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

Date of Decision: 10th October, 2011

+ **Crl. A. No.902/2011**

IQBAL SINGH

..... Appellant

Through: Ms. Jyoti Singh, Sr. Advocate with
Shri N. S. Bajwa, Adv.

versus

HARINDER & ORS.

..... Respondents

Through: Mr. Sanjay Lau, APP for the State.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The Appellant Iqbal Singh (being brother of deceased Brij Pal) impugns the order of acquittal dated 02.12.2010 passed by the learned Addl. Sessions Judge whereby the accused Harinder, Kavita and Sandeep were acquitted of the charges framed against them. Smt. Kavita (Respondent No.2) was married to Onkar Singh. She did not get along well with her husband and left him. In the year 1996 she and her two children shifted to Delhi and started residing with her brother-in-law (husband's brother) Brij Pal (the deceased). On 13.05.2005 Bhopal Singh (Brij

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Pal's brother) went to Police Station (PS) Welcome and lodged DD No.35B that his brother Brij Pal aged 38 years had left the house on 02.05.2005 at 8:30 PM saying that he was proceeding to Puranpur (District Peelibhit) for his duty (as he was working there as a Tanker Driver) and it was reported to them that Brij Pal did not reach his office. The DD entry was assigned to HC Ram Bhaj, who sent wireless messages to all the SSPs. He also informed the Missing Persons Squad, and National Crime Bureau. He could not get any clue about Brij Pal and further enquiry of the DD entry was handed over to SI Arvind Sagar (PW-32). It is alleged that on 05.06.2005 Kavita went to PS Welcome and made a statement that on 02.05.2005 at 8:30 PM Brij Pal had left for Puranpur (Peelibhit). On 07.05.2005 Brij Pal's colleague Anil talked to her on her mobile 935050077 and wanted to speak to Brij Pal. She informed Anil that Brij Pal had left for Puranpur. Anil (PW-22) informed her that he (Brij Pal) did not come to the office. Anil promised her to find out the whereabouts of Brij Pal. On 12.05.2005 she went to the house of her *Jeth* (husband's elder brother) Iqbal Singh to ascertain his whereabouts. Iqbal Singh informed her that Brij Pal was untraceable and that he did not go to the village. She complained that on the next date Brij Pal's brothers Bhopal, Prem, Iqbal, Devender, Nirdosh and one more person went to her house and misbehaved with her. They sat in the room on the second floor and left without disclosing anything to her and lodged a missing person report about Brij Pal with PS Welcome. She told the police that she searched for her husband Brij Pal but in vain. She suspected that her husband had been abducted by some unknown persons. A case for the offence punishable under Section 365 IPC was registered on the basis of Kavita's statement and investigation was taken by SI Arvind Sagar (PW-32).

2. During investigation it was found that Kavita was married to Onkar Singh in the year 1986 and two children were born out of the wed-lock. Thereafter, she separated from her husband. As stated earlier in the year 1996 she along with her children came to Delhi and started residing with her brother-in-law Brij Pal. It was found that the deceased Brij Pal had constructed a house in Babarpur, Delhi. Accused Harinder started residing in a room in Brij Pal's house as a tenant.

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3. It is alleged that Brij Pal used to drive a Tanker. Sometime in the year 1998 he secured employment in the agricultural department of the UP Government and was posted at Puranpur, Peelibhit. During investigation it was revealed that Brij Pal used to visit Delhi after 10-15 days. He last visited Delhi in the end of April, 2005 and went missing on 02.05.2005.
 4. During investigation Shweta (PW-11) and Rahul (Kavita's son) were interrogated. Shweta disclosed that before her uncle (Brij Pal) went missing, there was a dispute between him and her mother Kavita with regard to the accused Harinder. She (PW-11) stated that Brij Pal had enquired from her about the relations between Harinder and Kavita. She disclosed to the IO (PW-37) that on 30.04.2005 a dispute took place between Brij Pal and Kavita. Accused Harinder also went to their house at about 12:00 in the night. All the three had a quarrel while the room was bolted. On the next date Brij Pal quarreled with Kavita and beat her badly. On 02.05.2005 at about 11:30 PM she woke up on hearing the doorbell ringing. She saw accused Harinder, Sandeep and Sanjeev climbing the stairs. Harinder asked Kavita to cook food. Thereafter, Harinder, Sandeep and Sanjeev went to Brij Pal's room where some altercation took place between them. She then went to sleep.
 5. At about 2:30 AM she woke up on hearing the noise of a door being opened. She noticed Harinder going up stairs. Thereafter, she again went to sleep. She woke up in the morning and found Brij Pal not present in the house. Her mother (Kavita) told her that the deceased had gone for his duty. When the whereabouts of Brij Pal were not known, her mother (Kavita) advised her and her brother (Rahul) to tell everyone that Brij Pal had gone for his duty on 02.05.2005 at 8:30 PM.
 6. It is alleged that Brij Pal had purchased one property in Kavita's name and another in his own name. When Brij Pal went missing Kavita made efforts to get those properties transferred in her own name. According to the prosecution, when Kavita approached Rajender Singh (PW-3) and Manoj (PW-24) in connection

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with the transfer of the house in her favour; she informed them that Brij Pal would not return.

7. Shweta's (PW-11) statement led to the arrest of Kavita and Harinder on 25.05.2006 (i.e. more than a year after Brij Pal went missing). They allegedly made a confessional statement on 29.05.2006. Co-accused Sandeep was arrested from Meerut. However, accused Sanjeev could not be arrested and was declared as a Proclaimed Offender. On completion of investigation a report under Section 173 Cr.P.C. was presented against the accused for the offence punishable under Sections 365/302/120B/201/182 and 34 IPC.
8. In order to establish its case the prosecution examined 37 witnesses. PW-3 (Rajinder Singh), PW-11 (Shweta), PW-24 (Manoj), PW-30 (Onkar Singh), PW-32 (Arvind Sagar) and PW-37 (Yogesh Malhotra) are material witnesses. The Trial Court by the impugned judgment acquitted Respondents No.1 to 3 on the ground that the circumstantial evidence produced by the prosecution was shaky. Although, the Respondent Kavita lodged a report regarding Brij Pal's abduction on 06.05.2005 yet the statement of the witnesses were recorded and alleged recovery of ATM card, wrist watch, etc. were effected after more than one year from the date when the deceased went missing. The Trial Court held that recovery of ATM card from Kavita's residence was not of any consequence as admittedly she was residing with Brij Pal as his wife. The recovery of the wrist watch at Sanjeev's instance too was disbelieved by the Trial Court on the ground that nobody would like to keep an incriminating article with him/ her when the accused had an opportunity to dispose of the same. The Trial Court observed that Rahul (Kavita's son) was not examined by the IO for inexplicable reasons and much reliance could not be placed on Shweta's testimony because of delay of about one year in recording her statement under Section 161 Cr.P.C. The Trial Court further held that the extra judicial confession alleged to have been made by the Respondent Kavita and Harinder was unbelievable as although it was allegedly made to Rajinder Singh (PW-3) and Manoj (PW-24) just after Brij Pal went missing but the same was disclosed to the police only after one year of the incident.

9. We have heard Ms. Jyoti Singh, Senior Advocate on behalf of the Appellant and have perused the record.
10. In order to bring home the guilt of the accused the prosecution relied on the following circumstances;
 - (i) Last seen evidence – Shweta (PW-11);
 - (ii) Motive – Nirdosh @ Pintoo (PW-8), Shweta (PW-11), and Onkar Singh Dhaka (PW-30);
 - (iii) Extra judicial confession - Rajinder Singh (PW-3) and Manoj (PW-24);
 - (iv) Recovery of deceased's ATM card from Kavita and wrist watch from Sandeep- Onkar Singh Dhaka (PW-30).
11. We would deal with the circumstances one by one.

LAST SEEN EVIDENCE

12. Shweta (PW-11) (Accused Kavita's daughter) is the solitary witness produced by the prosecution to prove this circumstance. She deposed about the quarrel and beatings administered to Kavita, on 30.04.2005 and 01.05.2005. She also testified that her uncle Brij Pal questioned her as to whether her mother was having relations with Harinder (the Accused). She deposed that she was aware about the relations between her mother and Accused Harinder. Brij Pal was also in know of this fact yet he wanted to confirm the same from her and her brother Rahul. She deposed that on the night of 02.05.2005 at about 11:30 PM she woke up on hearing the sound of the doorbell. She saw Accused Harinder, Sanjeev and Sandeep (PO) coming up stairs. Harinder asked her mother to cook a meal. They all went to the room of Brij Pal. There was an altercation between them; she then went to sleep. She again woke up at about 2:30 AM on account of opening of the door (as the door used to create noise on opening). She saw Harinder coming up stairs but Sanjeev and Sandeep were not with him at that time. Thereafter she again went to sleep and got up in the morning. She testified that Brij Pal was not present in the house at that time. Her mother (Kavita) informed her that Brij Pal had left for his duty. She told her mother that there was no train for Puranpur in

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the morning. She deposed that Brij Pal never returned thereafter. In the cross-examination she admitted that she had come to the Court along with her father Onkar Singh and her *Taus* (father's elder brothers) Iqbal Singh and Bhopal Singh and *Phoofa* Nirdosh Singh. She denied the suggestion that she was tutored by the above stated persons. She admitted that she did not give the physical appearance of accused Sandeep in her police statement. She deposed that she had stated in her statement to the IO that her uncle Brij Pal had questioned her about the relations between her mother and Harinder. She deposed that she had stated to the IO that she was aware about the relations between the two. She was confronted with her police statement Ex. PW-11/DA where these facts were not recorded. She admitted that her grandmother, her *Tai* (father's elder brother's wife) Sheela came to her house with her father, uncles and Phoofa. She showed her ignorance as up to what period they remained in the house. She stated that her uncle, father and *Tau* were not liked by her mother. She added that her *Tau* Iqbal Singh used to visit their house from May, 2005 to May, 2006 but her mother did not allow them (PW-11 and her brother) to meet Iqbal Singh. She admitted that in her school record her father's name was mentioned as Brij Pal Singh. She showed her ignorance if the police used to visit their house after 13.05.2005.

13. Shweta's statement under Section 161 Cr.P.C. was recorded only in May, 2006 i.e. more than a year after Brij Pal had gone missing. It was not only the police but all her relations including the ladies in the family who used to visit PW-11 Shweta. From the tenor of her statement made to the police and in the court it is evident that she suspected Harinder and Kavita's hand in Brij Pal's disappearance. If that was so it was natural for her to have disclosed these facts if not to the police but at least to her close relations including her grandmother and her *Tai*. Shweta's explanation that she did not disclose this fact as her mother did not allow her to meet the relations is not convincing because of the inordinate delay in recording this witness' statement under Section 161 Cr.P.C. makes her unworthy of reliance. This assumes importance in view of the fact that Onkar Singh filed a Civil Suit as Shweta's and Rahul's next friends in respect of property No.B-14/639, Gali No.13, Subhash Mohalla, North Gonda, Delhi-110053. The Trial Court rightly

disbelieved this circumstance. We see no good reason to disagree with the Trial Court on this count.

MOTIVE

14. The second circumstance attributed to the commission of murder was that though Kavita was staying with Brij Pal, but Brij Pal had not legally married Kavita in spite of her judicial separation with her previous husband Onkar Singh (PW-30). On this count the prosecution examined Onkar Singh (PW-30) and Nirdosh (PW-8) both of whom testified that Brij Pal was ready to get married and a suitable girl was being searched for him. The Trial Court referred to the plaint of the Civil Suit Ex. PW-2/A. A Suit for permanent injunction was filed on Shweta's and Rahul's behalf wherein their father's name was mentioned as Brij Pal. Brij Pal at the time of his death was 38 years of age. According to the prosecution Kavita was residing with Brij Pal at least for the last 9 years. PW-30 Onkar Singh and PW-8 Nirdosh made vague averments about Brij Pal's proposed marriage against Kavita's wishes. Particulars of not even a single girl have been given by PW-30 and PW-8. Their testimonies do not inspire confidence. In our opinion this motive has not been established.
15. The prosecution wanted to prove that Kavita and Harinder were having illicit relations and, therefore, they wanted to get rid of Brij Pal. No evidence with regard to the alleged illicit intimacy was produced except a vague statement by Shweta (PW-11) that her mother had relations with Harinder. Since, Harinder was residing in a room in Brij Pal's house as a tenant, no inference of illicit relation can be drawn if Harinder visited Brij Pal's house and met his wife. PW-22 Anil (Brij Pal's colleague) deposed that he was posted with Brij Pal and that he never talked about the relationship between Kavita and Harinder. He deposed that he did not perceive anything which showed illicit relations between the two. In our opinion the prosecution has failed to adduce any reliable evidence to establish the illicit relations between Kavita and Harinder.

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EXTRA JUDICIAL CONFESSION

16. The prosecution examined Sayyed Mohd. Umar (PW-6) to prove that Kavita sold her house No.122, Street Mala Devi School, Babarpur to this witness for a consideration of ₹ 6,25,000/-. Admittedly this house was in Kavita's name. Although in his examination-in-chief PW-6 testified that the sale consideration was paid to accused Harinder, in cross-examination he made a contradictory statement and deposed that he had paid an earnest money of ₹ 50,000/- and the entire sale consideration was paid to Kavita and she executed the documents as the owner of the house. The prosecution examined Rajinder Singh PW-3 to prove that Kavita wanted to sell a plot of land in Indrapuri, Loni and sought his assistance. He deposed that Brij Pal had met him on 01.05.2005. He (Brij Pal) stayed with him for about one and half hours. After 8-10 days, he was called by Kavita through someone. He went to her house at Babarpur, Delhi. Kavita and Harinder were present there. On enquiry Kavita told him that she wanted *Kumharwala* plot in Indrapuri, Loni to be transferred in her name. He questioned her as to how the plot could be transferred in her name and how would he answer Brij Pal in this regard. At that time according to this witness, "Kavita and Harinder retorted" by saying where from Brij Pal would come back. The witness deposed that while answering there was smile a on their faces.
17. In cross-examination the witness deposed that he visited Kavita's house only once when he had been called by her. He did not give the name of the person through whom he had been called by Kavita. He was confronted with his previous statement Ex. PW-3/DA wherein he had not stated to the police that he was called by Kavita 8-10 days after Brij Pal went missing. In cross-examination this witness also admitted that *Kumahar* (seller of the plot to Brijpal) was not well acquainted with him. He just knew him. In these circumstances, it is not understandable as to why Kavita would need PW-3's assistance in transfer of plot in her name. Statement of this witness was also recorded after one year of Brij Pal's going missing. We do not find testimony of PW-3 to be credible so as to place implicit reliance thereon.

18. Manoj PW-24 deposed that he purchased a plot measuring 120 Sq. yds. in Paramhans Vihar, Loni in the name of his wife Munni Devi. He constructed two rooms on the plot in the year 1998 and sold the same to Brij Pal. Brij Pal started residing there with Kavita and two children. During this period Brij Pal got a Govt. job. In the year 2005 Kavita and Harinder contacted him and wanted the plot to be transferred in her name. He questioned as to where Brij Pal was and she informed that Brij Pal was missing for the last one month. He declined Kavita's proposal and told her that he had sold the plot to only Brij Pal and could not sell the same to her. They visited him again and they told him that Brij Pal will never return. This witness was confronted with the police statement Ex. PW-24/DA where the factum of non-return of Brij Pal was not mentioned. He admitted that Kavita had filed a Civil Suit against him for getting the plot transferred in her name. It is borne out from the record that Brij Pal's brothers including Kavita's previous husband Onkar Singh were interested in getting the property. A suit for perpetual injunction in the name of their two children as their next friend was also filed by Onkar Singh against Kavita and others. It seems that Kavita also wanted to protect her interest and, therefore, filed a suit against Munni Devi (PW-24's wife) in the Civil Court at Ghaziabad. Though, the accused persons have denied having approached PW-24 Manoj for getting the plot transferred in Kavita's name. Even if it is believed that Kavita wanted the plot at Loni to be transferred in her name, no inference of guilty mind could be drawn against her as she wanted to protect her and her children's financial interest as against the financial interest of her previous husband and brother-in-law. As stated earlier this witness made an improvement on the fact of Kavita stating that Brij Pal will never return and was confronted with his previous statement. It is well settled that extra judicial confession by its nature is a weak type of evidence. No extra judicial confession as to commission of offence was made by PW-3 or PW-24. Even if PW-3 and PW-24 are to be believed what can be inferred is that Kavita wanted to protect her financial interest. This circumstance is not proved by the prosecution.

RECOVERY OF INCRIMINATING MATERIAL

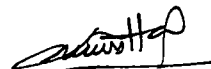
19. The prosecution relies on recoveries of deceased's ATM card from accused Kavita and wrist watch from accused Sandeep. The Trial Court held that accused Kavita and Brij Pal were residing together as husband and wife and the recovery of the ATM card from Kavita is not of any value. With regard to the alleged recovery of wrist watch at the behest of accused Sandeep, the Trial Court found the same to be not believable as the accused would not keep any incriminating article with him particularly when the same does not carry much value. The Trial Court referred to *Nissar @ Pappu v. State*, 1997 (40) DRJ (DB). The observation of the Trial Court is extracted hereunder: -

"In the present case the wrist watch which was allegedly recovered at the instance of accused Sandeep, was of not much value. It is also important to be noted that the recovery was effected after about one year of the alleged crime. It is also important to note that no independent witness was joined in the recovery of the wrist watch. Therefore, in view of the above discussed judgments, the recovery of wrist watch at the instance of accused Sandeep is doubtful.

As regards the recovery of ATM card of Brij Pal at the instance of accused Kavita is concerned, it is important to note that the accused Kavita and deceased Brij Pal were living under the same roof from where the recovery of ATM was effected. Therefore, the said recovery of ATM is natural."

20. We find no reason to disagree with the reasoning of the Trial Court.
21. The law is well settled that where the prosecution case rests on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn must, in the first instance, be fully established; the circumstances should be of a conclusive nature; the circumstances taken together must unerringly point to the guilt of an accused; the circumstances proved on record must be incompatible with the innocence of an accused and form a complete chain of circumstances and it must be proved that in all probabilities the offence was committed by the accused. (*Hanumant Govind Nargundkar & Anr. v. State of Madhya Pradesh*, AIR 1952 SC 343 and *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116).

22. The circumstances relied on by the prosecution have not been fully established in the case except the recovery of an ATM card, which in our view is only a neutral circumstance.
23. The High Court is slow to interfere in an order of acquittal passed by the Trial Court. It interferes when there are compelling and substantial reasons to do so. In this case we do not find any such ground so as to compel us to interfere with the order of acquittal. The Appeal is without any merit and the same is accordingly dismissed.



(G.P. MITTAL)
JUDGE



(S. RAVINDRA BHAT)
JUDGE

OCTOBER 10, 2011

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