

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on:07.01.2013

Judgment pronounced on:01.02.2013

CRL.A. 665/2009

MEHBOOB AHMED

..... Appellant

Through: Mr. S.K.Sethi, Advocate.

versus

STATE

..... Respondent

Through: Mr. Sanjay Lao, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. By the impugned judgment, dated 18.05.2009, the appellant Mehboob Ahmed has been convicted under Section 302 of the Indian Penal Code, 1860 (IPC, for short), for the murder of Rumana Praveen on 30.12.2005 in their residence, at H.No. F-277 Gali No.14 Khajuri Khas, Delhi. The appellant has been sentenced to life imprisonment and to pay fine of Rs.10,000/-, in a default of which, he is to undergo simple imprisonment, for six months.

2. The prosecution case is that on 30.12.2005, at around 10 a.m., the appellant, his step daughter- the deceased and Rubina Praveen (PW1), were present in his residence. Nasim Fatima (PW10), the mother of the deceased was at her shop, right outside their home. Noise of cries emanating from the inner room of the house, where the deceased and the appellant were sleeping, was heard by both PW1 and PW10. They rushed to the room and saw the appellant with a knife in his hand, smeared in blood. The deceased was lying on the floor with injuries on her neck and face and blood oozing profusely. PW10 tried to apprehend the appellant but he overpowered her, threw the knife and ran away. They raised alarm and Shehzad Ahmed (PW2), husband of PW1, came there. They took the deceased to Guru Teg Bahadur Hospital in a TSR where she was declared to have been brought dead.

**INCRIMINATING CIRCUMSTANCES THAT STAND ESTABLISHED
AGAINST THE APPELLANT**

Homicidal Death and Medical Testimony

3. It is undisputed that the deceased died a homicidal death in the morning of 30.12.2005. Dr. Arvind Kumar (PW19), who conducted the post mortem, has opined the cause of death to be hemorrhagic shock due to ante mortem injuries to neck and facial vessels caused by a sharp edged weapon.

4. The Post Mortem Report (Ex.PW19/A), conducted by Dr. Arvind Kumar, Senior Demonstrator, GTB Hospital, Shahdara, Delhi has recorded 19 injuries of which Injuries 'vi' to 'ix' were sufficient to cause death in the ordinary course of nature.

5. The injuries are as below:-

- i. Incise wound of size 4cm X 0.3cm X bone deep placed horizontally present over the right side of forehead on the hair line.
- ii. Incise wound of size 4.5cm X 0.3cm X bone deep with making cut marks on the underlying bone placed vertically present over the left temporal region 3 cm above and posterior to the upper lobe of left ear.
- iii. Superficial incise wound of size 5cm X 0.2cm X 0.2 cm making a flap of skin placed vertically in front of right ear.
- iv. Incise wound of size 3.5cm X 0.5cm X 0.5cm present right side of cheek bone placed obliquely starting 4cm medial to injury No.3 and extending upto right ala of nose.
- v. Incise wound of size 2cm X 3cm full thickness present over right ala of nose.

- vi. Incise wound of size 28cm X 0.9cm X 0.2cm starting from right angle of mandible going obliquely upward involving both the angle of mouth and left ear upper lobe cutting the vessel and muscle of the face of left side.
- vii. Incise wound of size 6cm X 0.2cm X bone deep placed obliquely over the right mandible.
- viii. Three incise wounds merging into each other making one wound of size 105cm X 1cm present right side of the neck, cutting the underlying neck muscles, right carotid vessels and trachea. The wound is 2.4 cm below the lower border of right year and 7cm above the calvical bone and 3cm right to the midline.
- ix. Incise wound of size 4cm X 0.2cm X 0.5cm placed horizontally just below the chin.
- x. Superficial incise wound of size 7cm X 0.2cm X 0.2cm present in front of neck below the thyroid cartilage.
- xi. Superficial incise wound of size 5.5cm X 0.1cm X 0.2CM present 2cm below the injury No.10.

- xii. Incise wound of size 7cm X 0.2cm X 0.8cm present over the palmer aspect of finger involving all the fingers except the thumb placed obliquely.
- xiii. Incise wound of size 1cm X 0.3cm X 0.8cm deep and 2cm width present over the palmer aspect of thumb, middle finger and ring finger of right hand.
- xiv. Superficial incise wound of size 13cm X 0.3cm X 0.1cm present over lateral aspect of left leg starting 4cm above the left heel going upward, obliquely up to the lower 1/3 of the shin.
- xv. Two superficial incise wound '7' shaped present on the lateral aspect of middle of left thigh. The horizontal arm is 9cm X 0.1cm X 0.1cm and other arm is 14cm X 0.1cm X 0.1cm. The pointed end is 23cm below the iliac crest, 17cm above the left knee.
- xvi. Over shape stab wound 0.7cm to 0.9cm in length and 0.4cm X 0.5cm in breadth, 1cm to 1.5cm in depth present over the lower aspect of right chest and lateral aspect of right chest. Four in number, present in an area of 11cm X 9cm. The upper wound is 0.8cm below and lateral to right nipple. The margin of all the wound is abraded.

- xvii. Oval shape stab wound 0.8cm X 0.3cm present right side of abdomen, 4cm right and lower to the umbilicus.
- xviii. Oval shape stab wound, three in number, 0.7 cm X 0.8cm in length, 0.3cm in width, 1cm to 1.5cm deep present lateral aspect of left forearm, 2cm below the lateral epicondyle of elbow joint, margin are abraded.
- xix. Oval shape stab wound, four in number, 0.8cm to 1cm long, 0.4cm broad, 1cm to 1.9cm deep placed in a line obliquely, the maximum distance between two is 14cm, the lower one is 17cm above the knee and upper most one is 27cm above the knee. Margins are abraded, present over the right thigh in front.

6. After examination of the knife (weapon of offence) PW19 has opined that Injury 'i' to 'xv' are possible with the knife i.e. the weapon given for examination.

Witnesses to the incident

7. The next question and issue is whether the appellant is responsible and had caused the said injuries. The prosecution in this regard relies upon statements of PW1 Rubina Praveen and PW10 Nasim Fatima. They claim that they were eye witnesses to the incident. PW1 is the real sister of the

deceased and was residing in the house of the appellant on the date of the incident. PW1 and PW10, the mother of the deceased, who were present in the house, have proved the presence of the appellant in the house at the time of incident. The offence having been committed in a dwelling house, the occupants of the same are natural witnesses to the incident and their presence is thus most probable in the instant case.

8. They have both affirmed that they saw the appellant with a knife (murder weapon), smeared in blood, standing next to the deceased and on the arrival of PW1 and PW10 in the room of the incident, he dropped the knife and ran away. Their testimony remains unshaken through the test of cross examination and is affirmed in all its material aspects.

9. It was submitted out through the statement of PW10 that there exist certain contradictions in her statement so as to establish her actual presence at the spot. Perusal of the rukka (Ex.PW10/A) read with the testimony of the witness shows that she states in the rukka that she was at her shop at the time when she heard cries coming from her house whereas in her testimony she has deposed that she was offering prayers. There is no material contradiction in both these statements. One does not make the other improbable. She could

be offering prayers in her shop. Either way her presence does not become doubtful due to this minute variance in her testimony.

10. It should also be pointed out that PW10 was cross examined on 28.08.2006, nearly 8 months after the incident. It is highly probable that she did not have perfect recollection of her exact spot at the time of incident. The human mind has imperfect memory and such like minor deviations is natural and not sufficient to make her presence doubtful. If we see these witnesses through microscope, it is true that the above mentioned contradictions would be visible but they have proved and established the case of the prosecution. The so called contradictions are not material and do not dent the prosecution case.

11. In a recent case reported as *Kathi Bharat Vajsur and Anr. v. State of Gujarat*, AIR 2012 SC 2163, the Supreme Court examined the law on material contradictions in the testimony of a witness and observed:

“19. This Court, in the case of *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra*, (2010) 13 SCC 657, summarized the law on material contradictions in evidence thus:

“Material contradictions

30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or

improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide *State v. Saravanan*)

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide *State of Rajasthan v. Rajendra Singh*)

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide *MahendraPratap Singh v. State of U.P.*)

33. In case, the complainant in the FIR or the witness in his statement Under Section 161 Code of Criminal Procedure, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide *State v. Sait*)

34. In *State of Rajasthan v. Kalki*, while dealing with this issue, this Court observed as under: (SCC p. 754, para 8)

“8. ... In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.”

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See *Syed Ibrahim v. State of A.P.*⁶ and *Arumugam v. State*)

36. In *Bihari Nath Goswami v. Shiv Kumar Singh* this Court examined the issue and held: (SCC p. 192, para 9)

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.””

12. Furthermore, no specific suggestion has been put to PW10 to explain any such contradiction. If there is an evident contradiction in the testimony of PW10 to establish her exact presence at the spot, then the same should have been put to her to enable her to explain the same. Whether she was at the shop or at home offering prayer, would have been explained if it were suggested to her. No such suggestion was put to her during her cross-examination.

13. In the case reported as *State of UP v. Nahar Singh*, AIR 1998 SC 1328, the Supreme Court has observed:

“13. It may be noted here that part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence PW-1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity.

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft quoted observation of Lord Herschell, L.C. in *Browne v. Dunn*, (1893) 6. The Reports 67 clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

14. The evidence of PW1 and PW10 which is reliable and worthy of credence has thus, justifiably been relied upon by the court.

Registration of FIR and Investigation

15. PW10 is the complainant in the case and the FIR was registered at her instance. Insp. B.S.Khushwah (PW17), the IO in this case, has deposed that on 30.12.2005 at around 10:45am, information was received vide DD No. 6-A that a girl had been stabbed. He reached the spot with SI Rakesh Kumar (PW14) and recorded statement of PW10 (Ex.PW10/A). Meanwhile, information was received regarding admission of the deceased in GTB Hospital. He rushed to the hospital, collected her MLC and prepared rukka vide endorsement Ex.PW 5/A. The FIR was registered at about 1:30 p.m. Thus we do not perceive that the registration of the FIR is belated or delayed.

16. The crime team and photographer were summoned at the spot. The crime team inspected the spot and took photographs. Vide memo Ex.PW 9/A the IO seized blood stained churri, sample of dari and bedsheet, blood samples, earth samples and earth control and prepared site plan of the spot at the instance of PW10.

17. The body of the deceased was identified by Suhail Adnan (PW3), husband of the deceased and Modh Khalid (PW4), brother of the deceased vide Ex.PW3/A and Ex.PW4/A respectively.

Disclosure and Recovery

18. The appellant was arrested on 31.12.2005 vide arrest memo Ex PW-14/B by Insp. B.S. Khushwah, PW17, in front of Raja Dhaba, Loni. His personal search was conducted vide memo Ex.PW14/C and disclosure statement Ex.PW14/D was recorded wherein he disclosed that he could get recovered the blood stained kurta pajama and kababseak behind a toilet on platform No.2 of Shahdara Railway Station.

19. It strongly emerges from the evidence on record that there are two weapons of offence. The knife that was seized from the crime scene itself and the kababseak that was got recovered by the appellant. The post mortem report records 19 external injuries on the person of the deceased. PW19, Dr. Arvind has examined the knife and has opined that Injuries *i-xv* are possible by the weapon of offence i.e. the knife. After examination of the iron rod (seak), on subsequent opinion, PW19 has opined that Injuries '*xvi*' to '*xix*' are possible by the weapon of offence i.e the iron rod (seak).

20. Both PW1 and PW10 have deposed that they saw the appellant in the room, holding a knife in his hand and on seeing them enter the room, he dropped the knife and ran away.

21. It is highly unnatural that the appellant would take one weapon of offence i.e. the iron rod (seak) with him in the process of fleeing the crime scene and at the same time drop the other weapon.

22. Another material irregularity in this regard is the testimony of PW10 who has deposed the following in her cross examination:

“At this state, a parcel duly sealed with Court seal is opened and a plastic jar is taken out. It is containing dari piece and bedsheet piece. Those pieces are Ex.P2/1 to 2 and Ex.P3 which are the same, which were cut and seized by the police from my house. Another parcel duly sealed with court seal is opened and a plastic jar containing a dagger is taken out. Dagger Ex.P1 is the same, which was seized by the police from my house. I had seen this dagger in the hands of accused, when I entered the inner room of my house, as detailed above. At the time of incident, accused was wearing kurta and pyjama. I can identify the same, if shown to me. Another parcel duly sealed with court seal is opened and kurta-pyjama are taken out. Kurta Ex.P5 and Pyjama Ex.P6 are the same, which the accused was wearing at that time.

XXXXXXXXXX by Sh. Arun Sharma, Advocate for the accused.

I cannot say whether my supplementary statements were recorded by the police or not. I had put my thumb impressions over all my statements. (At this juncture, defence counsel wants copies of those supplementary statements and Ld. Prosecutor replied that only one statement of the witness bears her thumb impression). I had not stated before the police in my statement

anything about seizure of kurta-pyjama. Kurta Ex.P5 and pyjama Ex.P6 were seized by the police from our house. It is correct that clothes of the accused were kept on pegs in the house. I am not aware whether police had recorded the factum of seizure of kurta-pyjama in my statement or not. Kurta Ex.P5 and pyjama Ex.P6 were lying in the room where blood was lying. Police reached our house 9.30-10 a.m.”

(Emphasis supplied)

23. The witness correctly identifies the clothes of the appellant worn at the time of the incident. These same clothes i.e. blood stained kurta and pajama were gotten recovered by the appellant through his disclosure statement. The fact that the witness states that the same kurta pajama Ex.P5 and Ex.P6 was lying in the room where the blood was lying makes the recovery notably doubtful and gives reason to believe that they may have been planted. We ignore the disclosure and consequent alleged recovery.

24. The Supreme Court on the aspect of re discovery of discovered fact, in case reported as *Sukhvinder Singh v. State of Punjab*, (1994) 5 SCC 152 has observed:

“17. The first piece of circumstantial evidence relied upon against them revolves around the recovery of the dead body of Varun Kumar from the house of Sukhvinder Singh and his parents on the disclosure statement made by Sukhvinder Singh, Sukhdev Pal and Puran Chand Ex. PW10/B, Ex. PW10/C and Ex. PW10/D respectively. We are surprised at the manner in which the disclosure statements were recorded by the investigating agency and relied upon by the Designated Court. That Section 27 of the Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence is not in doubt. However, vide Section

27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered. Section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse-even abuse-of the provisions of Section 27 of the Evidence Act.”

25. The testimony of PW10 discloses that the kurta pyjama was seized by the police from her house itself. The statement of PW10 shows that she is truthful and did not merely go by the police version and was not tutored. Also, close scrutiny of the evidence on record makes the possibility of the appellant running away with the iron rod (seak), at a time when he is seen dropping the knife, very doubtful. The dual effect of both these circumstances make the alleged recovery very suspicious and it cannot be relied upon. Thus we exclude that disclosure and recoveries from the incriminating material which can be relied upon, but as noticed this does not effect the final finding.

Motive and Conduct of the appellant

26. It was alleged that the appellant had sexual contact forcibly with the deceased, prior to her marriage with PW3. PW10 has stated that such information was communicated to her by the deceased on a previous occasion after which she confronted the appellant. However, the appellant threatened to divorce her and therefore out of fear for herself and disgrace to

family name she did not disclose this fact to anyone. This fact has been affirmed by PW3 in his cross examination.

27. PW1 has deposed that the deceased had confided in her regarding the same. PW1 has further stated that the appellant had tried to sexually exploit her as well about which she had informed her husband and on his advice she had stopped visiting the room of the appellant thereafter.

Absconder

28. It is also established that the appellant was absconding from his house after the incident till he was arrested on 31.12.2005 at 8:45p.m. as per his arrest memo Ex.PW14/B.

Examination of the appellant

29. The appellant has denied all allegations against him and stated that he has been falsely implicated in this case. He also alleges that PW9 was having intimate relations with his wife and therefore has deposed against him.

30. The appellant has taken the plea of alibi to prove his innocence and in his defence, he has examined his brother Aziz Ahmed DW1.

31. Aziz Ahmed DW1 has deposed that the appellant left his house at 7am on the date of incident. The defence witness has only stated about the

appellant's presence at the spot till about 7/7:15a.m. The incident occurred somewhere between 9:30 - 10a.m. No other person has been examined to establish the plea of alibi. It is noteworthy to mention that on a suggestion put to PW10 that the appellant left his home at 8am, the same has been denied. A suggestion was also put to PW10 that the appellant offered tea to a certain Hazi Shamsuddin at around 8a.m. and then left for work. This has also been denied by PW10. Further, the appellant has not examined any Hazi Shamsuddin to prove the same.

32. Section 106 of the Indian Evidence Act casts the burden to prove a fact especially within the knowledge of any person upon such person. Thus, in view of the evidence put forth, the appellant has not been able to establish his plea of alibi to the satisfaction of this Court.

33. It is also to be seen that the explanation of false implication is extremely vague and unconvincing. The appellant claims that his wife was pressurizing him to transfer his property in her name. The testimony of DW1 does not even mention the name of PW9 or any other circumstance to show that PW10 was having any intimate relations with PW9. Hence, this allegation has gone unsubstantiated.

34. The appellant has explained another reason for PW10 to falsely implicate him. He alleges that PW10 used to criminally intimidate him and pressurized him to forcibly occupy the room that was the property of his brother. She also used to fight with the appellant to transfer the said room in her name and since he did not accede to the same, she has falsely implicated him in this case. This explanation is quite absurd. Firstly, if PW10 wanted the property as desperately as the appellant claims, it would make more sense for her to threaten the appellant's brother and falsely implicate him. Secondly, and more importantly it is quite farfetched that she would let off the real culprit behind her daughter's murder in order to falsely implicate the appellant, who is none other than her own husband.

35. There is therefore, no evidence to suggest the possibility of the same and to believe this to be the reason for falsely implicating the appellant.

Injuries on appellant

36. PW20 has deposed that the appellant was brought to GTB Hospital on 31.12.2005 for medical examination and the following injuries were noted on his person:

- i) Old multiple superficial cut incised marks present at anterior aspect of neck just at the level of thyroid cartridge. Injuries were about 24 hours old.

37. The appellant has explained that the same were caused by a razor while shaving. Again it worth mentioning that despite opportunity, PW20 was not cross examined and therefore, no suggestion was put to him as to whether the said injury could have been caused by a razor to ascertain the truthfulness of the appellant's explanation.

38. Since the appellant was arrested the very next day and taken for medical examination, the doctor's opinion about the injuries on his neck and the time when they were sustained assume importance as a further incriminating circumstance against the appellant and he has not been able to explain the same. The said injuries may have been sustained by the appellant in the course of struggle between the appellant and the deceased at the time of the incident. However, the doctor who had examined these injuries has not opined on the cause of such injuries and at the same time the appellant has not been able to prove his explanation to the same.

39. De hors the fact that we disbelieve the recovery effected at instance of the appellant, we are of the considered view that the evidence adduced by the prosecution at the trial is sufficient to establish the guilt of the appellant before us beyond all reasonable doubt. We say so in view of the ocular testimony of PW1, which is confirmed and corroborated by PW10 in all its

material aspects. Further, motive for the murder proved by the combined testimony of PW1, PW10 and PW3 is highly incriminating evidence established against the appellant. The appellant has neither been able to prove his plea of alibi nor sufficiently explained the injuries sustained by him soon after the incident of murder.

40. The appeal is accordingly dismissed. Conviction and sentence awarded are upheld and maintained.

SIDDHARTH MRIDUL, J.

SANJIV KHANNA, J.

FEBRUARY 01, 2013

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