

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

% *Date of decision: August 22, 2014*

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CRL.A No.1092/2013

YOGENDER CHOUDHARY Appellant

Represented by: Mr. Rajendra Prasad, Adv. with
Appellant in custody.

Versus

STATE (GOVT. OF NCT) DELHI Respondent

Represented by: Ms. Aashaa Tiwari, APP for the
State.
SI Ajay Kumar, PS Dabri

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Yogender Choudhary is convicted for the murder of deceased Sonu, wife of Debashish Dey, and robbery, on the strength of the statement of Debashish Dey, the mobile phone call records and post mortem report.

2. Learned counsel for the appellant assails the judgment on the ground that the mobile phone calls have been wrongly analyzed by the learned trial court as no evidence has been led to show that the appellant was using the mobile phone from which it is sought to be proved that the appellant was in contact with the deceased. The eye witness Debashish is wholly unreliable as he himself has stated that after seeing the incident he ran away to Calcutta and came back belatedly.

3. The investigation was set into motion on receipt of DD No. 6A on 16.09.2009 at P.S. Dabri, informing that a person was found lying dead in House No.D-40, Gali No. 8, Dashrathpuri, Palam, Dabri and foul smell was emanating. ASI Kailash Chand (PW-20) and Constable Sushil Kumar (PW-15) reached the spot and found the main door of the house closed but the back door was open. On the ground floor they found two rooms and on the back side room a rotten dead body of a lady in half naked condition was found lying. The hands of the dead body were tied on the back side and blood was scattered on the floor. The blood was also found on the wall. Some broken pieces of earthen pot (gamla) were also found on the bed and the floor and the same were strained with blood. No eye witness was found and on local inquiry it was revealed that the deceased was living with her husband in the tenanted premises. Her husband was tried to be located, but in vain. Later on 18.09.2009, the husband of the deceased joined the investigation and informed that his wife was a prostitute and that on 11.09.2009 his wife Ruma @Sonu had received a call at around 4 P.M. on her mobile phone no. 9911024781, and the customer asked his wife as to who were present in the house. On this enquiry, his wife told the customer that her husband was present. The customer told his wife that he was a shy person and does not want to see any other person in the house. He further stated that his wife told the person that she will send her husband outside and disconnected the phone. When he asked his wife as to who was calling on her phone, she replied that the phone was of Poonam who was known to him. His wife made a call and asked the customer as to how much time they will take to come to the house on which they informed that they will be coming very soon. He left the house and after 10-15 minutes his wife made a

call to him on his phone no. 9250848472 and told him that the customer had come. He gave a missed call after fifteen minutes on the mobile no. 9911024781 of his wife, enquiring as to how much time will be taken by the customer, his wife stated that talks were going on. He again made a call to his wife after about 20-25 minutes however she did not pick the phone. After waiting for about 30-35 minutes, he went to his house and found back side of the house closed but not bolted. He opened the door and entered into the house. He found the lights of the inner room were on, however, lights of the outer room were off. When he went inside the room, he saw that Poonam who was known to her and a person having long hair were present in the inner room and both hands of his wife were tied at her back and the blood was scattered. He got scared and fled away from there. He did not disclose anything to the neighbours. On 15.09.2009 he went to the house of his sister-in-law where she and his brother-in-law told him to go to the police, however, he stated that since he was involved in the flesh trade, nobody would rely on his statement. On 17.09.2009 he went to his house and checked the belongings in the almirah and found Rs.6,000/- and the election card of the deceased missing. He also informed that a gold chain of the deceased with a locket was also found missing.

4. The version is a fantasy and is unbelievable.
5. Pursuant to the statement of Debashish, the appellant Yogender Choudhary was arrested, and at his instance a knife was recovered from the room where the dead body was lying under the earthen pot. Poonam could not be arrested during trial and she has been declared a proclaimed offender.
6. Thus, the prosecution case rests on the testimony of Debashish (PW-

10) purported to be an eye witness. This witness deposed in sync with his statement recorded under Section 161 Cr.P.C. He further stated that his wife used to work as a prostitute.

7. There is no gainsaying that despite the unusual conduct of this witness in running away from the place and not informing the police in case his version stands corroborated, conviction can be based.

8. It is the case of the prosecution that phone no. 9911024781 though in the name of Sushil Kumar was used by the deceased, phone no. 9210574508 though in the name of Jogendra was used by Yogender Choudhary and phone no. 9250848472 belongs to Debashish, husband of the deceased.

9. Shri M.N. Vijayan (PW-13) Nodal Officer, Tata Teleservices Ltd. appeared in the witness and exhibited the call details of mobile no. 9210574508 which was subscribed in the name of Shri Jogendra, son of Shri Anant Ram, r/o 950, Block-1, Mangolpuri, Delhi. Shri Jogendra Singh, s/o Shri Anant Ram appeared as PW-17 and stated that he had one Tata mobile phone no. 9268040717 and he had no information about another mobile no.. He further stated that he did not give his identity card etc., to anyone for obtaining any mobile connection. Thus, the so called mobile no. 9210574508, which was allegedly used by Yogender Choudhary as per the prosecution has not been connected to him by this evidence. Even Gurpreet PW-21 the brother-in-law of Yogender states that he did not remember the exact number of mobile phone of Yogender. On a leading question put by the learned APP he says that it was correct that mobile number of Gurmeet Kaur was 9210574508. It is highly unnatural that a man would be fixing appointment with a woman for sexual favours from the mobile phone of his

wife. Hence, reliance on the call details of phone no. 9268040717 by the learned trial court to connect the calls between the deceased and the Yogender Choudhary was wholly misconceived.

10. As per the post mortem report the cause of death was due to anoxia i.e., lack of oxygen because of cut throat injury by a sharp edged weapon like knife. The ligature strangulation was practiced after cut throat injury. The head injury was caused by throwing of earthen flower pots upon her head, which was ante mortem in nature. Manner of death was homicidal and the time since death was 2-3 days prior to recovery of body.

11. The dead body of the deceased was recovered on 16.09.2009, pursuant to DD No. 6A regarding foul smell emanating from the house, whereas, as per the testimony of Debashish the alleged incident took place in the evening of 11.09.2009. This version is contrary to the expert opinion of Dr. B.N. Mishra, who conducted the post mortem and exhibited the report as Ex.PW05/A. He also opined that time since death was approximately 2-3 days prior to the recovery of the body. This belies the version of Debashish as according to him death took place 5 days prior to recovery of the body.

12. The only other evidence available on record is of recovery of a knife at the instance of Yogender Choudhary from beneath the earthen pot lying in the room from where dead body of the deceased was recovered. It is highly unnatural that despite recovery of dead body on 16.09.2009 with cut throat injury by a sharp edged weapon, the police made no efforts to trace incriminating article lying in the same room from under the earthen pot (Gamla) till 28.09.2009 when Yogender Choudhary was arrested especially when the length of the knife was around 19 c.m. Thus, we are not inclined to believe that the knife was recovered at the instance of Yogender

Choudhary.

13. Yogender Choudhary also stand convicted for the offences under Sections 394/397 IPC. The recovery of knife at the instance of Yogender Choudhary as noted above has already been disbelieved. Debashish in his statement has deposed that on September 17, 2009 he went to his house and checked the belongings in almirah and found ₹6000/-, gold chain with locket of the deceased and election card of the deceased were missing. It is the case of the prosecution that at the instance of Yogender Choudhary a polythene containing some documents i.e. 5-6 pages were recovered from the beneath of water tank of the house No.187, Gali No.63, Vikram Vihar, Chandan Nagar. This version of Debashish is highly unnatural. On September 16, 2009 the dead body of deceased was recovered and recoveries were made from the room. It is not the case of the prosecution that the rooms were lying abandoned for anybody to have entered the same. This also belies the version of Debashish that on September 11, 2009 he went away to Calcutta and came back only when he was impressed by his relatives that he should disclose facts to the police. There is no explanation that despite having visited the room on September 17, 2009 why he waited till September 18, 2009 to make his statement. Further no recovery of cash or chain has been made from Yogender Choudhary and the fact that photocopies of some documents i.e. one election form with the photograph of Ruma Dey, one rent agreement with photograph of Debashish Dey and an affidavit of Debashish Dey which were allegedly recovered would be stolen from the house of the deceased by Yogender Choudhary does not stand to reason.

14. Hence the evidence of the eye witness Debashish being not reliable

and not corroborated even in material particulars coupled with his unnatural conduct on all counts, we are of the considered view that the appellant deserves to be given the benefit of doubt. Consequently, Yogender Choudhary is acquitted of the charge of Section 302/394/397/34 IPC framed against him. The impugned judgment of conviction and order on sentence are set aside.

15. The appeal is disposed of. The Supdt. Jail, Tihar will release the appellant forthwith, if not required in any other case.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 22, 2014
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