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

+ **CRL.A. 805/2017 & CrI.M.(B).1503/2017**

UMESH KUMAR

.....Appellant

Through: Mr. K. Singhal, Advocate

versus

STATE NCT OF DELHI

.....Respondent

Through: Ms. Radhika Kolluru, APP

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE REKHA PALLI

JUDGMENT

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07.11.2017

Dr. S. Muralidhar, J.:

1. This is an appeal by Umesh Kumar against the judgment dated 5th June 2017 passed by the learned Additional Sessions Judge ('ASJ'), North District, Rohini Courts in Sessions Case No. 59027 of 2016 convicting him for the offence under Section 302 IPC for committing the murder of his wife Pinki and the impugned order on sentence dated 4th July 2017 whereby he was sentenced to undergo imprisonment for life and to pay a fine of Rs. 25,000/- and, in default of payment of fine, to undergo simple imprisonment for a further period of one year.

Case of the prosecution

2. The case of the prosecution was that on 1st February 2016, information

was received by the Central Police Control Room ('CPCR') at 11.34 am that at Swaroop Vihar, Gali No.2 "*ek lady ne phasi laga li*". The message was transmitted to two police vans - CMD-58 and TGR-53A - at 11.44 am on the same day. The police van CMB-58 reached the spot at 12.06:59 pm. The report received from the said police van on 1st February, 2016 at 12.17: 37 was as under:

"Call is true. Lady pinki w/o umesh age 25 sal, r/o above hai usne gale me chunni se fanda laga kar farsh par padi hai kahan par band kar fanshi lagai hai nahi pata hai Husband Umesh ne bataya ki mai apne bache ko chhodne school gaya tha aur abhi aya hoon. SHO with staff mouka par c/r infd. 01/02/2016 12.34:32 cat ambulance, n-19, mouka par he dead declare kar diya hai"

3. On the basis of the said information, DD No.11A was recorded. Immediately preceding the above recording of information by the CPCR was the call made to the police by Bhuvneshwar Gupta (PW8), the brother of the Appellant. He stated, in his examination in chief, that he made a call at number 100 and told the police that "*meri bhabhi ne phasi laga li hai.*" From the Call Detail Record ('CDR') of the phone used by the Appellant (Ex.PW-6/H), it is seen that he too made a call to the police at 11.56 am.

4. As soon as the above information was received from the police van which reached the spot, Assistant Sub-Inspector ('ASI') Rajbir (PW16) along with other staff of the Mobile Crime Team attached to the Police Station ('PS') Maurya Enclave, Delhi reached Khasra No.1303, Gali No.2, Swaroop Vihar, near Ideal Public School, Swaroop Nagar where he met ASI Dalip Singh (PW 26) and other staff. PW16, in his deposition, stated that on reaching the

place of occurrence, they found the dead body of a female aged about 30/-32 years with head towards the east and legs towards the west. A piece of plywood of the sofa was found broken and lying in the said room. One chappal and broken pieces of bangles were found near the dead body. To the south side of the dead body, one chappal and yellow colour *chunni* was found near the dead body.

5. ASI Dalip Singh (PW26), in his deposition, stated that even before the crime team reached the spot, he had recorded the statement of Vinod Kumar Gupta (PW9), father of the deceased Pinki, wife of the Appellant. That statement was marked as Ex. PW9/B. PW26 stated that the Appellant was present in the ground floor of the house. His custody was entrusted to Constable Rajender Kumar (PW18). The rukka was prepared and handed over to Constable Vijay (PW19) for the purposes of registration of an FIR. After PW19 returned to the spot and handed over a copy of the FIR and the original rukka to Inspector B.R. Meena (PW27), the Investigating Officer ('IO') who had by then reached the spot.

6. From the evidence of Constable Rajender Kumar (PW18), it is seen that he along with the IO took the dead body of the deceased Pinki to BJRM Hospital where the MLC was prepared. In his cross examination, PW18 confirmed that during this time "Umesh was present at the spot during this period and was in my custody. The accused was not arrested at that time." He further mentioned that while leaving the spot for the hospital, he "handed over the custody of the accused to Constable Vijay." In his evidence, Constable Vijay (PW19) states that the dead body was removed from the

scene of crime at about 5 pm. The IO remained at the spot upto 6 pm and then PW19, the IO and the accused left the spot. He states that at the PS, the IO interrogated the Appellant and then allowed him to go.

7. From the Malkhana Register, which has been marked as Ex. PW17/A and Ex. PW17/B, it is seen that the recoveries effected from the spot were deposited there. The register shows that on 1st February 2016, the following articles were deposited:

- (i) Chappals
- (ii) Ear rings
- (iii) Exhibits handed over by the doctors at the hospital.
- (iv) Piece of ply
- (v) Hair clip
- (vi) Broken bangles
- (vii) Button

8. On 2nd February 2016, the following articles were shown to have been deposited in the Malkhana:

- (viii) Shirt got recovered from the accused.
- (ix) An SD Memory Card stated to have been recovered from the shirt of the accused, on his pointing out and
- (x) Exhibits as well as report of post-mortem which was conducted on 2nd February, 2016.

9. The post-mortem of the deceased was conducted by Dr. N.K. Gunjan (PW13). The external injuries noted in the post-mortem report (Ex.

PW13/A) were as under:

- “1. Boggy swelling was present over bilateral occipital region.
 2. A reddish brown coloured, abraded, dried, hard parchment like ligature mark was present around the neck. In the centre, mark was 03cm broad and 06cm below chin. On left side, mark was going horizontally backward. It was 2.5cm broad and present 4.5cm below angle of mandible, and further it was 2.5cm broad and 06cm below ear lobule. On right side, mark was going horizontally backward. It was 03cm broad and present 4cm below angle of mandible, and further it was 3.5cm broad and 5.5cm below ear lobule. The mark was continuous on the back of neck.
 3. Reddish contusion of size 04cm X 04cm was present on inner aspect of right thigh, 12cm above the knee.
 4. Reddish contusion of size 06cm X 03cm was present on anterior aspect of left thigh, 16cm above the knee.
 5. Reddish contusion of size 02cm X 02cm was present on outer aspect of left thigh, 10cm above the knee.
10. The internal examination of the neck of the deceased showed that the soft tissues and muscles beneath the ligature mark were showing contusion at places. The mucosa in the pharynx, larynx and trachea showed petechial haemorrhages and congestion. The medical opinion was that the cause of death was “asphyxia due to ante-mortem ligature strangulation.” The adhesive lift from the neck region, the clothes of the deceased etc. were handed over to the police and deposited in the Malkhana thereafter.
11. During the course of investigation, the police recorded the statements of Rahul (PW2) (brother of the deceased), Goldi @ Kamal (PW3) (the elder

son of the accused and the deceased) who was aged around 8 years, Yatender (PW4) (the landlord who lived on the floor above the residence of the deceased). The statements of Bhuvneshwar Gupta (PW8) (the brother of the accused), Vinod Kumar (PW9) and Sushma (PW10) (parents of the deceased) were also recorded. The statements of PW3 and PW10 were recorded under Section 164 CrPC as well.

12. The police also recorded on 4th April 2016, nearly two months after the incident, the statement of Sandeep (PW12), who was working as a peon in Guru Jambheshwar University, Hissar. He also worked with his brother in providing labourers for *jagrans* and marriages. He disclosed that the deceased, Pinki, and her sister, Kajal, would undertake the task of providing flower decorations on such occasions. This statement was marked as Ex. PW12/DA. PW12 stated that the deceased used to come from Delhi to work on such occasions. Both of them fell in love with each other, used to frequently converse on the phone and also had physical relations. PW12 stated that the Appellant began to suspect his wife, Pinki, and this led to frequent quarrels between them. Pinki was beaten by the Appellant. PW12 disclosed his mobile number and the two mobile numbers used by Pinki on which they used to frequently have conversations. PW12 further stated that he learnt that the Appellant had murdered Pinki after learning about their affair.

13. Kajal, the sister of Pinki who also worked for PW12 in providing flower arrangements for marriages, was not examined by the police and not tendered as a prosecution witness.

14. The case of the prosecution is that the Appellant, who used to sell *chole kulche* on a cart, and his wife were married for about 12 years as on the date of incident. They had two children, the elder being Goldy @ Kamal (PW3) who was aged 8 at the time of the incident and the younger being Vansh. At the time of the incident, PW3 was not present but the younger son was.

15. According to the prosecution, there used to be frequent quarrels between the Appellant and his wife and there were instances where he beat her. It was sought to be established that even just two months prior to her death, there was one such incident when the Appellant beat Pinki and pressed her neck. Even on the date of incident, it was sought to be established through the evidence of the landlord (PW4) that there was a heated and noisy quarrel between the Appellant and his wife Pinki.

16. The further case of the prosecution is that the Appellant, on the date of the incident, listened to intimate conversations between PW12 and Pinki recorded on the mobile phone and that he removed the SD memory card which contained such conversations and kept it in his shirt pocket. According to the prosecution, the motive for commission of the crime by the Appellant was the affair between his wife and PW12.

PWs turn hostile

17. There were as many as 27 prosecution witnesses. On his part, the Appellant examined his sister-in-law, Jyoti Gupta, as DW1. She stated that on the date of the incident, the Appellant visited the house of his brother and

sister-in-law at Nathu Colony, which was a 5-7 minute walk from his own, between 10.30 am and 11 am for breakfast. Thereafter, the Appellant left for his home at around 11.30 am.

18. It is significant that the PWs who did not support the case of the prosecution during their deposition in Court were PW3, PW4, PW9 and PW10.

19. PW3, the son of the Appellant and the deceased, aged around 8 years, in his statement under Section 164 CrPC was asked only a few questions. In response to the first question as to what he wished to say, he replied that his father used to beat his mother every day. In response to another question, he stated that his father would beat the deceased with his hands. However, in his deposition in the Court, PW3 did not support the prosecution. The relevant portion of his deposition in the Court reads as under:

“Q Where are you residing presently?

Ans. I am residing along with my maternal grandmother (Nani)

Q. With whom you have come to court?

Ans. I had come to court with maternal grandmother (Nani).

Q. Whether your father used to beat and quarrel with our mother?

Ans. No.

Q. Whether your father is present in the court?

Ans. Yes (correctly identified).”

20. For some reason, the learned Additional Public Prosecutor ('Addl PP') who was conducting the trial did not choose to confront PW3 with his previous statement under Section 164 Cr PC. The Addl PP also did not get PW3 declared hostile although he plainly did not support the prosecution.

21. The next witness who turned hostile was the landlord (PW4). He stated that on the morning of the date of the incident, he was getting ready to go to his office and the Appellant was also getting ready to go to his work. PW4 further stated thus:

"I left my house and went to my office, where I received a call of my wife, who informed me that wife of Umesh had hanged (*phansi laga li hai*). I came back to my house where police officials were present. Police made inquiries from me and I informed to them that I had gone to my office. I don't want to say anything more in this case."

22. Sensing that PW4 was not supporting the case of the prosecution, the Addl PP sought, and was permitted, to cross-examine him. PW4, in his cross-examination by the Addl PP, denied having told the police that he was present at around 10.30 am or 11 am when he heard the noise of quarrel between the Appellant and his wife Pinki or that PW4 banged the door which was not opened by the accused despite him raising his voice. He was confronted with his previous statement Ex.PW4/A and yet, he stuck to his denial that he had heard a quarrel between the Appellant and his wife Pinki on 1st February 2016. In his cross-examination by the defence, he maintained that there was no quarrel between the Appellant and his wife and that they had a very cordial relationship. He maintained that "It is correct that accused was living peacefully in my tenanted accommodation."

23. The next two PWs who declined to support the prosecution were the parents of the deceased. The father (PW9), in his examination-in-chief, declined to say anything against the Appellant. He confirmed that the Appellant had called him at about 10.30 to 11 am on 1st February, 2016 informing him that the deceased had “hanged herself”. Again, the Addl PP was permitted to cross examine this witness.

24. The transcript of the evidence shows that the answers given by PW9 during his cross-examination by the Addl PP were recorded as if they were his positive statements when in fact he was confronted with his previous statement to the police. For instance, PW9 stated:

“It is correct that accused Umesh used to doubt on the character of my daughter Pinki, he used to give her beatings. It is correct that whenever we received information that Pinki was beaten by accused, I along with my wife went to the tenanted room of the accused where we used to make both of them to understand, accused used to complain us that Pinki have illicit relation with some other person and he used to give beating to her on this issue. It is correct that my daughter Pinki informed us that accused had false allegations on her character and we made both of them to understand and live peacefully.

It is correct that 2 months prior to the incident my daughter Pinki made a call to me informing that she was beaten by accused and pressed her neck. It is correct that I went to my daughter Pinki where Umesh tendered apology and assured me that he would not repeat the same. It is correct that after making him understand I reached at my house. It is correct that I did not complain to the police in a hope to save her matrimonial life.

It is correct that on 12.16 I saw the body of my daughter in her

rented house where I noticed yellow colour chuni tied around her neck and my daughter was killed by accused by strangulating her with chuni.

I informed these facts to the police who recorded the same on my narration in my statement PW-9/B.”

25. It may be recalled that the Addl PP was permitted to cross examine PW9 only because he was, in his examination-in-chief, resiling from the statement given by him previously to the police. The transcript of evidence thereafter had to record the fact that a particular sentence in the previous statement (Ex.PW9/B) was shown to the witness and asked whether in fact he had stated so earlier. The answer to such question in the affirmative or negative had to be then recorded. Instead, the transcript shows that PW9 simply agreed to all the suggestions given to him by the Addl PP and his answers were recorded as his positive statements rather than a response to whether he had said so in his previous statement.

26. This Court has, in *State v. Sonu Panjabi (2014) 146 DRJ 37*, disapproved of the above manner of recording the cross examination of a hostile PW by the PP where it was plain that the witness was resiling from the previous statement made to the police. The Court in that context held:

“78. Section 142 of the Indian Evidence Act, 1872 (EA) states that leading questions may not be put in examination-in-chief except with permission of the Court. As noted above, the learned APP sought permission of the trial Court under Section 142 of the EA to put leading questions and permission was declined. The learned AAP did not seek permission of the trial Court to declare PW-27 hostile and to cross-examine her. This was an important aspect of the matter since the record in fact

showed that the APP maintained at this stage that “the witness has substantially deposed the incident but she is forgetting the details”. Therefore, from the point of view of the APP, the witness had not turned hostile and that is why he sought to ask leading questions under Section 142 EA.

79. Section 154 of the EA talks of permission being granted by the court in its discretion to the party who calls a witness, in this case the prosecution, to put questions to such a witness 'which might be put in cross-examination by the adverse party'. In ***Sat Paul v. Delhi Administration 1976 Cri LJ 295***, the Supreme Court observed that the words “hostile” and “adverse” in fact restrict the discretion of the court “and that it is to be liberally exercised whenever the court from the witnesses” demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice.” The Supreme Court in ***Sat Paul*** drew a distinction between the English law and the Indian law and observed that “faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness”. However, the Supreme Court did not dispense with the requirement of the party having to seek permission of the Court to put leading questions in the cross-examination of such witness. In ***Sri Rabindra Kumar Dey v. State of Orissa (1976) 4 SCC 233***, the Supreme Court explained in what circumstances Section 154 EA could be invoked by the prosecution:

“10..... Thus it is clear that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to

cross-examine its own witnesses cannot be allowed. *In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth.* In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The Court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.” (emphasis supplied)

81. The above position was reiterated in ***Gura Singh v. State of Rajasthan (2001) 2 SCC 205*** as under:

“Section 142 requires that leading question cannot be put to the witness in examination-in-chief or in re-examination except with the permission of the Court. The Court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the Court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The Courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness.”

82. In ***Varkey Joseph v. State of Kerala AIR 1993 SC 1892***, in

the context of Section 142 EA the Supreme Court held that the prosecution should not allowed to put leading questions so as to lead the witness to say that what the prosecution intends. The Court observed:

“The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give his own account of the matter making him to speak as to what he had seen. *The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen.* Sections 145 and 154 of the Evidence Act are intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. *Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witnesses intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner which the witness by answering merely yes or no but he shall be directed to give evidence which*

he witnessed.” (emphasis supplied)

83. Before proceeding to examine the position in the case at hand, the law explained in the above decisions of the Supreme Court may be summarised thus:

(i) Under Section 142 EA, the permission by the Court to a party to put leading questions to its witness has to be liberally exercised where the court thinks that the grant of such permission is expedient to extract the truth and to do justice.

(ii) Under Section 142 EA, the Court can permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. **However, Section 142 EA does not give power to the prosecutor to put leading questions on the material part of the evidence. The prosecutor shall not be allowed to frame questions in such a manner which the witness can answer merely by stating yes or no but he shall be directed to give evidence which he witnessed.**

(iii) Section 154 EA gives discretion to the Court to permit the person calling a witness to put any question to him which might be put in cross-examination by the adverse party. However, such permission for cross-examination cannot and should not be granted at the mere asking of the party calling the witness.

(iv) For the purposes of Section 154 EA, a witness should be regarded as adverse and liable to be cross-examined by the party calling him "only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth." (emphasis supplied)

27. It must be mentioned here that PW9 was further examined on

6th January 2017 when he supported the prosecution about the recoveries made in his presence and in particular the recovery of one button lying near the face of the deceased and one microSD card of 4 GB capacity found in the left side pocket of the shirt produced by the Appellant.

28. However, when PW9 was cross-examined immediately thereafter on the same date, i.e. 6th January 2017, he stated that Pinki was living happily with the Appellant at her matrimonial home “except some small confrontations.” He added: “Those confrontations are not such which have to be reported to the police. Those confrontations were the routine wear and tear of the married life.” He further stated:

“Umesh used to sell chholey kulchey on rehri at Samay Pur Badli. He used to leave house at about 11 am or 12 noon and returned at about 5 or 6 pm. It is wrong to suggest that on the day of incident accused had gone for selling chholey kulchey. It is wrong to suggest that police had not seized any exhibit from the scene of crime. It is correct that the shirt button and the memory card are easily available in the market. Vol. But these were recovered from scene of crime. It is correct that I identified the case property at the instance of police. It is wrong to suggest that I was tutored by the IO about my statement. It is correct that accused was not having any reason to kill Pinki and that they were living peacefully.”

29. It is, therefore, plain that while the Addl PP was trying his best to salvage the evidence of PW9 by eliciting positive statements in his cross-examination, PW9 in his cross-examination by the counsel for the Appellant clearly did not support the prosecution at all.

30. More or less the same thing happened with PW10, the mother of the

deceased. The trial Court permitted the Addl PP to cross-examine her and very similar answers, as given by her husband, were recorded for her instead of confronting her with her previous statement and asking her whether she stood by it. In any event, in her cross-examination by the defence, she maintained that:

“The relation between my daughter Pinki and accused Umesh were cordial. Umesh never ill treated or gave beatings to my daughter Pinki. Accused was providing every house hold article and facilities to my daughter Pinki. Pinki visited my house one day prior to her death. She did not tell me that her husband torture her or beats her. Before that Pinki stayed with us for about two months and left about one month prior to her death.”

31. PW10 also confirmed that Pinki used to work for Sandeep (PW12) and that her younger daughter (Kajal) also used to work for him and that all of them were acquainted with PW12. She added:

“Umesh never objected to work of Pinki with Sandeep at Hissar. It is correct to suggest that Umesh never suspected the character of Pinki. It is correct that Umesh has not committed this offence. I do not know who committed murder of my daughter.”

32. Therefore, in effect, neither PW9 nor PW10 actually supported the case of the prosecution. As already noticed, PW3 and PW4 too did not support the prosecution. The trial court has in the impugned judgment gone wrong on the analysis of the evidence of PW9 and PW10. In para 65 of the impugned judgment, it is wrongly noted that during their cross-examination, PW9 and PW10 stated “that accused and deceased used to quarrel with each other and accused also used to beat her.”

Role of PW12 not investigated

33. Coming next to the evidence of PW12 Sandeep. He too failed to support the prosecution. Whereas, in his statement under Section 161 CrPC, as noted hereinbefore, he admitted to having an affair and physical relations with the deceased and that being the source of the quarrels between the Appellant and the deceased and the beatings given to the deceased by the Appellant, in his deposition in the court he stated that, "I was not having love affair with Pinki." He admitted that he used to call Pinki on her two mobile numbers and she used to call him on his phone but stopped by saying, "I don't want to say anything more." At this stage, Addl PP was permitted to cross examine PW12. He, however, maintained as under:

"It is wrong to say that I was having illicit relation with Pinki or that Umesh used to suspect Pinki or that due to suspicion there used to be quarrel between Umesh and Pinki. I had visited Delhi also. Once or twice in a year I visited Delhi. I never met Pinki 'on my visit to Delhi. I never called Pinki while in Delhi and Pinki also never called me during my visit to Delhi."

34. PW12 was asked about his mobile phone and sim card in his cross-examination by the counsel for the defence and this is what he had to say:

"I am having only one mobile phone. The sim card is in the name of my father. I am having my Identity documents. I have not purchased any sim using my Identity documents. It is wrong to suggest that was using the sim card purchased in the name of my father in order to save myself. It is wrong to suggest that I told the police in my statement that I was having physical relation with Pinki. Confronted with EX.PW-12/0A wherein it is so recorded. It is wrong to suggest that I and Pinki were in love with each other or that Pinki was pressurizing me to marry with her or that I wanted to get rid of that relation. I was in Hissar, Haryana on 1 to 6."

35. For some reason, in the present case, the police does not appear to have fully investigated the precise role of PW12 despite him admitting in his statement to the police that the deceased used to work for him; that he knew both her mobile numbers; that he did have conversations with her on both mobile phone numbers; that they were having an affair and physical relations. It appears that while the police collected the CDRs of the two numbers used by Pinki (Ex. PW5/C and PW6/C), they did not collect the CDR of the mobile phone of PW12.

36. Further, the CDRs of the two phones used by Pinki did not contain the details of the calls made and received by her on the date of the incident itself, i.e. 1st February 2016. Ms. Radhika Kolluru, learned APP, pointed out that the police did request the mobile service providers (Airtel and Vodafone) for the complete CDRs, including those of 1st February 2016, but those were not provided. She pointed out that till 31st January 2016, there were a number of calls between PW12 and the deceased, even at odd hours. It is strange that despite this, the police did not pursue the investigation into the conduct and role of PW12. As pointed out by Mr. Kanhaiya Singhal, learned counsel for the Appellant, what is even stranger is that the police waited for more than 2 months to even record the statement of PW12 under Section 161 Cr PC.

37. Added to the mystery is that the two mobile phones stated to have been used by the deceased were, in fact, never recovered. Learned APP pointed out that two mobile phones were stated to have been recovered from the

accused but again these were not analyzed by sending them to the FSL. Why the police did not follow these leads is not known. This becomes particularly relevant because, according to the prosecution, the motive for the crime was the alleged affair between PW12 and the deceased which presumably angered the accused.

The SD Memory Card

38. One piece of evidence to prove the important circumstance of the affair between the deceased and PW12 was the SD memory card (Ex.PW18/Art.3) which was seized under seizure memo Ex.PW9/M. It appears that a CD was prepared of the contents of this SD memory card as spoken to by Mahender Singh Niranjana, a Junior Forensic Assistant Examiner at FSL Rohini (PW20). The CD was marked Ex.PW20/Art.1.

39. The trial court relied on the conversations in the SD card in determining the guilt of the accused. It observed:

“There is one memory card recovered from the pocket of the shirt of accused. The recording of which has been proved on record and the CD has also been placed on record which shows that there were some intimate talks between Sandeep & Pinky. This recovery of SD card from the pocket of the accused which is the memory card of mobile phone of deceased itself shows that accused had heard the recording of the same and i.e. why he was disturbed.”

40. The trial court failed to pay attention to several crucial aspects. Whether indeed Pinki had any phone on which such an SD card could be used? If it could, who recorded the conversations between her and PW12? Did the SD card contain recordings of only those conversations or other conversations

that she had? How was it that the accused knew that Pinki's phone contained an SD card which recorded conversations? Why did he preserve that SD card and put it in his shirt pocket for it to be easily lifted by the police if, in fact, he had planned to kill his wife?

41. Further, no attempt was made to recover any audio time stamp on the SD memory card which could have indicated when these conversations, which were supposedly intimate, took place. There is nothing to show that those conversations took place on the phones of Pinki and PW12. Further still, no attempt was made to demonstrate that this SD memory card actually contained the conversation between PW12 and the deceased. Neither was her voice on the CD identified by her close relatives, i.e. PW2, PW3, PW9 and PW10 nor was the sample voice of PW12 obtained by the police and identified by PW9 and PW10, who acknowledged that he was known to them and their family. None of the witnesses were asked to listen to the phone conversations contained in the SD card and identify the speakers. Without this, the SD memory card could not provide the necessary link in the chain of circumstances.

42. It is plain that the trial court heard the conversation but on what basis did it accept that those conversations were indeed between PW12 and the deceased? This was too important a piece of evidence to be treated in a casual manner by both the prosecution and the trial court.

Law relating to circumstantial evidence

43. This was a case based entirely on circumstantial evidence. It was

necessary for the trial Court to have, from to the story of prosecution, listed out the circumstances which according to the prosecution formed a continuous unbroken chain. Further it was incumbent upon the trial Court to satisfy itself that the prosecution had proved beyond reasonable doubt each link in the chain of circumstances.

44. The law relating to circumstantial evidence is well settled. In ***Hanumant Govind Nargundkar v. State of Madhya Pradesh AIR 1952 SC 343***, it was held:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the 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.”

45. In ***Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622***, the Supreme Court spelt out the following principles (or *panchsheel*) governing the law relating to circumstantial evidence:

- “1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the

accused is guilty;

3. The circumstances should be of a conclusive nature and tendency;

4. They should exclude every possible hypothesis except the one to be proved;

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

46. In *State of Haryana v. Jagbir Singh AIR 2003 SC 4377*, it was held:

“It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan AIR 1977 SC 1063*; *Eradu and Ors. v. State of Hyderabad AIR 1956 SC 316*; *Earabhadrapa v. State of Karnataka AIR 1983 SC 446*; *State of U.P. v. Sukhbasi and Ors. AIR 1985 SC 1224*; *Balwinder Singh v. State of Punjab AIR 1987 SC 350*; *Ashok Kumar Chatterjee v. State of M.P. AIR 1989 SC 1890*. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab AIR 1954 SC 621*, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

We may also make a reference to a decision of this Court in *C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193*, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence...."

Chain of circumstances

47. In the present case, the circumstances which according to the prosecution form a complete chain pointing unerringly to the guilt of the Appellant are as under:

- (i) The Appellant and the deceased had a troubled matrimonial life. The Appellant used to have frequent quarrels with the deceased. She was beaten up by the Appellant on several occasions.
- (ii) The Appellant used to complain that the deceased was having illicit relations with some other person and used to beat her on this issue.
- (iii) The deceased and PW12 were having an affair and they also had a physical relationship. On this issue, there were frequent quarrels between the deceased and the Appellant and he used to beat her.
- (iv) The Appellant happened to listen to the intimate conversations

between PW12 and the deceased which were recorded in an SD Memory card which was attached to the mobile phone of the deceased.

- (v) On the date of the incident, the Appellant removed this SD Memory card from the phone of the deceased and kept it in his shirt pocket in an *almirah*. This was got recovered at the instance of the Appellant.
- (vi) There were heated arguments and quarrels between the deceased and the Appellant just prior to the incident on 1st February 2016, soon after which she was found dead. The Appellant was last seen with the deceased by PW4 just prior to her death. There were no forcible signs of entry into the house by anyone and it was for the Appellant to explain how her death occurred.
- (vii) A button was found near the body of the deceased which matched the buttons on the shirt of the Appellant which was recovered at his instance.
- (viii) The Appellant, with a view to misleading the police, falsely stated that the deceased had committed suicide by hanging when in fact it was he who had strangled her.
- (ix) The Appellant took a false plea of *alibi* by stating that he was not present in the house when the death occurred and that he

returned to find her dead.

48. As explained in *Sharad Birdhichand Sarda v. State of Maharashtra* (*supra*), it was incumbent upon the prosecution to fully establish each of the above circumstances in a manner that they ought to be “consistent only with the hypothesis of the guilt of the accused” and not “explainable on any other hypothesis”.

Circumstance (i) and (ii)

49. Now taking up each of the circumstances, as far circumstances (i) and (ii) regarding the relationship between the Appellant and the deceased prior to her death are concerned, the prosecution has relied on the evidence of PW3 (the elder son, Goldi), PW4 (the landlord), PWs 9 and 10 (the parents of the deceased) and PW12 (Sandeep).

50. As already noticed, each of these witnesses failed to support the case of the prosecution when deposing in the Court. PW9 and PW10, in their cross examination by the defence, stated that the accused and the deceased had a cordial relationship and there were only some small confrontations between them which were part of the “routine wear and tear” of marriage. They denied the suggestion of the deceased having any illicit relationship or the Appellant being upset with her on that score.

51. Ms. Kolluru, learned APP, sought to explain this away by saying that the Appellant’s in-laws wanted to save him, considering there were two children to be looked after and the reputation of the family was at stake. However,

this still does not explain how each of the other PWs, i.e. PW3, PW4 and PW12, also did not support the prosecution on this aspect.

52. As far as the son (PW3) is concerned, he completely resiled from his statement made under Section 164 CrPC and answered in the negative when asked whether his father used to quarrel and beat with his mother. This was a boy of 8 years of age and, therefore, was certainly in a position to speak his mind about the nature of the relationship between his parents. As already pointed out, he was not confronted by the Addl PP with his statement under Section 164 CrPC. PW4 and PW12 also failed to support the prosecution.

53. It is not known why the prosecution failed to examine Kajal, the sister of the deceased. The brother of the deceased (PW2) also did not speak anything about the strained relationship between the Appellant and the deceased. Consequently, the prosecution must be held to have failed to establish the first two circumstances.

Circumstance (iii)

54. Turning to the third circumstance, viz. PW12 was having an affair and a physical relationship with the deceased, the prosecution relied upon the direct evidence of PW12 himself and the corroborating evidence in the form of the SD memory card. As already noticed, with PW12 resiled from the statement made by him to the police under Section 161 Cr PC while deposing in court when he completely denied having an affair with the deceased. PW12 stood firm in the Court and would not budge when cross-examined by the Addl PP. Even when cross-examined by the defence, he

maintained that he did not have affair with the deceased.

55. The failure of the police to properly investigate the role of PW12 has already been adverted to. More than two months had elapsed since the incident before his statement was recorded by the police. The CDRs of his mobile number were not collected. His mobile phone was not even picked up for examination. This, despite him stating that he and the deceased conversed often on their respective mobile phones. Inexplicably, the CDRs of the mobile phones of the deceased did not contain the crucial details of conversations between PW12 and the deceased on the date of the incident. The two mobile phones of the deceased were not picked up for analysis either. Therefore, the crucial pieces of evidence which could have provided the missing link in the chain of circumstances were overlooked by the police.

56. The other piece of evidence relied upon in support of the prosecution story regarding the affair between PW12 and the deceased is the SD memory card purportedly containing the intimate conversations of the deceased and PW 12. As already pointed out, there was no attempt made to collect the sample voice of PW12 and compare it with the voice on the CD prepared by the Junior Forensic Examiner, FSL. The voice of the deceased was not identified by any of her close relatives, many of whom were PWs. The conversations in the CD do not appear to have been put to any of the PWs. No transcript of the conversations appears to have been prepared. Circumstance (iii) has, therefore not been proved by the prosecution.

Circumstances (iv) and (v)

57. There is nothing to indicate how the Appellant knew that the mobile phone of the deceased contained an SD card in which her conversations with PW12 were recorded. If it indeed was the Appellant who had such SD card inserted in her phone, then who recorded those conversations is not clear. Why would the deceased record such conversation if it was going to be accessible to the Appellant? Nothing is known as to who, if anyone at all, managed to get the SD card inserted in the mobile phone of the deceased and who recorded those conversations. Without the mobile phones of the deceased being collected, the prosecution failed to establish that the SD card in question was in fact used on a phone used by the deceased. The date and time stamp of the SD card or of the conversations therein is also not known.

58. The police reached the scene of crime within an hour of its occurrence. The Appellant was there throughout. Nobody saw him tamper with any evidence. He was calling PW8, PW9 and the police within a few minutes after noticing the dead body of the deceased. After the police arrived, he was entirely under their custody. From the depositions of the police officials referred to hereinbefore, the case of the Appellant that he was detained continuously from 1st February 2016 itself and that his arrest was formally shown on 2nd February 2016 appears to be substantiated. So, how is it that the Appellant managed to remove the SD memory card from the phone of the deceased? Furthermore, what happened to the two phones she was using is again not explained. Why would the Appellant, if he was indeed guilty of killing his wife, keep such an incriminating piece of evidence like the SD memory card in his shirt pocket for it to be easily recovered? With all these

lacunae, the mere fact that there was an SD card, the seizure of which was proved, takes the prosecution case nowhere.

59. Circumstance (iv) supplies the motive for the crime which, in a case of this nature, is a critical component. It is this that forms a crucial link in the chain of circumstances. Absent the Appellant listening to the conversations between PW 12 and the deceased, the build up to the crime of murder would be non-existent.

60. There were also problems with the seizure of the SD card. The entries in the Malkhana register have already been referred to. They make it appear that the SD card was deposited there on 2nd February 2016. However, when ASI Jagraj Singh (PW17), who maintains such register, was examined-in-chief, he stated that all the 9 pulandas were in fact entrusted to him on 1st February 2016 itself. This completely demolishes the case of the prosecution that the SD card was recovered only on 2nd February 2016.

61. Consequently, it is concluded that the prosecution failed to establish circumstances (iv) and (v).

Circumstance (vi): Last seen

62. The next circumstance is that of 'last seen'. It is stated that it was PW4 who has spoken of the Appellant being seen last with the deceased. A careful perusal of the evidence of PW4 reveals that he did not say that it was the Appellant who was last present with the deceased. In his cross-examination by the Addl PP he states: "On that day younger son of accused

along with his wife were present at their house. On that date, the elder son of the accused had gone to school.” PW4 only states that “accused Umesh was also getting ready for going to his work” when PW4 left his house for his office. The above statement of PW4 can hardly be said to prove beyond doubt that it was the Appellant and no one else who was seen last with the deceased prior to her death.

63. There was a suggestion put to PW12 that it was he who had been instrumental in the death of the deceased as she was pressurizing him to marry her. This angle was not explored completely by the prosecution and why it was not, remains a mystery. It cannot be said that evidence gathered by the prosecution is wholly consistent with only the guilt of the Appellant to the exclusion of anybody else. Circumstance (vi) has therefore not been established by the prosecution by leading credible evidence.

Circumstance (vii)

64. The fact that a button matching that on the shirt of the Appellant was found next to the deceased is a circumstance relied upon by the trial court to convict the Appellant. This has also been relied upon by the learned APP in this Court. This is but one circumstance. The FSL report states that the button found next to the deceased did match with the other buttons in the shirt recovered from the Appellant. The FSL report also notes that two of the buttons on the Appellant’s shirt were missing. However, the seizure memo of the shirt does not state that there were any missing buttons. This contradiction has not been sought to be explained by the Addl PP by eliciting any response from either the IO or the FSL expert.

65. In any event, the solitary circumstance of the button of the shirt of the accused being found near the body of the deceased cannot, by itself, establish the prosecution story beyond reasonable doubt that it was the accused who murdered the deceased. In her cross-examination by the defence, the FSL expert, Dr. Bharti Bhardwaj (PW25), admitted: “It is correct that such types of buttons and threads are easily available in the market.” Therefore, this circumstance by itself is a weak piece of evidence and, in the absence of other links in the chain being proved, loses much of its significance.

Circumstance (viii)

66. The PCR form shows that when the police reached the spot they were told by the Appellant that the deceased was found dead by him. He did not state that she had hung herself or that he took down her body. Merely because the PCR form records that the first message was, “*lady ne phasi laga li hai*” does not go to suggest that it was the Appellant who gave the information that the deceased had hung herself. For that matter, the CPCR also notes that when the police van reached there, the Appellant told them that he had gone to drop his son at school and upon returning, found his wife dead. The stray sentence in the evidence of PW9 is not sufficient to conclude that the Appellant has somehow tried to mislead the police by believing that this is a case of suicide.

67. On the other hand, the evidence shows that the police never believed that it was a case of suicide and had a suspicion that it was a case of homicide.

Although no pointed question was put to the post-mortem doctor (PW13) in this regard, the fact remains that the Appellant was throughout in the custody of the police who reached the spot within an hour after the death of the deceased. During this time, he could have hardly, without it being noticed by the police, destroyed any evidence or tried to create any evidence that might mislead the prosecution. On the other hand, the conduct of the Appellant is inconsistent with the case of the prosecution that he killed his wife. He made calls, first to his father-in-law (PW9) and then to his own brother (PW8) and thirdly to the police to report about the death of his wife. The CDR of his mobile number bears this out. Circumstance (viii) has, therefore, not been proved by the prosecution in a manner that is wholly consistent with the guilt of only the Appellant and no one else.

Circumstance (ix)

68. As far as the Appellant's plea of *alibi* is concerned, the Appellant has examined his sister-in-law (DW1) who has spoken about the Appellant having visited her for breakfast between 10.30 am and 11 am on 1st February 2016. This witness has not been shaken in her cross examination by the Addl PP.

69. It was sought to be suggested by learned APP that CDRs of the mobile phone used by the Appellant did not show that he moved anywhere from his house during this period. It must be recalled that the house of DW1 is just 5/6 minutes walking distance from that of the Appellant within the Swaroop Nagar area itself. If the prosecution wanted to show that the Appellant in fact remained in his house and did not go to the house of DW1, then it had

to demonstrate that:

- (i) The Appellant stated that he was carrying his mobile phone when he visited DW 1; and
- (ii) There were several mobile towers which were in the area and the mobile tower that covered the area where DW1 had lived is different mobile tower which covered the area where the accused is living.

70. The prosecution has not cared to undertake such an exercise. Therefore, to simply suggest that the Appellant never left his residential house is not sufficient for the prosecution to discharge its burden of discrediting the evidence produced by the Appellant in this regard. Circumstance (ix) has also, therefore, not been established by the prosecution.

71. It is thus seen that the major links in the chain of circumstances have not been established by the prosecution in a manner consistent only with the guilt of the Appellant and no one else. The prosecution has failed to bring home the guilt of the Appellant under Section 302 IPC.

The trial Court judgment

72. Turning now to the impugned judgment of the trial Court, it is seen that there has been no delineation of the chain of circumstances and in-depth analysis of the evidence on record *qua* each link in the chain of circumstances. The trial Court appears to have relied essentially on the recovery of button which matched with the buttons of the shirt of the

Appellant. It has also relied on the conversation between the deceased and PW12 as contained in SD card.

73. The trial Court omitted to note that the above circumstances were, in the first place, not established by the prosecution. The trial Court noted that the Appellant told PW8 that he had gone out to bring certain articles whereas PW8 did not mention that there were any articles in the hand of the Appellant.

74. The Court does not see any major contradiction when the Appellant says that he initially went to drop his son at the school and then visited his sister-in-law, who was examined as DW1. In any event, this did not absolve the prosecution of having to prove each of the links in the chain of circumstances so as to unerringly pointing out to the guilt of the Appellant.

75. It requires to be reiterated that the trial Court failed to cull out the circumstances which according to the prosecution formed a continuous chain. Next the trial Court had to examine whether each of the links in the chain of circumstances had been proved by the prosecution. This again the trial Court failed to do.

Conclusion

76. In *Subhash Chand v. State of Rajasthan (2002) 1 SCC 702* the Supreme Court presciently observed that “human nature is too willing when faced with brutal crimes, to spin stories out of strong suspicions. Between may be true and must be true there is a long distance to travel which must be

covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned a convict.”

77. For all of the aforementioned reasons, the Court sets aside the impugned judgment dated 5th June, 2017 as well as the impugned order on sentence dated 4th July, 2017 of the trial Court. The Appellant is acquitted of the offence under Section 302 IPC. He shall be set at liberty forthwith, unless required in any other case, subject to compliance with Section 437 A Cr PC.

78. The appeal is allowed in above terms but, in the circumstances, with no orders as to costs. The pending application is disposed of.

S. MURALIDHAR, J.

REKHA PALLI, J.

NOVEMBER 07 2017
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