

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

RESERVED ON: 15.03.2012
PRONOUNCED ON: 30.03.2012

+ **Crl. A.1370/2011, Crl. M. (Bail) 1929/2011**
AMAN KUMAR RASTOGI Appellant

Through: Sh. R.K. Singh, Advocates.

versus

STATE Respondent

Through: Ms. Richa Kapoor, APP, for the State.

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. By this appeal, the appellant challenges his conviction recorded by the learned Additional Sessions Judge vide judgment dated 12.07.2011 and the order on sentence dated 09.08.2011 for committing offences under Sections 302/201/354 IPC.

2. The prosecution allegations are that on 25.6.2004 at 1:10 AM, on receipt of information (through PCR Ex. PW-8/A at 12:55 midnight), SI Ramesh Dutt Sharma and Constable Suresh went to House No. 4D, CC Block, Shalimar Bagh where they found the dead body of a woman. It was in an unauthorized portion of the house, in a room. The body was identified as that of 'A' (assumed name) by her father namely Mahender Muni.

Strangulation marks were visible on the neck of the body; blood was oozing out from the mouth. A slipper (*chappal*) lay near the bed, a key ring containing three keys, two locks and a helmet, another key ring with two keys and a small doll lay nearby. The window wire mesh (*jali*) had been removed. Upon inquiry, Mahender Muni told the police that his daughter 'A' used to wear four golden bangles, a gold chain and that the left (gold) ear ring that she used to wear, were missing. On inspection, the police found signs of struggle at the scene of crime. The prosecution further alleged that Inspector

K.C. Negi reached the spot (PW-20) and the case was registered.

3. The deceased's father viz. Mahender Muni suspected the Appellant, Aman Kumar Rastogi, (her brother in law). It was alleged that on sustained interrogation the Appellant confessed his guilt, to having committed A's murder. He allegedly led the police to the rooftop, and his disclosure led to the recovery of jewellery articles concealed by him. He was later arrested. The prosecution version was that the Appellant found the deceased alone at home, and tried to rape her; when she resisted, he feared exposure, strangled and killed her. The *rukka* or spot recording of the crime, pursuant to the intimation, and investigations, took place at 2:20 AM (Ex. PW-20/A). The FIR was registered at 2:30 AM (Ex. PW-13/A). The appellant's medical examination took place, and the report (Ex. PW-3/A) was produced during the trial.

4. After completion of investigations, during the course of which the police collected the post-mortem report, as well as the report of the forensics, and recorded the statements of various witnesses, the Appellant was charged with committing the crime. He denied guilt, and claimed trial.

During the proceedings, before the Trial Court, the prosecution examined 20 witnesses, and produced documents and material exhibits. After considering all these, the Trial Court convicted the Appellant for the offences, and sentenced him to various prison terms.

5. The Trial Court held that the Appellant, after committing the murder, in order to shield himself on account of his unsuccessful attempt to rape the deceased, called up PW-1, her father, and cooked up a story about forced entry by burglars; to lend authenticity to this, he took away the deceased's personal ornaments, and hid them on the roof. The Trial Court rested its conclusions on the recoveries made soon after the disclosure statement by the Appellant to the police, the identification of the articles by the deceased's father, the tell tale bite and scratch marks seen on the Appellant's body upon his medical examination, and certain other recoveries, such as that of a button, which appeared to have been prised or torn out during the deceased's death struggle. The button was identical to other buttons, recovered from a shirt, seized from the appellant. One of the shirt buttons was missing. The Court relied on the testimonies of PW-1, the deceased's father, PW-4, the Appellant's cousin, PW-20, the IO, the doctors who examined the deceased's body, and examined the appellant. Saliently, the Trial Court also noticed that the record unambiguously established that the Appellant was the only one apart from the deceased, at home on the fateful day, and had nothing to say, in support of his case, after conclusion of prosecution evidence. His explanation was unconvincing; consequently all the circumstances required to prove his guilt were established, and there was elimination of every hypothesis consistent with his innocence, during the trial.

6. Learned counsel for the Appellant argued that the Trial Court erred in believing the prosecution story too readily, and not examining whether indeed the wire mesh of the window (of the room) where the deceased's body lay, had been forced open. It was submitted that the motive sought to be alleged against the Appellant, i.e attempted rape, was not proved at all, because neither the post-mortem report Ex. PW-12/A nor the doctor who conducted the post mortem, spoke about such an attempt. More convincingly, the serological report (Ex. PW-10/A) ruled out semen signs on the clothes of the deceased. Therefore, the prosecution completely failed to prove the motive alleged against the accused.

7. The appellant's counsel contended that as far recovery of a button and recovery of torn shirt goes, they did not belong to the accused. The shirt was "planted" by the investigating officer, as evident from the testimony of Meenu Rastogi (DW1) that at that time the appellant wore a blue shirt. It is argued by Counsel that under these circumstances, the investigating officer ought to have photographed the accused at the time of his arrest. PW-5 claimed to have photographed the crime scene; yet no attempt to photograph the alleged recoveries was made. The appellant therefore, was entitled to the benefit of doubt.

8. It was argued on behalf of the Appellant that the prosecution did not present the entire story before the Court during trial. He submitted that PW-1 only partially supported the prosecution, as regards having reached the spot, pursuant to a phone call allegedly made by the accused, and then seen the body of his daughter. It was argued that the witness had levelled serious allegations of dowry harassment, and cruelty, on that account, to the deceased, and even filed a complaint before the Metropolitan Magistrate, on

10-9-2004; this had led to his examination under oath on 13-9-2004. The file and the statements were sent to the Sessions Judge, for being considered during the trial. Counsel highlighted that the prosecution witnesses' complete silence, and his admission about having made the complaint, to the Magistrate, which was marked during the trial, as Ex. PW-1/DA.

9. It was pointed out that in this complaint, PW-1 had alleged that at the insistence of his son in law, i.e deceased's husband, considerable amounts had been spent towards marriage; he also alleged that the Appellant had demanded Rs. 1,50,000/- to set up a partnership business, which he refused to give. He further alleged that the deceased had been ill treated, and had suffered abdominal pains. Her in laws did not give her proper medical attention, as a result of which the witness took her to his place for treatment. He also alleged that the deceased's in laws, had hatched a plot to get rid of her, and had conveniently disappeared from the premises. Aman, the Appellant was part of the conspiracy. All these facts, according to the witness (in his complaint) were not investigated by the police. The appellant argued, in this context, that the witness was completely silent about his suspicions, and did not utter a word about having levelled allegations about collusive investigations, to shield the other conspirators, and instead, played along with the prosecution version in his testimony during the trial.

10. It was urged that the Appellant's argument of false implication, and a biased investigation, was brushed aside wrongly by the Trial Court. In this context, it was submitted that the defence before the Trial Court was that someone broke in, robbed the deceased, who put up a fight, leading to her being strangled. Counsel urged that the Court overlooked a very material aspect, i.e the breaking open of the wire mesh attached to the window, which

was open. The missing ornaments, and the tell tale signs of struggle, which also suggested resistance put up by the deceased, was a reasonable explanation which had not even been investigated. The prosecution owed an explanation why such important leads had been ignored. Deliberately the police created a story and implicated the accused. Counsel referred to cross examination of PW-1, and submitted that the witness had admitted to the open window, when he went inside the room, and that it was wide enough to allow entry of a grown individual; the witness similarly admitted to the wire mesh having been tampered with. It was further submitted that the witnesses' deposition also suggested that some footprints could be made out; yet the police did not investigate or take samples. Similarly, a screw driver was recovered and seized from the spot; it did not surface during the trial, and the prosecution conveniently glossed over this omission.

11. It was next submitted that the Appellant had argued before the Trial Court – a submission again ignored altogether in the impugned judgment – that he, as elder brother of the deceased's husband, wanted the family to remain together, undivided. This was resented by PW-1, the deceased's father, who wanted her to move away from her husband's joint family, and set up a separate residence. Counsel pointed out to the cross examination of PW-1 in this regard further arguing that the Trial Court owed a duty to consider and advert to this aspect, in its impugned judgment.

12. It was submitted that there was a serious contradiction in the evidence of the prosecution witnesses. PW-4, who allegedly reached the spot earliest – even before PW-1, mentioned having been told by the Appellant about the attack, and testified to reaching the place. His phone was used by his younger brother, Pradeep, (who accompanied him) to inform the police. He

also claimed that jewellery was recovered from the terrace of the house. This witness did not support the prosecution version about recovery of the jewellery at the instance of the Appellant, and on the contrary said that it was recovered with the aid of the dog squad. He was completely silent about PW-1 reaching the spot, or the Appellant having allegedly made any disclosure statement leading to recovery of any article. Most importantly, he did not even say that PW-1 arrived there, or that a crowd had gathered, as claimed by the latter. Further, submitted the Appellant's counsel, the entire story of the prosecution that the whole case had been solved within two hours, was disproved by the fact that according to PW-1, the accused was taken away by the police at around 2:30 AM or so; yet he was shown to have been arrested much later, according to the record.

13. It was submitted that the deposition of PW-1 showed that a large crowd had gathered in the early hours of the morning, around the time he reached the spot. Yet, no member of the public was sought to be joined in the investigation. None of the recoveries were proved by any independent witness, though the eyewitness account showed that they were available at site. Learned counsel submitted that neither were the accused's fingerprints found on or near the body, and the police very conveniently built a story that some ornaments of the deceased were recovered at the accused's instance. This was the easiest part, and could be manipulated since no independent witness was joined to support the recoveries. Counsel also highlighted the discrepancy between the testimonies of prosecution witnesses by saying that Pradip, who, according to PW-4 was there at the spot, along with him, was never examined.

14. The appellant's counsel emphasized the fact that none of the deceased's family members, including the parents in law, and husband were present. The police never tried to find out where they had gone; they were not even examined neither were their statements recorded, during the investigation. This threw a cloud of suspicion in respect of their role, in the entire episode.

15. The learned APP argued that the question of false implication, or fabrication of evidence to falsely implicate the accused did not arise in the case. The earliest intimation about the incident was received by the police at 12:50 AM; the police went to the spot almost immediately. PW-1, the deceased's father also reached there soon after them. By then, PW-4, the Appellant's cousin had gone there. The deceased's husband, and other relatives too had reached there. The appellant did not dispute his presence in the premises. His explanation about a forcible robbery, and homicidal attack of the deceased had to be therefore, examined, since concededly, he was last seen in the premises, and no one else was present there, apart from him. The APP relied on the testimonies of PW-1 and the police witnesses, who deposed about the recovery of gold bangles and other valuable articles from the rooftop. It was submitted that in law, though the disclosure statement of an accused is inadmissible, any portion of such statement which led to the discovery of an article or a fact, was admissible. Here it was submitted that the police or the other witnesses were unaware about the place where the articles had been concealed. The Appellant's disclosure statement led to their recovery, from a place especially within his knowledge. This was a material incriminating circumstance, which pointed to his being the only individual culpable and criminally responsible. It also showed that his

motive was to sexually assault the deceased; when he was unsuccessful, he strangled her, and divested of her ornaments, and created circumstances to divert the attention of the police, with the story of illegal and forcible entry, into the premises.

16. The learned APP argued that the Appellant gave no explanation regarding the two injuries which were observed during his medical examination, which occurred soon after his arrest; it took place at 7:30 AM in the morning. Relying on the MLC, counsel pointed out that the doctor also had noticed scratch marks on the Appellant's chest, and a bite mark on his left finger. His silence about this incriminating circumstance, was a factor that weighed heavily against him.

17. Arguing that the evidence of PW-1 could not be discarded, as suggested by the Appellant's counsel, the APP submitted that if the witness, a distraught father, had at some stage, out of rage, or sorrow, or both, sought to implicate others, on account of alleged dowry harassment, that did not mean that the accused's role could be overlooked. The prosecution had examined those allegations, but was not of the opinion that there was sufficient evidence to go ahead. On the other hand, all the circumstances pointed to the complicity of only the accused/Appellant in this case, and did not establish the existence of a predetermined larger conspiracy theory suggested by the deceased's father at some other stage of the proceeding. What mattered to the Trial Court was the deposition of the witness in the court; in that PW-1 clearly implicated the Appellant, and cogently deposed about the recovery of articles, at his behest, as well as the circumstances of his arrest.

Analysis and Findings

18. The judicial record in this case would show that the information was received by the concerned Police Station around 12.55 AM (PW-8/A). PW-4, the accused's cousin deposed in Court about being informed that he had received a telephone call from the appellant around 11.30 PM. He was not challenged on this aspect. The appellant too does not deny having informed his cousin or for that matter having informed the deceased's father around 11.00 PM or so. The question then is whether the police – who concededly arrived at the spot at about 1.10 AM in the morning, had sufficient scope for manipulation. Now the *rukka* in this case and FIR were registered within an hour of the police arriving at the spot (i.e. *rukka* at 2:20 AM, Ex. PW-20/A and FIR at 2:30 AM; Ex. PW-13/A). The accused was taken to the hospital and medically examined at 7.30 AM – the time recorded in the Medico Legal Report (MLC, Ex. PW-3/A). PW-1 the deceased's father deposed that Aman had called him at around 11.40 PM. He reached the spot after 1.10 AM; the police had gone there by that time, and did not initially allow him inside the house. By then the deceased's husband i.e. Aman's brother had reached there. PW-1 in his testimony deposed that the appellant confessed to the crime and led the police to the terrace from where jewellery articles had been seized. These were kept concealed and not readily visible. The recovery took place fairly early, and the *rukka* and FIR were recorded within an hour of the police arriving at the crime scene, around 2.30 AM. These facts more or less foreclose the possibility of false implication as the accused was taken to the Jagjiwan Ram Memorial Hospital at 7.30 AM; most crucially the MLC notices bruises marks over the right side of upper chest and scratch marks; the doctor who recorded it also noticed a bite mark on the left middle finger. Although PW 3 was not the doctor who examined the

accused, during cross examination, he denied the suggestion that such injuries or marks could be the result of torture. However, the prosecution corroborated this aspect through the evidence of PW-20. This witness mentioned that the 4th button of the appellant's shirt had been broken and removed and that the pocket of the appellant's shirt was half torn. The witness PW -20 also mentioned about the broken tooth lying at the spot.

19. The Trial Court has gone to great lengths to connect the medical evidence in this case, with the accused, and even considered medical literature on this aspect. While such a course cannot be regarded as impermissible, at the same time, the court should adopt a cautious approach, in relying on medical texts alone, while theorizing on probabilities, especially when the medical expert's opinion may be limited, or his deposition may not have covered all such facets.

20. The post-mortem report (PW-12/A) as well as the testimony of the doctor, PW-12 established that the body had seven injuries i.e. one, a human teeth bite mark over the left cheek; two the right lower first incisor tooth was missing. The doctor's inspection revealed that the socket was fractured with local collection of haematoma and a contusion mark and indentation at the mucus aspect of the lower lip correspondingly reddish in colour. The third injury was a multiple reddish blow of irregular shape, varying in size 2 cm x 3 cm to 2 cm x 4 cm, over the outer aspect of both arms, shoulder forearm and upper chest. The fourth injury was on the neck which according to the doctor was consistent with manual strangulation over front of 1/3rd portion of upper neck with underlying tissue which found contused. The post-mortem report indicated haemotoma, as extending up to the tracheal rings.

The theory of torture, in the opinion of the Court, is inconsistent with the Appellant's version, during his defence. His wife, DW-1 deposed that the injuries were the result of his fall in the bathroom. She admitted that at the time when police came to the spot they found that there were scratch marks on the chest of her husband and when they inquired for the reason she told them that her husband had fallen down in the bathroom and got injured due to a fall on the bucket. She however admitted that her husband did not fall on the bucket in her presence. She said that it was probable that the scratch marks would be fresh but she does not remember. PW-18 and PW-20 mentioned about the accused having been taken to the hospital. Having regard to the overall circumstances, the question of the accused having been inflicted with injuries as a result of beating or police torture does not arise. Several police witnesses deposed about those injuries; the MLC Ex. PW-3/A speaks of it. Furthermore, the torture theory is not consistent with the deposition of DW-1, who admitted that the deceased had the injuries.

22. The appellant's counsel had placed great emphasis on the fact that the button seized from the spot as well as the shirt subsequently seized from him, did not match. It was also argued that the shirt which was described by DW-1 as a blue coloured one, did not match the description given by the other witnesses. Counsel further emphasised that during the trial, when the shirt was exhibited in court, it turned out to be brown and not cream-coloured as alleged by the prosecution. The Trial court's findings on this aspect are as follows:

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<u>Details of exhibits</u>	<u>Exhibit No.</u>	<u>Exhibit No.</u>	<u>Expert</u>
<u>Opinion</u>			

	<u>given in Ct.</u>	<u>of FSL</u>
Button found in the room of the deceased	Ex.P3	Ex.7 (Physics Division) The button was found similar to the buttons found present on the shirt of the accused Ex.P5 in respect of colour, texture, design, number of holes diameter of holes, thickness and the distance between the holes. This button recovered from the spot was from the shirt of the accused whose pocket was also found partially torn.

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The Trial Court also held that:

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the seizure memo of the shirt worn by the accused which is Ex.PW1/E shows that at the relevant point of time the accused was wearing a cream colour shirt, whose fourth button was missing which was converted into a pullanda after which it was seized and taken into possession which shirt is Ex.P5 and duly identified by the both Mahender Muni (PW1) and Gopesh Kumar (PW2). There is, therefore, no reason to doubt the same.

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And again, that:

“XXXXXX XXXXXX XXXXXX

Mahender Muni (PW1), Gopesh Kumar (PW2), SI R.D. Sharma (PW19) and Inspector K.C. Negi (PW20) have in their oral testimonies corroborated each other on the existence of the said injuries and also proved that the corresponding injuries on the body of the deceased. They have testified that when they

reached the house of the deceased, they found bruises and scratch marks on the right side chest of the accused and the bite mark on the left side of the deceased and strangulation marks on her neck. PW1 Mahender Muni and PW2 Gopesh Kumar have specifically mentioned having observed the teeth mark on the left side cheek of the deceased and also proved that a broken tooth was found at the spot. They also noticed bruises on the forearm and upper chest of the deceased and strangulation marks around her neck and dried blood in the nose. I may observe that the upper button of the shirt worn by the accused was found missing and the pocket of the shirt was also found partially torn which shirt was taken into possession by the police and is Ex.P5 and the button of the shirt is Ex.P3. It is evident that during the struggle and the resistance offered by the deceased, the button of the shirt of the accused came out and his pocket was also torn which explains the bruises present over the right side of the chest.

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Ex.PW-20/C is the crime team report. The team inspected the crime scene between 02:25 and 4:15 AM. It recorded the presence of the button, the helmet, and other articles, which were seized by the police. The relevant Forensic Report, Ex. PW-11/A, has this to say, about the button:

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RESULTS OF EXAMINATION

Examined the button Exhibit-7 and the buttons B1 to B7 present on Exhibit9 generally and under magnification. They were found to be possessing similar physical characteristics in respect of colour, texture, design, number of holds, diameter, thickness diameter of holes and distance between holes.

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Having regard to all these materials, this Court holds that the button produced before the Trial Court was appellant's, and recovered from the spot.

23. As far as recoveries are concerned, the prosecution case is that the accused was interrogated on which he disclosed his involvement in the present case which disclosure statement is Ex.PW19/C. This aspect is corroborated by the testimonies of PW-1, Gopesh Kumar (PW2), R.D. Sharma PW19 and PW-20. The disclosure statement of the accused, led to recovery of a screw driver, four gold bangles, (Ex. P-14) one gold chain, (Ex. P-15) one gold ear ring (Ex. P-16). All the witnesses, i.e PW-1, PW-2, PW-19 and PW-20, completely supported the recoveries made. While the recovery of articles by itself may be considered a weak or neutral circumstance, yet, the place where it is recovered from, as well as the article itself, may indicate the accused's desire to hide it. This aspect becomes material, and a larger Bench ruling on the question of admissibility of such a statement (in *K. Chinnaaswamy Reddy v State of A.P.* AIR 1962 SC 1788) held as follows:

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The words 'where he had hidden them' are not on a par with the words 'with which I stabbed the deceased' in the example given in the judgment of the Judicial Committee. These words (namely, where he had hidden them) have nothing to do with the past history of the crime and are distinctly related to the actual discovery that took place by virtue of that statement. It is however urged that in a case where the offence consists of possession even the words 'where he had hidden them' would be inadmissible as they would amount to an admission by the accused that he was in possession. There are in our opinion two answers to this argument. In the first place, Section 27 itself

says that where the statement distinctly relates to the discovery it will be admissible whether it amounts to a confession or not. In the second place, these words by themselves though they may show possession of the appellant would not prove the offence, for after the articles have been recovered, the prosecution has still to show that the articles recovered are connected with the crime, i.e., in this case, the prosecution will have to show that they are stolen property. We are therefore of opinion that the entire statement of the appellant (as well as of the other accused who stated that he had given the ornament to Bada Sab and would have it recovered from him) would be admissible in evidence and the Sessions Judge was wrong in ruling out part of it.

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It is also apparent from the record that PW-1, the deceased's father, had clearly mentioned that the gold ear ring of his daughter was missing. The Appellant's knowledge regarding the place where the articles were hidden, in view of his disclosure statement, which led to discovery of the articles, clearly amounts to a strong incriminating circumstance.

24. Thus, the prosecution's case, about the Appellant informing the police, even before PW-1 and the deceased's family went to the spot, the recovery of articles which belonged to the deceased, and were recovered pursuant to his statement, his knowledge of the place where they were hidden, and most importantly, the bite and scratch marks on his body as well as the lack of any reasonably convincing explanation, incriminate him.

25. The testimonies of PW-1, PW-4 and DW-1 are consistent with the accused's presence at the spot. There was no one else, at home, when the incident occurred. In these circumstances, it was incumbent upon him, to disclose to the court, at the relevant stage during the trial, how the incident

took place, and how, for that matter, he became aware of the tragedy. It is not disputed that the accused, and the deceased, as well as her family, lived in the same premises. Barring both, there was no one else. It was therefore, essential for the appellant to disclose how, and under what circumstances, he discovered the deceased's body. If indeed, there was an attack for the sake of robbery, and the attackers, who robbed the deceased of her valuables, and fled the premises, the recovery of the articles from the rooftop of the house defies logic and reason. No one would rob a woman, or rob a household of valuable articles, murder someone, and flee the spot, but after leaving behind the articles robbed or stolen. In these circumstances, the explanation given by the Appellant, is unconvincing.

26. In this case, this court is satisfied that the Trial Court has based its findings on sound reasoning. All the circumstances which point to the Appellant's guilt, were proved; every hypothesis of the Appellant's innocence was ruled out. For these reasons, the appeal has to fail; it is dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

MARCH 30, 2012

