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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 19.10.2011
PRONOUNCED ON: 14.11.2011

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Crl. A. 945/2011

STATE (GNCT) OF DELHI

..... Appellant

Through: Sh. Dayan Krishnan, APP for the State along
with Sh. Nikhil. A Menon, Advocate.

versus

AKHLAQ & ANR.

..... Respondents

Through: Sh. Rajeev Sharma, *Amicus Curiae* and Sh.
Sahil Bhalaik, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

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

MR. JUSTICE S.RAVINDRA BHAT

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1. The State appeals, by leave (granted by this court) against a judgment and order, dated 09-04-2010 in SC No. 131/2009, acquitting the respondent (Akhlaq, referred to hereafter by his name, for the sake of convenience) of the charge of murdering his wife, Afsana, on 19-09-1994.

2. The prosecution story was that On 19.9.2004, DD no. 10A (Ex. PW-6/A) – was recorded at Police station, Welcome, when the police received an unknown telephone call informing them of a murder of a woman at around 3:20 PM. On three policemen reaching the spot, they found the dead body of a young woman, later identified as Afsana, aged 24-25 years; the body was lying

on the floor on a plastic mat in the inner room of the ground floor of premises L-21, Welcome, Delhi. A white string (*nara*) was tied around the deceased's neck and a ligature mark was clearly visible. The deceased was wearing earrings, glass and plastic bangles and a ring. Used *biri* buds were lying inside the room. A pair of male slippers and a pair of female slippers was found in the room. Three pouches of jewelry were found, after the police searched the room. The police found Imrana, (PW-7), who was the landlady of the premises, and stayed on the first floor at the location with other *mohalla* people. Her statement was recorded; she claimed to have given the house on rent to a couple (i.e Akhlaq and the deceased Afsana) who was accompanied by another man named Mukhtiyar on 14.9.2004. She said that she saw him leave for work at about 7 AM as usual on the day of the incident. PW-7 went at 3 PM to wash her clothes in the room downstairs and saw the room bolted from outside. She opened the latch and went inside and called out for Afsana two or three times. When there was response, she went outside and called for the people in the locality (*mohalla*) people. Her sister in law, along with a neighbor, Lali, went into the house, and saw the body of Afsana. She said that she had last seen Afsana at around 11 pm at night and raised suspicion on Akhlaq, since he had not come home as usual for lunch that day.

3. The police conducted investigations; Afsana's sister identified her body later. Akhlaq surrendered after a few days. He was arrested, and after conclusion of investigations, was charged with murdering Afsana. He pleaded not guilty and claimed trial. The prosecution relied on the testimonies of 36 witnesses, besides exhibits produced during the trial. After considering these, and submissions made on behalf of the parties, the Trial Court, by the impugned judgment, acquitted Akhlaq. The State has therefore appealed.

4. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State, argued that the impugned findings acquitting Akhlaq deserve to be set aside, because the court found that he was in fact the last person seen leaving the house from where the body of Afsana was found. It was urged that the

testimony of PW-7 proved that he and Afsana had rented the premises four days prior to the incident, and that he was in the habit of leaving the house for work at about 7 AM, returning for lunch and thereafter again leave for work. He used to return for the day at around 7 PM. Imrana had deposed that Imrana had seen deceased alive at 11 PM on the 18th and Akhlaq on the 19th at 7 AM. Significantly, he did not return home as usual in the afternoon. Imrana went down around 03:00 PM, to wash her clothes, when she noticed that the premises were bolted from outside. She unbolted the premises, and called out Afsana. There was no response; as a result, she called a neighbor, who went inside with her. They discovered Afsana's body. Akhlaq did not return that day, or the subsequent days. The police recorded the statement of neighbours and others, and much later, Akhlaq was arrested after he surrendered in court.

5. Learned counsel submitted that the evidence on record, particularly the testimony of Shamshida, (PW-12 who identified the body) showed that Afsana was abducted by Akhlaq, from Mohalla Killa, Thana Manglore, District Haridwar. Afsana's relatives also suspected Akhlaq for murdering Afsana. The prosecution urged that once the Trial Court concluded that Akhlaq was last seen leaving the premises at 7:00 AM in the morning, as usual, then his conduct in not returning either that day, or any subsequent day, but in fact surrendering much later, on 27-4-2004, was sufficiently incriminating for him to discharge the onus of explaining such conduct, by reason of Section 106, Evidence Act. It was submitted that though the prosecution is obligated to prove its case beyond reasonable doubt, and in a circumstantial evidence based case, has to prove all circumstances, as well as the links conclusively, and further rule out every hypothesis except the guilt of the accused, the burden is not an impossible one, and should be considered as discharged when the "last seen" evidence, is so strong as to rule out complicity of anyone else in the crime. Furthermore, submitted Mr. Krishnan, the fact that Akhlaq went missing, contrary to his normal habit of returning in the afternoon, and indeed not returning at all, underlined his involvement in the crime.

6. The prosecution relied on the decision reported as *State of Goa v Sanjay Thukran* 2007 (3) SCC 755, to say that there is no strait jacket formula applicable to cases of circumstantial evidence where the prosecution relies on the accused being last seen in the company of the deceased, to the following effect:

“There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

7. Learned counsel for the respondent, Shri Rajeev Sharma, argued that the reasoning and findings recorded by the Trial Court are sound, and do not call for any interference. He submitted that the prosecution had banked almost entirely on the testimony of “last seen” spoken to by PW-7, who claimed to have seen Akhlaq leaving the premises at 7:00 AM, the morning of the incident. It was submitted that PW-7 saw the deceased at 03:00 PM the same day. However, the medical evidence in the form of the post-mortem report, Ex. PW-26/A contradicted this theory; as well as the doctor PW-26 stated that the time of death was 4-5 days before the time of commencement of post-mortem on 24-4-2003. This was unimpeachable evidence; it showed that the “last seen” theory and the Appellant being the author of the crime could not be established.

8. It was urged that the last-seen theory, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration. Counsel relied on the judgment reported as *Bodh Raj @ Bodha v State of J& K* 2002 (8) SCC 45, to the following effect:

“The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases...”

9. Counsel urged that the “last seen” theory cannot also be given importance in this case, since the eye-witness PW-7, admitted to having let out the premises to the Appellant only 4 days before the incident. In these circumstances, there was no question of her being familiar about his habits; her testimony also revealed that she used to stay upstairs, and on the day of the incident went down only at around 3:00 PM; there was no occasion for her to call out for Afsana, much less open the door. In any case, 3 days time was too short a period for anyone to familiarize about another’s habits, or practices. Further, the last seen would have been important in the present case, had the incident occurred at a time when the husband and wife were alone in the premises, particularly at night. However, the medical evidence showed that death occurred at around 3 PM, which gave a lie to the “last seen” circumstance, since PW-7 admittedly saw the Appellant in the morning at 07:00 AM.

10. Counsel submitted that the lack of motive in a circumstance evidence based prosecution is very crucial. In a case based on circumstantial evidence,

motive assumes significance; its absence puts the court on its guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof. In support of this proposition, counsel relied on the judgment reported as *Surender Pal Jain v Delhi Administration* 1993 (Suppl3) SCC 681.

11. It was submitted that the primary burden of the prosecution of proving the allegations beyond reasonable doubt, has to be discharged before the court treats the onus as shifted, or invokes Section 106 of the Evidence Act, calling upon the accused to answer to facts within his knowledge, of which explanation is necessary. The mere fact that the accused in a given case is not available, or had even absconded, would not constitute *ipso facto* an incriminating circumstance, which adds up against him. In this regard, reliance was placed on the judgment reported as *Matru @ Girish Chandra vs. The State of U.P.*, AIR 1971 SC 1050, to the following effect:

*"The appellant's conduct in **absconding** was also relied upon. Now, mere **absconding** by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of **absconding** is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of **absconding**, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence."*

Other judgments (*Rahman vs. State of U.P.* AIR 1972 SC 110; and *State of M.P. vs. Paltan Mallah & Ors.* AIR 2005 SC 733) too were relied upon.

12. This court notices that the present case is entirely based on circumstantial evidence; the Trial Court convicted the Appellant almost entirely on the basis of the “last seen” theory. To arrive at this conclusion, the court believed the testimony of the couple’s landlady, PW-7. While there is no thumb rule that a solitary eyewitness, in a criminal case, needs corroboration, and the courts have to subject the testimony of each witness to the test of credibility, at the same time, the last seen theory has to be kept in perspective. One of the cardinal rules on which the edifice of the last seen theory is based, is that the

*“the time gap between the point of time when the accused and the deceased were **last seen** alive and the deceased is found dead is **so small** that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration..”*

(Bodh Raj (supra); Ramreddy Rajeshkhanna Reddy v State of AP 2006 (10) SCC 172; State of UP v Satish 2005 (3) SCC 114; Jaswant Gir v State of Punjab 2005 (12) SCC 438; Shivaji @ Dadya Shankar Alhat v State of Maharastra AIR 2009 SC 56).

13. In this case, the categorical testimony of PW-7 is that she saw the Appellant last leaving the premises at 07:00 AM on the day of the incident; she was in the premises the entire day, till 03:00 PM when she went down, and saw the room (where Afsana’s body was found later) bolted. Now, the time gap between the “last seen” evidence and the time of discovery of the body (which significantly, is also the time of death) is 8 hours – not small (certainly not “so small” having regard to the circumstances). In the present case, we also notice that the incident, according to the prosecution evidence, and by all available materials, occurred during the day time. The evidence also points out to the premises (i.e the Appellant’s room) being situated in the ground floor of the premises. It has not been shown that access to the premises was not possible or was difficult. This aspect is important because the last seen theory as well as a case based on circumstantial evidence, predicate that only the accused, and

none else could have been the author of the crime. Only if the proven facts and circumstances point to that, would the court infer the guilt of an accused, not otherwise. The considerable time lag (not a “small” one in this case) coupled with the possibility of access to others- since the premises were located in the ground floor, in this court’s opinion, weaken the prosecution case against the Appellant.

14. While on this aspect, the court also notices that while PW-7 might have deposed truthfully about what she saw, that by no means can irresistibly lead to the inference of the Appellant’s guilt, or the conclusion that only he and none else could have committed the crime. Concededly, PW-7 had occasion to observe the couple only for precisely 3 days before the incident. It would therefore, be hazardous, based on this testimony, to hold that the Appellant was normally leaving the house at a particular time, or was in the habit of coming back for lunch, and leaving again. Such conclusions cannot be readily drawn, since patterns of behavior can usually be discerned after observations by someone after a length of time. Instead, what can be said is that PW-7 had seen the Appellant leave at a particular time, and return home, on the three days she had occasion to observe him. This assumes a vastly different meaning, because the court would then not be saying that the Appellant was in the “habit” of maintaining a particular regular routine. Similarly, the court – at least in this case, cannot assume that PW-7 (who deposed to sitting in her terrace) being “clued in” to the goings on in the locality. It is inconceivable that someone (especially a housewife aged 32 years, such as PW-7) can remain rooted at one place for 7-8 hours continuously- and that too in the month of September, when the weather is not always pleasant. If such were the true position, and keeping in mind the fact that the premises where the deceased was found, could have been accessed by others during the daytime, the possibility of others being responsible for the crime cannot be ruled out. This court is fortified in this opinion by the following observations of the Supreme Court, in *Rajkumar, v. State Of M. P* AIR 2004 SC 4408:

“The “last-seen” evidence of PW 8, even if believed, cannot be pressed into service by the prosecution on account of the long time gap, that too during daytime. Barring the evidence of PW 8 who claimed to have seen the accused at 9.00 a.m. at his house, there is no other evidence to establish the presence of the accused in the house proximate to the time of occurrence.”

15. The court is of the opinion that while conduct of an accused may constitute a material circumstance, his disappearance, or absconding with a view to escape the police, cannot be considered a strong incriminating circumstance, sufficient to attract the provision of Section 106, Evidence Act. Long ago, in *Matru* (supra), the Supreme Court cautioned courts reading too much into such conduct, in circumstantial evidence based cases, saying that an accused absconding (from the police) “*can scarcely be held as a determining link in completing the chain of circumstantial evidence.*” As far as applicability of Section 106 of the Evidence Act, is concerned, the onus of explaining facts “especially” within the knowledge of an accused, would arise after the prosecution discharges its primary burden of proving all other facts, beyond reasonable doubt. The court can do no better than refer to the legendary Justice Vivien Bose, who spoke for the Supreme Court, in *Shambu Nath Mehra vs. State of Ajmer* 1956 SCR 199 thus:

*“This lays down the general rule that in a criminal case the burden of proof is on the prosecution and **Section 106** is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without difficulty or inconvenience*

The facts in this case point to the prosecution’s inability to prove, beyond reasonable doubt, that the Appellant alone and no one else could have killed his wife, based on the last seen theory. Therefore, his absence of explanation as to why he surrendered much later, cannot possibly be a substitute for proof beyond reasonable doubt.

16. This court is further conscious that though exercising appellate power with the concomitant right to fully examine the entire record and evidence, it upset what is a plausible or reasonable view of the Trial Court, acquitting an accused. This was articulated by the Supreme Court in *Kallu v. State of M.P.* (2006) 10 SCC 313 in the following manner:

"8. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt."

17. Having regard to the above discussion, we are satisfied that the reasoning of the Trial Court is based on a plausible view that can be taken on the basis of the evidence led. The impugned judgment therefore, does not call for interference. The Appeal has to fail, and is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATIBHA RANI
(JUDGE)**

NOVEMBER 14, 2011