

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

Reserved on: 7th March, 2011
Date of Decision: 15th March, 2011

+ **CRL. A. 5/2011**

BRIJPAL @ BIRJU ...APPELLANT
Through: Ms. Ritu Gauba, Advocate

Versus

STATE ...RESPONDENT
Through: Mr. Lovkesh Sawhney, APP for the State.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

G.P. MITTAL, J.

1. Appellant Brijpal @ Birju impugn the judgment dated 13.09.2010 and the order on sentence dated 15.09.2010, whereby he was convicted for the offence punishable under Section 302 of the Indian Penal Code ('Code') and was sentenced to undergo imprisonment for life and to pay fine of ₹1,000/- or in default of payment of fine to undergo Rigorous Imprisonment for six months.
2. Briefly put, the prosecution case is that the Appellant, who is PW-2 Satish Kumar's cousin (*Mausi's son*) along with his wife Laxmi and three sons Golu, Rudraksh and Anuj went to PW-2's house on 03.04.2007 to stay as a guest. On 05.04.2007 there was an election in the Metropolitan City of

Delhi for MCD. According to the prosecution, at about 9:45 A.M., PW-1 Smt. Lokesh and PW-2 Satish proceeded to the Polling Booth situated at MCD School, Madanpur Khadar to cast their vote. On reaching there, PW-1 found her name missing from the voters' list. She, therefore, returned to her house, whereas PW-2 stayed back at the Polling Booth to cast his vote. On reaching her house, PW-1 found the main gate (of the house) and door of the drawing room on the ground floor opened. She noticed Anuj, the youngest son of the Appellant, aged about 1½ years crying in the room and Laxmi lay dead on the sofa. Blood was oozing out of the injury on left side of the neck. Blood was also found on the sofa and on the floor of the room. Appellant was not found present in the house. PW-1, therefore, called on the mobile phone of her husband PW-2. PW-2 immediately reached home and informed the police about the incident at number 100. ASI Chaman Singh (PW-9) reached the spot and recorded statement Ex.PW-1/A of PW-1 Smt. Lokesh and sent rukka for registration of the case to the Police Station (PS), on the basis of which FIR (Ex.PW-9/B) was recorded on 12:10 P.M.

3. According to the information disclosed by PW-1, the Appellant suspected the character of his wife Laxmi. PW-1 also informed PW-9 ASI Chaman Singh that she was sure that the Appellant had committed the murder of his wife Laxmi and had absconded.
4. PW-16, Inspector Narender Chawla, SHO, PS Sarita Vihar also reached the spot. According to the prosecution, the crime team was summoned to the spot; blood, bloodstained articles like sofa, sofa cushion, a cloth sheet found on the sofa, all stained with blood were seized and sealed with the seal of 'NC'. During the course of investigation, on the basis of secret information, the Appellant was apprehended near Agra Canal. He was interrogated. The Appellant made a confessional-cum-disclosure statement Ex.PW-2/C on the basis of which a bloodstained knife (Churra) Ex.P-7 was recovered. The same was also seized and sealed vide memo

Ex.PW-1/L. Photographs of the scene of crime Ex. PW-4/B-1 to PW-4/B-7 were taken. Crime team also gave its report Ex.PW-13/B.

5. Autopsy on the dead body of Laxmi was conducted by Dr. B.L. Chaudhary (*proved in Court by PW-10 Dr. Shiva Prasad*), who found 14 stab injuries on the person of deceased Laxmi. He found all the injuries to be ante mortem and fresh in duration. The cause of death was opined as hemorrhagic shock due to multiple injuries, caused by a sharp pointed weapon and was sufficient to cause death in the ordinary course of nature.
6. The exhibits were sent to CFSL for examination. As per report Ex.PW-17/A, all the articles except Churra Ex.P-7, contained blood group 'B' (of the deceased).
7. On the Appellant's pleading not guilty to the charge under Section 302 of the Code, the prosecution examined 17 witnesses. There was no direct evidence in the case. The prosecution relied upon circumstantial evidence in the shape of motive; recovery of a blood stained Churra Ex.P-7; the deceased being last seen alive in the company of the Appellant, and the abscondence of the Appellant after commission of the crime. To prove all the circumstances, the prosecution examined PW-1 Smt. Lokesh, PW-2 Satish Kumar, PW-7 Mr. Jain (deceased's father), PW-8 Pankaj (deceased's brother), PW-11 Sayyam and PW-12 Sushant (sons of PWs 1 and 2) apart from the official witnesses.
8. Appellant was examined under Section 313 Cr.P.C. He denied that PWs 1 and 2 had left the house at 9:45 A.M. to cast their vote. He stated that he had left the house simultaneously with PWs 1 and 2 at 8:00 A.M. on 05.04.2007. PWs 1 and 2 had left to cast their vote, whereas he left in search of an accommodation to be rented by him. His wife Laxmi and the children were in the house. His wife was also on the first floor (with the children) when they left. He returned to the spot at about 10:45 A.M. He saw his wife lay dead on the sofa and the son on her lap. He also

noticed blood on the head of his son Anuj, who was crying. He did not see PW-1 Lokesh and her husband PW-2 Satish there. He went to the Police Station on his motorcycle, to give information of the offence where he was detained and falsely implicated in the case. His motorcycle was also detained by the police. He denied that any weapon of offence was recovered or that any such disclosure statement was made by him.

9. During cross-examination of some witnesses, he had raised an accusing finger towards PWs 1 and 2 as the persons responsible for the ghastly crime. He did not produce any evidence in defence.
10. The learned Additional Sessions Judge (ASJ) by the impugned judgment disbelieved the recovery of the weapon of offence. He also disbelieved the motive of demand of dowry or the story of illicit relationship of Laxmi with any one; yet, he held that there might have been a small grievance or grudge which could have actuated the Appellant to take an extreme step of murdering his wife. The learned ASJ believing the evidence of “last seen” and considering the time gap between when the Appellant and the deceased were seen alive together, and when the deceased was noticed dead, to be very small, found that the prosecution’s case stood established on the basis of circumstantial evidence, which in his view, was of a conclusive nature. He held the accused/Appellant guilty and convicted him accordingly.
11. We have heard Ms. Ritu Gauba, learned counsel for the Appellant, Mr. Lovkesh Sawhney, learned Additional Public Prosecutor (APP) for the State and have perused the record.
12. It is well settled that when a case rests upon circumstantial evidence, the circumstances must be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. In *Hanumant Govind Nargundkar & Anr. v. State of M.P.*, AIR 1952 SC 343, the Supreme Court held:-

"In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

13. This view was reiterated in several later judgments. Reference may be made to ***Mahmood v. State of U.P.***, (1976) 1 SCC 542; ***Gambhir v. State of Maharastra***, (1982) 2 SCC 351; ***Henry Westroller Roberts v. State of Assam***, (1985) 3 SCC 291; ***Ashok Kumar Chatterjee v. State of M.P.***, 1989 Supp (1) SCC 560; ***Kishore Chand v. State of H.P.***, (1991) 1 SCC 286; ***Trimukh Maroti Kirkam v. State of Maharastra***, (2006) 10 SCC 681; ***Satni Bai v. State of M.P.***, (2010) 2 SCC 646.
14. Ms. Ritu Gauba, learned counsel for the Appellant urged that though the Trial Court has disbelieved the circumstance of the Appellant being aggrieved on account of illicit relationship of the deceased with some villagers and the recovery of the blood stained Churra, yet the manner in which the FIR was lodged (at the instance of PW-1) shows that PWs 1 and 2 wanted to shift the blame of Laxmi's murder upon the Appellant and that is why the story of illicit relationship, recovery of blood stained Churra and story of abscondence of the Appellant has been invented. The circumstance of illicit relationship has not been proved, whereas circumstance of recovery of blood stained Churra and abscondence have been found to be false.
15. The Appellant's version is that on coming to know of the murder of his wife, he had immediately rushed to the Police Station where he was made to wait and was falsely implicated in the crime. The learned counsel for

the Appellant has taken us through the evidence to show that although the Appellant has been shown to have been arrested after 3:00 P.M. on the basis of a secret information, yet it is established on record that the Appellant was in PS well before 2:00 P.M., which gives credence to the defence taken by the Appellant.

16. It is argued that “last seen” evidence is of very doubtful nature; the accused is not required to prove his defence, he has to merely furnish a probable explanation as to create a doubt in the prosecution version.
17. On the other hand, Mr. Lovkesh Sawhney, APP for the State has urged that the evidence of “last seen” is a very strong one in this case. Since, the Appellant failed to explain how and when he departed from the company of his wife Laxmi, he cannot escape the responsibility of his wife’s murder.
18. The FIR in this case was registered on the basis of a statement Ex.PW-1/A made by PW-1 Smt. Lokesh wife of PW-2 Satish. Satish is the Appellant’s cousin. PW-1 Smt. Lokesh had informed ASI Chaman Singh (PW-9) that, when she found Laxmi dead on the sofa, and informed her husband on his mobile phone. Her husband returned home without casting his vote. She informed the ASI that the Appellant suspected the character of his wife and she was sure that Laxmi’s murder is the handiwork of her husband (Laxmi’s husband) Brij Pal.
19. In her examination-in-chief PW-1 deposed that “*Brij Pal used to say that the character of his wife was not good and he used to express suspicion over her.*” When cross-examined, PW-1 deposed that she did not know the Appellant before this incident. She had only seen his photographs in the album of her (PW-1) marriage. She testified that the Appellant went to her home for the first time on 03.04.2007. She stated that she did not know when Brij Pal got married to the deceased. Brij Pal’s wife did not meet her before 03.04.2007. She went to the extent of stating that she did

not know anything about Brij Pal and his family before 03.04.2007 (i.e. the date of the Appellant's visit with his wife and children).

20. PW-1 admitted that neither Brij Pal nor his wife (Laxmi) had disclosed about the illicit relations. If we believe the version of PW-1 as testified in the Court, how PW-1 got information about the alleged illicit relations of Laxmi is a mystery.
21. DD No.11-A, Ex.PW-9/C regarding the incident was recorded in the PS Sarita Vihar at 10:35 A.M. on the basis of the information passed on by S-66 Operator (of the PCR). Information was conveyed by PW-2 from his mobile phone. DD No.11-A records that the murder of a woman had been committed by her husband. Such a conclusion drawn by PWs 1 and 2 immediately on reaching their house just after 10:00 A.M. shows that they were pre-disposed to implicate the Appellant even without verification of the full facts, about how the incident had occurred.
22. The recovery of Churra Ex.P-7 was no doubt disbelieved by the Trial Court yet the matter, does not end here. Report Ex.PW-13/A of PW-13 (In charge of Crime Team) shows that the Churra Ex.P-7 was planted either by PWs 1 and 2 or by PWs 1 and 2 in collusion with PW-16 Investigating Officer (IO) of the case. As per Ex.PW-13/A, the inspection by Crime Team was carried on 05.04.2007 between 12:00 noon to 1:00 P.M. PW-13, SI Naveen Kumar testified that on 05.04.2007 he was posted as In charge of the Mobile Crime Team in South District. On that day he along with Constable Mohan Singh (PW-4) etc. had visited the place of occurrence at 267, Jatav Mohalla, Madanpur Khadar, Delhi from 12:00 P.M. to 1:00 P.M. He proved his report Ex.PW-13/A. In cross-examination, he stated that he had tilted the *takhat* in order to find out if any other thing (article) was available. He deposed that the mattress put on the *takhat* was also checked, but nothing was found from there.

23. According to the prosecution, the Appellant was arrested much after 3:00 P.M. (as the secret information was received at 3:00 P.M.). If *takhat* and the mattress on it had been tilted and checked by experts like the officer In charge of the Crime Team, how Churra Ex.P-7 could be recovered by the Appellant, in pursuance of the alleged disclosure statement Ex.PW-2/C, (which in fact, is in the form of a confessional statement) is a mystery. In all probability, the Churra Ex.P-7 could not have been found underneath the mattress by PWs 1 and 2 without connivance and in collusion with the police of PS Sarita Vihar. IO (PW-16) was content to show the recovery of the Churra from underneath the mattress; he was apparently oblivious of the visit of the Crime Team, or else he would have known that every article lying in the room, where the ghastly crime had been committed, must have been checked by the crime team.
24. The tainted investigation does not end here. According to prosecution, the Appellant had absconded after committing the crime. PW-16 IO, stated that he received secret information at 3:00 P.M. that the Appellant was present near Agra Canal. Before that he had forwarded the dead body to the AIIMS mortuary through Constable Shri Ram. They reached Agra Canal at 3:45 P.M. He, along with ASI Chaman Singh and Constable Lal Babu apprehended the Appellant. PW-16 gave the distance between spot and Agra Canal to be one kilometre. It is highly improbable that an accused, after committing the murder of his wife, would abscond, as is the prosecution version, and yet would roam about in the vicinity of the place of occurrence despite getting almost five hours, to escape from the area. The story of the Appellant's arrest, as deposed by the IO is falsified by PW-2, when he stated that upon reaching PS Sarita Vihar (to bring *Panni* (thermoplastic) to wrap the dead body), the Appellant was sitting in the PS. The thermoplastic must have been brought from PS to the spot either on foot or in some vehicle. It is bound to take some time.

25. According to PW-9, ASI Chaman Singh, the dead body was removed (for postmortem examination) at about 2:00 P.M., through HC Shri Ram. Thus, it can be inferred that PW-2 must have brought the thermoplastic from the PS before that time and had seen the Appellant in the Police Station sometime before 2:00 P.M. In any case the story of the Appellant's arrest at 3:45 P.M. in pursuance of secret information is falsified.
26. With the tainted investigation noticed above, what is to be considered is whether the evidence of the Appellant being last seen in the company of the deceased is worthy of credence. As stated earlier, the Appellant has explained that he left the house at 8:00 A.M.; PWs 1 and 2 also left for casting their vote, at that time. PW-1 was silent about the presence of her mother-in-law (i.e. PW-2's mother) in the house. In cross-examination, PW-1, however, showed her ignorance if her mother-in-law had cast her vote on 05.04.2007. Of course, PW-2 became wiser and stated, in his examination-in-chief that he had proceeded to the MCD Primary School to cast his vote along with his mother and his wife. In cross-examination, he stated that his mother had cast her vote on 05.04.2007. The police made inquiries from his mother at their residence. In view of the variations in the testimonies of PWs 1 and 2 (wife and husband), it is doubtful whether PW-2's mother had really accompanied PWs 1 and 2 to cast her vote. In any event, she was an important witness who was questioned, as per the testimony of PW-2. She was, however, neither cited as a witness nor produced in the Court. This casts a serious doubt upon the allegation about the Appellant being last seen with the deceased as alleged by the prosecution. In such circumstances, it would be unsafe to say that the chain of evidence is complete so as not to leave a reasonable ground for a conclusion consistent with the innocence of the accused. It would be apt to extract the observations of the Supreme Court in *Hanumant Govind Nargundkar*, where it was observed, inter alia, that:

*"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson to the jury in **Reg. v. Hodge** (1838) 2 Lew 227 where he said:-*

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete."

27. It must be remembered that suspicion, however, strong cannot take the place of proof. In view of the explanation offered by the Appellant coupled with the absence of examination of PW-2's mother, and the absence of any motive and false story of his (the Appellant's) abscondence grave doubts in prosecution version, arise.
28. In our view, the learned Additional Sessions Judge committed a serious error in considering the guilt of the Appellant simply on the "last seen" evidence, which was of a doubtful nature. Since such evidence (of last seen) was not of a clinching nature, learned Trial Court was not justified in holding the Appellant guilty of the serious charge of committing murder of his wife.
29. The impugned judgment, therefore, cannot be sustained; it is accordingly set aside. The appeal is hereby allowed. The Appellant is ordered to be set at liberty.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 15, 2011/vk