the defence' suggestion that in the disclosure statement he did not mention that the accused got the mobile phone recovered, and that it also did not reflect how much cash was kept at the appellant's father's residence, nor were the details of the jewelry items mentioned in his disclosure statement. PW-18, Inspector P.S. Chahal, had investigated the case as he held additional charge of SHO, PS, Khajoori Khas. He proved the site plan Ex.PW18/A. He has supported the prosecution version.

8. After closure of prosecution evidence, the appellant/ accused was examined under Section 313 Cr.P.C; he pleaded innocence and claimed that the deceased's brothers and her other family members wanted to get the house at Dayal Pur transferred in their name. He stated that on 21.10.2005 he had gone to Meerut as the father of his uncle Prabhat Kumar (PW-7) was unwell and a telephone call, in this regard was received by the said Prabhat Kumar. He stated having gone there on 21.10.2005 along with Prabhat Kumar on his own motor-cycle. He further stated that at the time of leaving his house, the deceased's brother, i.e. Bhagwan Das was present in his house and that the deceased was all right and on returning from Meerut he learnt about the incident. He relied on the testimony of Vishan Pal, DW-1; who sought to confirm the appellant's defense regarding his visit to Meerut on the night intervening 21-22.10.2005 to attend PW-7's ailing father i.e. Parmeshwar Dayal. According to him on 21.10.2005 Prabhat's mother asked him to call him (Prabhat) intimating telephonically about the serious condition of his father, on account of high blood pressure. At about 3.30 PM he had called Prabhat Kumar, and informed him of the situation. At 8-8.30 PM Prabhat along with the Appellant reached Meerut and left the next morning at 8.30 PM and that he had particularly enquired from the appellant why he did not bring his wife since DW-1 has not seen her but was aware that he (the Appellant) had a love marriage. The appellant had told him that due to the two of them, i.e. Prabhat and he (the appellant) being in a hurry on hearing the news of PW-7's father's illness, there was no chance to bring his wife at that time. He further stated that on 31.12.2006 upon the death of PW-7's father, i.e. Parmeshwar Dayal, when the appellant did not come, he learnt (through Prabhat) that he had been implicated in the case. He proved the death certificate of Parmeshwar Dayal as DW1/1.

9. The prosecution moved an application Under Section 311 Cr. P.C. to examine Dharamvir Singh and Suraj Pal as court witnesses, claiming their testimony being essential for a just decision of the case. A similar request had been declined earlier; the later application was allowed. Dharamvir Singh was examined as Court Witness No. 1 while Suraj Pal was examined

as Court Witness No. 2. CW-1 Dharamvir Singh testified that he used to sell ice-cream on commission basis, from the deceased's agency from March 2005. For this, he was provided with an ice-cream *Rehdy* by the deceased. His daily routine was that he used to collect ice-cream from her agency at D-43, Gali No.4, Sanjay Mohalla, Bhajan Pura, Delhi between 3-4 PM; and between 10 PM and 12 midnight he used to go to the deceased's agency, to hand over the daily sale accounts. They were handed over, sometimes to one Pradeep, the deceased's employee and sometimes to the appellant. On one or two occasions during his visit there between 3-4 PM he heard, a conversation between the deceased and the appellant when the deceased was telling her husband to do (mind) his business and that she would (mind) her ice-cream business herself. This, she used to say sometimes cordially and sometimes in anger (*Kabhi Raji Main Kahti Thi, Kabhi Gusse Main Kahti Thi*). He stated that on 21.10.2005 at 7.30 PM the deceased and the appellant went to his *rehdy* at Yamuna Vihar C-9, near Aggarwal Dharam Shala to check, and after checking it (his *rehdy*) they left from there. On that day (21.10.2005) at about 11.30 PM he had gone to the deceased's godown to park his *rehdy* when the appellant alone met him, as the deceased was not there. This witness identified the accused in the Court. On that day he handed over the sale proceeds to the appellant, and returned home. The next day when he went to the godown it was closed. On 22.10.2005 he learnt through Pradeep about the deceased's death. After 4-5 days (of the death), Bhagwan Das her brother inquired from him if he had seen anything during his work (of ice cream sales from the deceased's agency) upon which, he narrated these facts and on the asking of Bhagwan Das, he agreed to testify these facts to ACP. After two months he then went to ACP's office along with Bhagwan Das and got his statement recorded, which he proved in the Court as CW1/A. In his cross-examination he stated that Bhagwan Das met him 3-4 times after the incident and before his statement recorded before the ACP; that Bhagwan Das met him about 4-5 months after the incident; that he never came to the Court prior to recording his evidence in the Court; that he did not visit the police station on his own to make a statement with regard to the case; that Pradeep met him for 2-3 times after the date of occurrence. He denied the suggestion that he was not selling ice cream on *rehdy* as an agent of the deceased or that he was a procured witness, testifying at the instance of Bhagwan Das. He admitted that in his statement before the ACP he told that Bhagwan Das had informed him that somebody had falsely deposed in the Court about the appellant's absence in Delhi on 21.10.2005 and that he was in Meerut on that day. He denied the suggestion that he was identifying the accused in the Court as he (the accused) had been shown to him by Bhagwan Das during the Court proceedings prior to recording his statement in the Court.

10. CW-2 Suraj Pal, testified that the ground floor of his house at D-43, Gali No.4, Sanjay Mohalla, Bhajan Pura, Delhi was rented by his wife to the deceased by an agreement/rent deed Ex. CW-2/B. According to him, on 21.10.2005 at about 8-8.30 PM, when he was present in his house the deceased and her husband (whom he identified in the Court), were present at the godown and they had wished him and thereafter, they left. After 3-4 days he learnt through the newspaper about the deceased's death. According to him no police official visited him at that time nor did he visit any police official but after 3-4 months of the incident, a police official

came to his house and thereafter, he went to P.S. Seelam Pur and got his statement recorded through Ex.CW2/A. In his cross-examination, he revealed that he was a property dealer by profession for the last 10-12 years. He admitted that agreement Ex. CW2/B was up to 3rd November 2006 but the godown let out to the deceased was vacated about 4-5 months prior to his statement to the police, (his statement was recorded before the ACP Seelam Pur, North East District on 26.06.2006). He stated having asked Pradeep to get the godown vacated, which he got done through Bhagwan Dass. The godown was vacated 2-3 months prior to November 2006, therefore, balance amount was adjusted in the rent. He admitted the suggestion that Bhagwan Dass had taken *rehdies* from the godown but he did not know where they were taken to. He also stated that Pradeep kept operating the godown for about 2-3 months after the incident and that he had arranged a meeting of this witness with Bhagwan Das for vacating the godown. He also stated that Pradeep did not tell him about recording the statement before the police but it was police who visited his godown a number of times and he had then told the entire facts to the police. According to him, when his statement was recorded, Bhagwan Das was present in the Police Station. He denied the suggestion that he had seen the couple at 4-4.30 PM, in the godown or that he agreed to give statement to the police only on the condition of Bhagwan Das' vacating the godown. He denied the suggestion he was testifying at the instance of Bhagwan Das.

11. After recording the statement of court witnesses, the trial court felt that in view of the incriminating facts coming on the record a statement of accused under Section 313 Cr. P.C was required; it was further recorded on 16.11.2007. He denied any acquaintance with Dharamvir and stated that he was not working with any agency of the deceased at any point of time. He claimed having seen the court witness Dharamvir twice or thrice along with Bhagwan Das prior to recording his (Dharmvir's statement); that court witness Suraj Pal sent a message through Bhagwan Das in the Jail to him in the month of March 2006 for vacating godown but he stated that he would talk to Suraj Pal when he would come out from Jail. According to him, Suraj Pal had testified at the instance of Bhagwan Das who got the godown vacated without his permission.

Trial court's findings

12. The trial court, in the impugned judgment held that the accused used to quarrel with the deceased; the learned Judge relied upon the evidence of PW-2, 4 and 5. The Court did not believe the version of PW-3, who had deposed that the couple had cordial relations. It was held that the said deposition was an important one which did not shake the consistent version of the other witnesses material to this aspect, i.e. PWs 1 to 5. The Court similarly discounted the discrepancy in deposition of PW-3, about the deceased having taken-away ₹ 30,000/- from him, that day. It noted that PW-3 had not specified the time when the accused had visited the deceased's godown and believed the earlier version recorded by PW-3 that the deceased had taken-away ₹ 13,000/- as sales proceeds from the godown, did not matter in view of the phonetic similarity between the words "Thirteen" and "Thirty", and the testimony of PW-13. The trial

court explains this reasoning in the following terms:

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.....When PW13 reached at the spot on receipt of wireless call at 11.30 a.m. regarding the incident, obviously this information would have been given to him in normal course of human conduct by Vikas who was present when police reached there. So this also lend support to the claim of PW3 that Rs. 30,000/- were taken by Radha and not Rs. 13,000/- and this discrepancy might have crept in due to phonetic similarities in words. On what basis Vikas told PW13 regarding missing of Rs. 25,000/-, Mangal Sutra and ear ring from purse of victim is only within the knowledge of Vikas and it cannot be said that such information was conveyed by PW13 to Head Quarter from Vaccum.....

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13. The trial court disbelieved the appellant’s version of having left for Meerut along with PW-7 on the evening of 21.10.2005. The trial court, on this score noted that PW-7 had recorded in his version under Section 161 Cr. PC that the accused had visited him at 11.00 PM that night. However, the trial court was of the opinion that the defense put forward (about the accused’s absence from the site) was unbelievable because PW-5 Tulsi Prasad had deposed about the house being unlocked despite which the appellant went and asked for the key. The trial court noted that PW-5 nowhere mentioned the presence of PW-7 at the time, i.e. 11.00 AM, on 22.10.2005. The Court concluded that being a relative of the accused, PW-7 endeavored to support the defense by stating that the appellant had left Delhi at 06.30 PM. The Court also disbelieved PW-7’s version about having left for Meerut around 06.30 PM, observing that such conduct was strange since he was informed about his father’s illness at 3.30 PM. The trial court observed that PW-7’s version amounted to new story as regards presence of PW-2 Bhagwan Dass in the deceased’s house, in order to extricate the appellant. The trial court also held as follows:

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.....PW5 is hostile otherwise so there is no reason as to why he will be silent as regards presence of Prabhat Kumar with accused when accused came to his house at about 11 am on 22.10.05. In his (PW5) cross examination deliberately, accused did not refer to presence of PW7 with him otherwise, PW5 would have revealed the facts of non-accompanying of PW7 with accused. This omission is to be read adversely against the accused more so when he is endeavoring to introduce a new fact that PW7 accompanied him on return from Meerut. It seems that accused had gone to the house of PW5 just to create evidence. It is highly unlikely that accused would not have noticed the lock lying in unlocked position and door being closed in bright sun light. The key of the house were finally handed over by accused to police. The conduct of accused Vikas becomes highly suspicious in the obtaining facts and circumstances and notwithstanding the hostility of PW5 with regard to his having not heard couple quarelling in the night at their home and accused leaving his house on motor cycle, a question is whether accused can be fastened with the next chain so as to link him till the conclusion of the crime.

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The trial court relied upon the appellant’s statement to the following effect:

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..... “Main Apni Marji se Zindagi ZiyuGee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley”

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14. It was held in this regard that when this statement was recorded, the police was unaware about PW-3’s role or that he was an employee of the deceased, who witnessed the quarrel of the couple on 21.10.2005. The Court, therefore, was of the view that there was no prohibition from looking into that part of the statement, holding as follows:

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.....*In my considered view ld. Defence counsel is misconstruing the judgment relied on by him. Whatever incriminating which is by way of admission or confession of accused as mentioned in disclosure statement is not admissible. In this case he is mentioning about the conduct of his wife and not his own involvement in commission of crime, so this much of disclosure made regarding presence of Pardeep in the godown on 21.0.05 and regarding the remarks of his wife to accused at home as referred above is admissible in law.....*

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The trial court did not doubt the seizures of articles effected from the accused’s father and overruled the appellant’s objection regarding lack of specificity or details in regard to individual jewelry articles of the deceased, the cash amount or the Nokia phone.

15. The trial court thereafter went to find as follows:

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.....*This is a case where both the material prosecution witnesses and defence witnesses when appeared before the court subsequently after the occurrence, at a much space of time, their mind sets changed due to availability of time at their disposal in the intervening period. The material witnesses who are relations of deceased, in their statement before the police claimed that motive was accused doubted the character of his wife (deceased) but in their testimony before the court PW1 mother, PW2 and PW4 brothers of deceased introduced a new story in addition to the motive of character doubting by accused to the effect that accused wanted to get the house of deceased transferred to his name which being a new case cannot be believed and is not being accorded any credence. As such the arguments of ld. Defence Counsel to the effect that it is improbable that deceased would purchase the house herself when on record the financial condition of her parental side was dim is of no avail to either side and is not being accorded any credence. The conduct of PW2 in going to jail to meet the accused as admitted by him in court questioning also falls in the same parameter as referred above and it does not ennure to the benefit of either side. Rather in his statement under section 313 Cr.P.C subsequently recorded accused has claimed that PW2 visited him in jail to talk about vacation of godown of deceased which claim was not put to PW2 in his cross examination. It is logical and understandable that when any event takes place contemporaneously PWs do not get time for contemplation to make statements to suit them for all the purposes. That is why in their initial statements to police, PW1, PW2 and PW4 have stated on the same line that accused doubted the character of his wife. PW2 and PW4 have fully supported these line of prosecution, before the court. Accused in his disclosure statement referred to remarks of his wife “Main Apni Marji Se Zindagi Ziyu Gee, Tujhe Jo Karna Hai*

Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley". Such remarks are sufficient for a husband to loose his temper as it reflects to breach of matrimonial obligation by his spouse (here deceased wife). The conduct of wife as referred in above disclosure statement of accused lends support to prosecution version that accused had suspicion over character of his wife more so when his wife was unfaithful to her first husband during the subsistence of her marriage as she had courtship with accused himself.

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16. The Court noted that some of the witnesses, who were relatives of the deceased, had sought to introduce a new fact to show another motive on part of the appellant, i.e. to secure transfer of the property. It was held that though this attempt was palpably discernable, but that itself could not falsify the prosecution version. The Court was of the opinion that the solitary defense witness was unreliable since he belonged to the PW-7's village, and PW-7 was the accused's relative. In these circumstances, the Court felt that the appellant's version with regard to illness of PW-7's father, and his visit to Meerut could not be believed. The trial court's findings in regard to the credibility of the seizure of articles and presented before it are as follows:

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42. *Now the question is whether recovery effected from the house of father of accused at later instance is believable or not. To my mind recovery is believable when case is viewed as a whole for the reasons that just after seeing the dead body telephone call was made to PCR. In his cross-examination PW13 HC Rishi Pal had given the information from wireless to head quarter, from the spot itself woman is lying dead at the spot. At 12.10 pm he further gave information to Head Quarter that Radha wife of Vikas Bansal is lying dead. Vikas Bansal had gone to Meerut yesterday, when he came back to Delhi he found a chunni lying tied around the neck of Radha lying on the floor. Rs. 25,000/- from her purse, ear rings and Mangal Sutra is missing. Other articles are lying scattered (Ex. PW13/DA). It is to be seen that when HC Rishi Pal reached there he was not knowing the name of deceased and that is why he gave the information as woman is lying dead. At 12.10 pm the information became clear this time name of deceased, name of her husband and articles missing were indicated in the message to Head Quarter. A stranger or a neighbourer who happens to be present at the spot would not be knowing as to what articles were missing from the house or from the dead body. The inference can be drawn from the common course of human conduct that this information was developed from accused Vikas who happened to be present there as he was the only relation of deceased about whom prosecution witnesses including police official state that he was present at the spot when police arrive there. Obviously, it was accused who disclosed about the missing of Rs. 25,000/- from purse of deceased, ear ring and Mangal Sutra and there cannot be any other hypothesis other than this. This Mangal Sutra and ear tops were got recovered by the accused from the house of his father in pursuance of his disclosure statement. The arguments has been advanced by ld. Defence counsel that I.O. has intentionally not taken details of the individual jewellery items or the number of mobile and cash amount so that he could fabricate the same later on by planting the articles. To my mind if accused does not come out with details of such articles despite asking by the police or police commits some irregularity in not seeking the details of such articles from the accused while recording his disclosure statement, it does not mean that any recovery effected pursuant to such disclosure statement would be no recovery in the eyes of law.....*

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On this basis of the above findings, the Court convicted the accused and sentenced him to undergo Life Imprisonment with fine of ₹ 5,000/-.

Appellant's contentions

17. The learned counsel for the appellant argues that the Trial Court findings are unsustainable on all the counts. It is submitted that the trial court failed to appreciate that the prosecution was unable to establish any clear motive. Elaborating on this, learned counsel submitted that the finding that the appellant and the deceased had a strained relationship due to which they used to frequently quarrel and that on the fateful day, she had even said, “*Main Apni Marji se Zindagi Ziyu Gee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley*” is unbelievable. Learned counsel highlighted that there was a material contradiction in the prosecution witnesses’ depositions, with regard to the appellant’s suspecting his wife’s character. He urged that the evidence of PW-2 Bhagwan Dass had been relied upon by the trial court whereas the deposition of PW-3 and PW-4, read together clearly showed that the latter two witnesses did not support it. The appellant argued that even though PW-2, a relative of the deceased and PW-4 mentioned about the quarrel which broke-up between the couple on 21.10.2005, he was specific that the subject matter was regarding labour. He was confronted on the other aspect since in his earlier version recorded with the Appellant, there was no mention about any quarrel since marriage. Similarly, PW-4 had deposed in Court in his examination-in-chief that the accused used to keep track of the deceased’s activities- which was, however, not recorded in his statement made under Section 161. So far as the evidence of PW-5 is concerned, all that was deposed against the appellant was about the alleged scuffle between the couple for unknown reasons.

18. It was urged that the appellant was known to the deceased for more than a decade and had supported her during trying times when her previous marriage was on the rocks and she was facing hardship. He was well-known to members of the deceased’s family as was evident from the circumstance that he was invited for the marriage of the deceased’s elder brother, admittedly, as per PW-2 in 1996. Learned counsel pointed-out to the cross-examination of PW-2 and PW-4 to say that the deceased’s family used to make frequent demands for financial assistance from him, and that this sometimes led to quarrel between the couple. Other than that, said the counsel, there was no credible material or evidence to suggest that the appellant used to suspect his wife’s conduct as was found by the trial court. It was submitted that the reliance upon the evidence of PW-2 in this regard was unsafe because his motive for deposing in Court required close scrutiny. Learned counsel pointed-out that PW-2 had moved the Court after recording his statement under Section 161 Cr.PC that two persons had seen the appellant later than 6.30 PM; this was after the entire prosecution evidence had been led and even Section 313 Cr. PC questions had been put to the accused. The initial application moved in this regard was rejected by the Court on 20.08.2007. Subsequently, another application was moved and was allowed on 13.09.2007 as a

result of which CW-1 and CW-2 were permitted to be examined. It was contended that before this, PW-2 had visited the accused in March 2006 with a view to secure the transfer of the Dayal Pur property on condition that he would not depose against him in Court in case the said property were transferred to him. However, not receiving a positive response, he went back and moved an application for release of keys in respect of that property which is a matter of record. It is urged that this conduct is also corroborated by PW-2's admission, in the cross-examination that he had visited the accused. For these reasons, states the counsel, PW-2's deposition is untrustworthy on the question of alleged motive of the appellant. It was also stated that PW-1 Chanderwati, the deceased's mother did not support the prosecution version about the appellant suspecting his wife's character. Learned counsel submitted that furthermore, if there were any truth in this regard, it would have been natural for the deceased to share it with her mother rather than PW-2, who was staying away from her family with his in-laws, for more than four years.

19. Summing up on the question of motive, it was urged that the trial court, on being presented with conflicting versions – on the one hand, one set of witnesses deposing that quarrels took place between the couple on the question of transfer of Dayal Pur property and on the other, the version being the alleged infidelity of the deceased, suspected by the accused, the trial court ought not to have rendered the findings as it did, holding that the appellant suspected his wife's conduct and character.

20. Learned counsel for the appellant next submitted that the trial court ought not to have, under the circumstances, and the evidence presented before it, accepted the prosecution version and disbelieved the appellant's defense about the facts surrounding the incident. He argued that the evidence of PW-3, 5 and 7 read together cumulatively, clearly pointed to the deceased and the accused returning on 21.10.2005 to their matrimonial home. PW-3 had spoken about heated arguments between the couple on account of labour and that the deceased had taken ₹ 30,000/- from him on 21.10.2005. PW-5 corroborated the appellant's version as well as that he returned from Meerut at 11.00 AM and asked for the key to the premises upon which he was informed that the premises were lying unlocked. PW-5 even called the appellant when the appellant was asked to see the deceased's dead body and the house in disarray. PW-7 completely supported the appellant's version of the latter going-away to Meerut around 6.15 and 6.30 PM on 21.10.2005 with him (i.e. PW-7), to see his ailing father. Relying upon the evidence of PW-7, it was submitted that this witness also established that having accompanied the accused when he returned back to Delhi to his house at 11.00 AM and having approached PW-5 for the keys to the house and subsequently discovering the murder and theft in the house.

21. It was next argued that the prosecution version which found favor with the trial court about recovery of articles and ₹ 12,850/- cash is unbelievable. To substantiate the submission, learned counsel relied upon Ex. PW-13/DA. The intimation received by the Police Control Room (PCR) at 11.30 AM had recorded that ₹ 25,000/-, along with a pair of ear-rings and *mangalsutra* was missing from the crime scene. The appellant had informed the police at that stage; this,

submitted the counsel, found corroboration in the deposition of PW-17, who claimed to be on the spot. Learned counsel relied upon the cross-examination of this witness to say that according to PW-2, he (PW-17) was present and remained as the Investigating Officer (IO) of the case till 12.30 AM. Although he had mentioned about the recovery of a polythene bag containing the jewellery articles, ₹ 12,850/- in cash and Nokia phone, which was allegedly identified by PW-2, there was material contradiction with his previous statement. It was argued that PW-3 had clearly deposed in Court about having settled the accounts and given ₹ 30,000/- to the deceased. Thus, though the appellant mentioned that ₹ 25,000/- was missing, what was allegedly recovered was far less. Furthermore, submitted the counsel, the description of the articles, allegedly recovered, i.e. Ex. P-1, Ex. P-15 were all artificial jewelry. In this respect, learned counsel relied upon the description of articles found in Ex. PW-2/C.

22. Learned counsel further submits that the entire story about the recoveries alleged to have been made from the appellant's father's house at his behest is unbelievable. In this regard, he relied upon the depositions of PW-2 who nowhere mentioned about recovery of any such article; particularly, the deposition that he remained on the spot with the police for about 2-2 ½ hours, after which he went to the police station with the accused and remained there up to 8.30 PM, has been relied on. It is argued that PW-2 nowhere mentioned about the visit to the accused's father's house or even disclosure statement made by him which led to the alleged discoveries. It is argued that there are material contradictions between depositions of PW-15, PW-17, PW-18, as well as PW-2 on the question whether the appellant made any disclosure statement at all that led to the seizure of the articles which were allegedly recovered.

23. Learned counsel also emphasized that the prosecution witnesses, particularly, PW-17 had admitted to being present at the time of recovery of the articles and also that family members of the accused were present and yet no attempt was made to associate them to witness the recoveries. It was also pointed-out that PW-7 contradicted PW-2 as to till what time latter was present with the police party and further that PW-2 nowhere mentioned visiting the accused's house when the recoveries are said to have taken place. Learned counsel also stated that the accused never made a disclosure statement as was found by the trial court and for this purpose relied upon the contradiction between PW-15 and PW-2. PW-15 had stated that the appellant was interrogated only at the spot by PW-17, at the direction of PW-18. On the other hand, PW-2 deposed that PW-17 allegedly informed him in the police station that the accused had confessed to his guilt. It is also highlighted that even PW-18 admitted that the disclosure statement was not recorded that the accused had kept the articles allegedly in his father's house and further stated that the same could be recovered. Learned counsel also pointed-out that PW-18 denied the suggestion about presence of PW-2 in the police station till 8.30 PM.

24. It was argued on the basis of these discrepancies that the prosecution story about the alleged recovery of ₹ 12,850/- with jewelry articles is unbelievable and could not be made the basis for convicting the accused/appellant.

25. Lastly, it was argued that the prosecution story was unbelievable and full of material contradictions. The accused appellant knew the deceased since 1993 and had also stayed by her for nearly a decade, supporting her through rough times when she was facing dowry harassment and cruelty in her previous marriage. During that time, he became close to her as well as her family and was invited to functions such as marriages and other occasions. The appellant had even purchased the Dayal Pur property in 1996 in the deceased's name. Eventually, when the deceased was divorced from her previous husband, the accused married her. Both had separate businesses independent of each other. Learned counsel emphasized that like any other family, the deceased and the appellant could have quarreled at times for various reasons. PW-3's deposition that on the fateful day, about a quarrel which occurred regarding labor ought not to have been brushed-aside by the trial court which relied upon the depositions of PW-2 - an untrustworthy witness, to conclude erroneously that the appellant doubted his wife's character. Learned counsel further stated that the trial Court should not have rejected the defense version of a visit by the accused along with PW-7 to Meerut at 6.30 PM on 21.10.2005 and his return only the next morning at 11.00 AM. These facts were proved by the depositions of PW-5, 7 and DW-1. It was finally stated that the so-called recovery pursuant to a statement which was never proved to be a disclosure statement ought not to have been taken into consideration by the trial court.

26. Learned counsel relied upon the decision of the Supreme Court reported as *Ram Gopal v. State of Maharashtra*, AIR 1972 SC 656; *Awadhi Yadav and Anr. v. The State of Bihar*, AIR 1971 SC 69 and *Bakhshish Singh v. State of Punjab*, AIR 1971 SC 2016, to submit that being a case of circumstantial evidence, it is incumbent upon the prosecution to fully establish all facts beyond reasonable doubt and link them so strongly that the entire story ought to inevitably and strongly point only to the hypothesis of the accused's guilt and further that the circumstances ought to be conclusive in nature and tended to exclude every hypothesis but the one proposed to be proved. In such case, argued the counsel, many findings were returned on the basis of surmises without credible proof of the facts and to cap it, the chain of evidence was incomplete, rendering the impugned judgment open to attack.

Prosecution's argument

27. The prosecution argues that the trial court's findings about motive, are sound, and based on proven facts. It relies heavily on the testimony of PW-2, and also says that PW-4 has supported the prosecution version that the accused used to doubt the deceased's character, even though the precise import about doubting the character did not come out in the Section 161 Cr.P.C statement. PW-2 stated that accused suspected on the deceased's character and when he enquired from the Appellant, after his confession before the police why he murdered his wife, he (the Appellant) said that she used to receive telephone calls and therefore, he murdered her. PW-4 deposed that the appellant used to keep a track on the activities of the deceased, and was suspecting her of having some affairs with others. It was also submitted that even PW-3 mentioned about quarrels between the couple, in his testimony, and PW-5 mentioned about

scuffles between them. Cumulatively, these depositions proved the motive for the murder, i.e. that the appellant suspected his wife's fidelity.

28. The learned APP argued that too much cannot be made of the other motive, sought to introduced by the prosecution witnesses regarding the appellant's intention for the murder, i.e. getting the house of his wife transferred to himself, in his name, as it was not projected at the relevant time when police recorded their statements, during investigation. The trial court therefore, correctly regarded that part of their depositions, as unbelievable. The APP highlighted that while whereas the deceased's mother PW-1, denied the prosecution version, yet it was confirmed by the two brothers i.e. PW-2 and PW-4, who withstood cross examination on the point, and established it. It was also argued that the trial court's finding that the motive- of doubting the character of the appellant's wife not being beyond comprehension, as she had an affair with him (the appellant) despite her subsisting previous marriage cannot be faulted. It was urged that the improvements made by PW-2 and PW-4 were explanations, as correctly deduced by the trial court, about this aspect of motive. Counsel also submitted that even PW-1, the deceased's mother did mention about quarrel between the couple. She and PW-2 deposed having advised the couple to live peacefully, without quarreling.

29. It was argued that the Appellant cannot fault the trial court judgment on the ground that PW-2 had sought to meet him before recording of evidence, in March, 2006. It is submitted that often, relatives of deceased, in such circumstances may be driven to act and say something in the course of a trial, with a view to acquire his or her property, or other belongings. Such versions may not be accurate, or trustworthy. Yet, the testimonies of those witnesses, to the extent they support the prosecution story, (in this case, the prosecution story consistently being that the Appellant suspected his wife's character) have to be believed, as was done by the trial court, with which no exception can be taken or found.

30. The learned APP argued next that the trial court correctly rejected the defense version that the Appellant went to Meerut, visiting PW-7's ailing father. It is submitted that this was not believed by the trial court, because all indications pointed to this being a false story, created for the purpose of furnishing an *alibi* to the Appellant. It was urged that PW-7, whose deposition is relied upon, admitted to being the Appellant's relative; even the incident of his father's alleged illness was sought to be supported by reliance on the testimony of an interested witness, DW-1, who worked with PW-7's father. PW-7, in his deposition, was cross examined by the prosecution, with leave of court, since he contradicted the statement given to the police, under Section 161 of the Criminal Procedure Code; in that previous statement, he had mentioned about the Appellant approaching him (PW-7) at 11:00 PM, at night, on the fateful day, and nervously mentioning about a fight with his wife. It was also urged that PW-5 never deposed about the presence of PW-7 with the Appellant. He was not cross examined on this aspect. Therefore, the Appellant sought to bolster his case, by ensuring that his relative, PW-7, supported the *alibi*, in this regard.

31. The learned APP submitted that the testimonies of PW-15, 17, 18 and PW-2 have to be read together, and minor discrepancies cannot be blown out of proportion. So viewed, their depositions established that the Appellant had made a statement, which led to discovery of articles from his father's residence. The evidence of what was found was consistent with the reporting of articles that were missing. On this aspect, it was submitted that PW-13 had contradicted himself while deposing that the deceased had taken ₹ 30,000/- on the day of the incident, whereas in the Section 161 statement he had stated that the amount of ₹ 13,000/- had been taken. On this aspect, the prosecution cross examined him. If these circumstance were to be taken note of, as was done by the trial court, the recovery of ₹ 12,850/- and the jewelry articles could not be doubted, and stood established. As regards recovery of the Nokia mobile phone, the accused had not mentioned it in his statement to the police; yet, having regard to the totality of circumstances, that fact could not be doubted.

32. It was urged that the trial court's findings are unexceptionable and do not call for interference, since the prosecution was able to prove the case beyond reasonable doubt. It was urged that the Court should not be swayed by minor discrepancies in the testimony, particularly about motive of the accused, since the post death behavior of the parties or a witness, particularly a member of the deceased's family, pertaining to succession to assets, or in respect of property, might be an entirely unrelated factor, which should be viewed and judged independently of the other facts which may point to a strong motive.

Analysis and Findings

33. In this case, the first question to be addressed, is the relevance and importance of motive. As is apparent, the prosecution story is dependent on circumstantial evidence. The absence of ocular and other direct evidence means that existence of motive assumes importance. This aspect was highlighted by the Supreme Court decision, in *Tarseem Kumar v. Delhi Admn.*, 1994 Supp (3) SCC 367, where it was held that:

“6. The case of the prosecution solely rests on circumstantial evidence. As the case is based solely on the circumstantial evidence, the court has to be satisfied that: (i) The circumstances from which conclusion of guilt is to be drawn has been fully established. (ii) All the facts so established are consistent only with the hypothesis of guilt of the appellant and they do not exclude any other hypothesis except the one sought to be proved. (iii) The circumstances on which reliance has been placed are conclusive in nature. (iv) The chain of the evidence in the present case is such that there is no scope for any reasonable ground for a conclusion consistent with the innocence of the accused.

.....

.....

8. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable doubts on basis of the materials produced before the court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question,

even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question.”

(emphasis added)

34. The undoubted facts are that the deceased and the Appellant, were acquainted with each other for over a decade. He knew her, even during the subsistence of her troubled previous marriage. After she secured divorce, the couple got married. Both of them carried on their separate and individual businesses independently. The deceased's business was that of an ice-cream vending agency; this was done from a godown where she had employed some people, including her nephew PW-3. The prosecution had alleged that the couple had strained relationship, and used to quarrel often. The quarrels between the two have been spoken of generally by PW-3, PW-1 and PW-5. PW-3 mentioned about a quarrel, on the fateful day regarding some labor issues, between the husband and wife; PW-1, the mother, mentioned about some friction between the couple, and how they were counselled to resolve their differences. Both PW-1 and PW-3 differed in their depositions from the police statements, where they had apparently said about the nature of quarrels between the couple, and that the appellant had suspected the deceased's fidelity. However, they did not support that, and mentioned about quarrels generally; PW-3 said that the quarrel pertained to labour, on the fateful day. PW-5 deposed about scuffles between the couple. PW-2 and PW-4's testimony, on this aspect is relevant. It is only PW-2 who mentions about the Appellant suspecting the deceased's conduct. PW-4 no doubt, deposed that the Appellant used to keep track of the deceased's movements; yet this was an improvement, from his police statement; that part of the previous statement was confronted to him.

35. Some of the witnesses (PW-1 and PW-4) have talked about the reason for the quarrel between the couple being the ownership of the property, purchased in her name in 1996. PW-4 had admitted to the property being purchased by the Appellant in the deceased's name, in 1996 (during the subsistence of her previous marriage); he later clarified, volunteering, and deposed that the property was purchased with his father's money. PW-2 admitted visiting the Appellant in March 2006. The appellant had argued that this coincided with the date when the witness moved an application for release keys to the property, which had been sealed after the incident. It was suggested that the witness had his eye on the property, and had sought to persuade the Appellant that in case he gave up his claim for it, he (PW-2) would not depose against him. Although the date on which his application coincides with the visit, the Court is of opinion that this aspect alone could not have weighed against the said witness, whose deposition had to be considered in its terms.

36. Now, it has come on record that PW-2 was married and had been living away from his parents, and with his in-laws for about four and a half years before the incident. Even though PW-1, Chandrawati, the deceased's mother, contradicted her previous statement recorded under Section 161, the court is of opinion that her version could not have been discarded, as was done

by the trial court, in this case. This is because being the deceased's mother, there was more probability of the former confiding in her, rather than in a brother who had moved away from the family, to reside with her in-laws. Furthermore, PW-3 was the deceased's nephew, the son of another brother. Even though he did not support the previous statement made under Section 161, there was no reason why this aspect ought to have rendered his testimony unworthy of acceptance. He did mention about some quarrel between the couple, and yet clarified that it pertained to (handling) labour. All that PW-5 mentioned in his deposition was that the couple sometimes had scuffles. Even PW-4 (who mentioned that the appellant used to keep track of his wife's movements) admitted to improving upon his version recorded in the police statement, where he was silent about this aspect of motive; he also deposed that the quarrel between the husband and wife related to ownership of the Bhajanpur property.

37. The overall impression which one gathers from the evidence, on the question of motive is that at the highest, the Appellant and the deceased sometimes had differences, and used to quarrel; they were counselled, by family members (PW-1) to live peacefully. The conclusion of the trial court that the accused, (was incensed about his wife's behavior) and in his disclosure statement referred to her remarks "*Main Apni Marji Se Zindagi Ziyu Gee, Tujhe Jo Karna Hai Kar Ley Main Aaj Bhi Bahar Kar Ke Ayee Hoo Tu Rok Sakta Hai To Rok Ley*" and that

"Such remarks are sufficient for a husband to loose his temper as it reflects to breach of matrimonial obligation by his spouse (here deceased wife). The conduct of wife as referred in above disclosure statement of accused lends support to prosecution version that accused had suspicion over character of his wife more so when his wife was unfaithful to her first husband during the subsistence of her marriage as she had courtship with accused himself..."

are incomprehensible, to say the least. The Court here had to see whether the material evidence could establish that the husband had suspected his wife's fidelity. Instead of directing the enquiry to this aspect, the trial court surmised, (on the assumption that the wife had openly dared the husband to do what he pleased, and mentioned about her supposed escapade) that it was not unnatural for the husband to suspect the deceased, since he had courted her during the subsistence of her previous marriage. Such conjecture, in this Court's view, amounted to taking a leap from suspicion to proof, to bolster speculation into an established fact. The prosecution had not leveled any such allegation, about the theory that the appellant suspected the deceased, since he had wooed her during her previous marriage. In these circumstances, in the absence of any supporting material save the allegedly confessional statement of the Appellant, it was unsafe to arrive at such a conclusion. The trial court also improperly relied on the said alleged statement, which was inadmissible. In this context, it would be necessary to quote the relevant discussion as to admissibility of such statements, made by the Supreme Court, in the judgment cited in this case, before the trial court, i.e. *Mohmed Inayatullah v. State of Maharastra*, 1976 (1) SCC 828:

"...it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Palukuri Kotayya v. Emperor (74 IA 65 : AIR 1947 PC 67 : 48 Cri LJ 533); Udai Bhan v. State of Uttar Pradesh (1962 Supp 2 SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251)).

14. Before proceeding further, it is necessary to be clear about the precise statement which had been made by the appellant to the police officer. This statement finds incorporation in the panchanama, Ex. C, and we have reproduced an English rendering of the same earlier in this judgment. While considering this statement, the High Court observed that the accused had stated that "he had kept them (drums) there". We have perused the original record of the statement which is in Hindi, and we are of opinion that they no stretching of the words this statement can be so read or construed as has been done by the High Court. The copy Ex. C of the panchanama, in the paper book contains a correct English rendering of the same. What the accused had stated was : "I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August". It will be seen that he never said that it was he who had deposited the drums at the place from which they were produced. It seems the latter part of the statement which was an outright confession of the theft, was not completely rules out of evidence and something of it was imported into and superimposed on the firstpart of the statement so as to fix the responsibility for deposit and possession of the stolen drums there, on the accused.

15. Having cleared the ground, we will now consider, in the light of the principles clarified above, the application of Section 27 of this statement of the accused. The first step in the process was to pinpoint the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was : (a) the chemical drums in question, (b) the place, i.e. the musafirkhana, Crawford Market, wherein they lay deposited, and (c) the accused's knowledge of such deposit. The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus processed, in the instant case, only the first part of the statement, viz., "I will tell the place of deposit of the three chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely, "which I took out from the Haji Bunder on first August", constituted only the past history of the drums or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of the evidence altogether..."

38. The result of the above discussion is that the Court is of the view that the prosecution could not establish the motive set up against the Appellant, i.e. that he suspected the deceased's fidelity and character, and therefore, planned her murder.

39. The next aspect which has to be considered is whether the prosecution proved, beyond reasonable doubt, that the Appellant accused was present in the premises, at around the time of the incident. The prosecution version was that the Appellant was last seen with the deceased, and the needle of suspicion pointed to his involvement in the crime. For this, they had apparently relied on the testimony of PW-5 and PW-7. PW-5 had stated, previously, under Section 161, before the police, that he had witnessed the couple coming home at 8:30 in the evening. However, he did not support this version. PW-7 mentioned about leaving the Appellant's house in the evening of 21st October, 2005, with him, after having a cup of tea served by the deceased to the two of them, and PW-2, around 6:15 PM. He stated that they went to visit Meerut, to see his ailing father, and further that they returned on the morning of 22nd October, 2005, to the Appellant's house, around 11:00 AM, when he found the dead body of the deceased and the house in disarray. PW-7 was confronted with his previous statement, where he had apparently stated that the appellant had visited him at 11:00 PM on the night of 21.10.2005,

displaying nervousness and mentioned about a quarrel with the deceased. The trial court, on these facts, ignored the testimonies of the witnesses, and preferred to rely on the statements recorded during the police investigation. Interestingly, the trial court relied on a part of the testimony of PW-5, to the effect that the couple used to have scuffles.

40. The Court at this stage notes that the duty of the prosecution is to establish that the guilt of the accused is proved beyond reasonable doubt. Here, the case is dependent on circumstantial evidence. The prosecution witnesses have not supported its version that the accused was present at the time of the incident, and was seen by others, much later to the time he claimed to have left for Meerut (6:15 PM). The trial court has discarded the versions of PW-5 and PW-7, to the extent they support the Appellant's *alibi* of having left the premises in the evening of the fateful day, with PW-7. It has, on the other hand, chosen to rely on the statements recorded by those witnesses, under Section 161. Now, one singular feature of the case is that on the question of the accused's presence, at the relevant time (of the incident) there is no clear testimony. The findings rendered are based on Section 161 versions, and not on the depositions recorded during the trial. On the other hand, a part of PW-5's deposition was accepted, as regards scuffle by the couple, and that the accused asked him about the position of the house lock, at 11:00 AM on 22nd October, 2005.

41. The Court disbelieved the Appellant's explanation that he left for Meerut, along with PW-7, at about 6:15 PM. It went on to hold, on the basis of inference drawn from a reading of depositions of PW-5 and PW-7, that his *alibi* was unbelievable. It is no doubt true that PW-2 does not mention having visited the Appellant's house on the date of incident, and being present at 6:15 PM. This aspect was highlighted during the prosecution's argument, before this court. However, it is to be remembered that the prosecution has the primary obligation to establish its case, by leading evidence, and cannot expect the defense to cross examine its witnesses on aspects which they (the witnesses) may not make any assertion. The silence of PW-5 about the presence of PW-7, and the defense's lack of cross examination on this score, is, similarly, of not much assistance to the prosecution. PW-5's deposition established that the Appellant had visited him on the morning of 22nd October, 2005, enquiring about the key to the premises; shortly before that, at 9:20 he found the lock in an unlocked position. It was sought to be argued that the accused could easily have found out that the gate was unlocked, visually, and that he went to PW-5 to ask for the key, intentionally to create the impression that he reached the spot at that time, and that his version is unbelievable, since PW-5 neither deposed about the presence of PW-7 (who had stated having accompanied the appellant, and described the latter having secured the key from him) nor was PW-5 cross examined on this aspect. PW-5's omission no doubt results in a suspicion about the Appellant's version. At the same time, the two witnesses who mention about the time, to be later than 6:15 PM, in their previous statements under Section 161, resiled from that version, during the trial. Undoubtedly, there is some suspicion about this aspect. Yet, it would be relevant here to remember that in a criminal trial, the court has to be – at all times – mindful of the prosecution's obligation to cross the barrier between "may be so" as is inevitable

in cases where there is no direct, or ocular evidence, to “must be so”, as observed by the Supreme Court in *Jaharlal Das v. State of Orissa*, 1991 (3) SCC 27:

“...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. It has been indicated by this Court that there is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions.”

It would also be useful to extract the observations in this regard, in *Tanviben Pankajkumar Divetia v. State of Gujarat*, (1997) 7 SCC 156:

“46. We may indicate here that more the suspicious circumstances, more care and caution is required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court.”

In view of the above discussion, and having regard to the material evidence, the court is of the view that the prosecution was unable to prove that the accused Appellant was present at the time of the incident, or he did not go to Meerut around 6:15 (at 8:30 or around 11 PM) as held by the trial court. PW-7 and PW-5's evidence, viewed cumulatively, disclose that the accused was last seen at the place of occurrence at 6:15 PM, after which he left for Meerut, with PW-7.

42. The next question is the one pertaining to recoveries said to have been made, pursuant to the appellant's disclosure statement. The prosecution version is that PW-17, PW-15, PW-13 and Constable Jeet Paul, reached the premises as soon as the wireless message was relayed about the incident. PW-17 deposed that he was the IO till 12:30, after which PW-18 took over the investigation. The version of these witnesses is that investigation continued at the spot, and the accused/Appellant was questioned. PW-17 says that after sustained questioning, the appellant confessed, and made a disclosure statement Ex. PW-15/A. The time when this happened has, however not been disclosed. PW-18 mentions that the disclosure statement was recorded at 6:45 PM on the day of the incident itself. PW-2 however, contradicts this, saying that he was at the spot with the police for 2 – 2-1/2 hours after reaching there soon after the incident, after which the accused was taken to the police station; he too went there and remained there till 8:30 PM. PW-2 does not mention anything about learning of the disclosure statement, except saying that PW-17 Rajesh Dogra had mentioned that the Appellant confessed to the crime. The evidence of all the prosecution witnesses establishes that when the alleged recovery was made of the articles marked as exhibits, members of the Appellant's family were present, in his father's house. None of the police witnesses state that the interrogation or investigation shifted to the police station, as is deposed to by PW-2. Ex. PW-2/F the arrest memo contradicts PW-2's version that the interrogation scene shifted to the police station, where he remained till 8:30 PM. He is a witness to the arrest memo; yet he did not speak about it in the first instance, in his examination in chief, and exhibited the document, in the cross examination by the prosecution

with leave of the Court. The arrest memo states that the accused was taken into custody at 5:30 PM, at the place of incident. PW-17, also contradicted himself as to what was recovered from the Appellant's father's house. Moreover, significantly, no TIP in respect of the articles was carried out, as conceded by PW-17.

43. As far as the recovery of articles itself goes, PW-17 does not recollect what were precisely found in the Appellant's father's house. The amount said to have been recovered is ₹ 12,850/-. The earliest intimation of the theft, even as per PW-13/A was the statement that besides jewellery, ₹ 25,000/- was missing from the crime scene. This was apparently intimated by the Appellant, as is evident from the deposition of PW-13. However, PW-15 mentions that the figure stated by the appellant's brother in law, as well as himself (the accused) was ₹ 13,000/-. On this aspect, PW-3 had deposed in his examination in chief that the deceased had collected ₹ 30,000/- from him, on the day of the incident, when she went to the godown with the accused. However, he was confronted with his previous Section 161 statement where he had mentioned the figure as ₹ 13,000/-. These differing versions were papered over by the trial court, in its judgment, as an error, since ₹ 13,000/- and ₹ 30,000/- were phonetically similar. This Court is unpersuaded by such reasoning. The Appellant's consistent version was that the sum of ₹ 25,000/- was missing. This was corroborated by PW-13, and the intimation received and recorded by the PCR flash. The deposition of PW-3 in court also supports that the figure (₹ 30,000/-) was closer to what was reportedly lost or missing (₹ 25,000/-). In these circumstances, the prosecution was unable to satisfy why only ₹ 12,850/- was found, and what happened to the rest of the amount. Similarly, the articles of jewelry found show that they were generally "silver type" or silver plated articles, and not of gold. There is clear mention of some of them being artificial. It was sought to be proved that a mobile phone of Nokia make was also recovered. If indeed, the prosecution's story was that the phone belonged to the deceased, it is also a matter of record that no attempt was made by them to recover the call history, which could have corroborated the version of PW-5 that he had tried to contact her around 9:20 AM on the day of the incident, when he discovered that the house was unlocked. The personal search memo of the accused Ex. 2/G included a Nokia 2100 make mobile phone. The prosecution has not made any attempt to establish its case, through call tracing history on that mobile phone, which could have established, precisely, his whereabouts.

44. In the light of the above discussion, this Court is of the opinion that the prosecution version about the seizure of articles pursuant to a disclosure statement allegedly made by the appellant and the lack of any independent witness corroborating these facts, is unbelievable.

45. For the above reasons, this Court is of the view that the prosecution was unable to discharge the burden imposed upon it, i.e. to establish conclusively each circumstance, alleged against the accused, and also to prove beyond reasonable doubt that every link to each such

circumstance had been established in turn beyond reasonable doubt, so as to point only to the guilt of the accused, and rule out any hypothesis pointing to his innocence. The appeal therefore has to succeed. The impugned judgment and order is hereby set aside; the appellant is acquitted and shall be set free forthwith; the bail bonds furnished in this case are hereby discharged. The appeal is consequently allowed.

(S.RAVINDRA BHAT)
JUDGE

February 09, 2011

(G.P. MITTAL)
JUDGE