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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.981 of 2002

Vijay Kumar alias Lolo Panika, son of Narmada Prasad Panika, aged about 29 years, R/o Village Barsara, P.S. Jhilmilee, District Surguja, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh

---- Respondent

For Appellant	:	Shri Neeraj Kumar Mehta, Advocate
For State/Respondent	:	Smt. Smita Ghai, Panel Lawyer

Hon'ble Shri Navin Sinha, Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Navin Sinha, Chief Justice

27/4/2016

1. The Appellant, who is the husband of the deceased stands convicted under Sections 302 and 201 IPC to life imprisonment by the 6th Additional Sessions Judge, Fast Track Court, Surajpur in Sessions Trial No.26 of 1996 dated 28.8.2002.

2. The deceased was aged 16 years, married to the Appellant two years earlier. Her dead body was found on the railway track dismembered into four pieces on 11.7.1995 in the morning. Merg 14/95 was registered by the then Head Constable Christopher Tirki proved by PW-10, Dilip Pandey. Formal FIR, Exhibit P-12 was lodged on 23.7.1995 by the latter. Post Mortem, Exhibit P-7, was conducted on 12.7.1995 at about 11:30 am. by PW-8, Dr. Rakesh Kumar Sharma along with one Dr. Kalawati Patel, both of whom signed the report opining that death was due to asphyxia caused either by throttling or smothering and the dead body then placed on the railway track and run over by train.

3. Learned Counsel for the Appellant submitted that there is no eyewitness to the occurrence. The allegations against him are based on circumstantial evidence only. It was therefore mandatory for the

prosecution to establish the chain of circumstances inter linked with one another leading to the inevitable conclusion of the Appellant alone being the assailant. In the absence of any chain of circumstances having been established by the prosecution it cannot be said that the charge has been proved beyond reasonable doubt to warrant conviction. In fact, there was no evidence whatsoever linking the Appellant in any manner with the death of the deceased either remotely or even on suspicion. There is no evidence to invoke the last seen theory also. In a case of circumstantial evidence, motive is a very important factor. The Learned Trial Judge has arrived at a finding that there was no motive for the Appellant to kill his own wife. The Learned Trial Judge has grossly erred in convicting the Appellant on what can well be described as a speculated conclusion based on misappreciation of evidence which does not necessarily lead to the conclusion of the Appellant being the assailant. There is no evidence of any cruelty by the Appellant towards the deceased much less for dowry or otherwise. The plea of alibi taken by the Appellant that he was on duty at the flour mill of DW-1, Ramu Prasad Goswami has not been considered and appreciated properly causing prejudice to the Appellant. Merely because the deceased was the wife of the Appellant who died in unnatural circumstances at night, outside the house, it cannot be presumed or the onus shifted onto the Appellant under Section 106 of the Evidence Act in absence of the prosecution having first established a *prima facie* case for homicidal death against the Appellant. If the body was dismembered into four pieces on the railway track, the possibility that the deceased may have committed suicide by jumping onto the track cannot be completely ruled out. If this possibility exists even remotely, the benefit of doubt must go to the Appellant. Reliance in support of the submissions was placed on (2009) 14 SCC 415 (Subramaniam v. State of Tamil Nadu), (2009) 13 SCC 565 (State of Kerala v. Anilachandran alias Madhu) and (2011) 12 SCC 545 (Varun Chaudhary v. State of Rajasthan).

4. Learned Counsel for the State opposing the appeal referring to the evidence of DW-1, Ramu Prasad Goswami submitted that the deceased was a rustic village girl newly married hardly 16 years of age who would keep her face covered with the saree and would not even speak in front of her husband. It is highly improbable that such a girl would have ventured out of the house all alone at night in late hours. No suggestion has been given on behalf of the Appellant that for what purpose she may have left the house at this unearthly hour. It is also not the case of the Appellant that the deceased had any extra-marital relations and may have gone out of the house surreptitiously. Referring to the evidence of PW-4, Smt. Ramkunwar, mother of the deceased it was submitted that apparently the deceased was not being treated well by the Appellant as even though she would not say anything, she would keep crying all the time. The Appellant had a minor younger brother only apart from his mother in the house. DW-2, Sahodari Bai, mother of the Appellant stated that she had closed the door and gone to sleep. The fact that PW-4, Smt. Ramkunwar may not have mentioned any specific occasion or incident does not lead to a definite conclusion for absence of any cruelty in the nature of evidence given by the witness as also PW-5, Bhagalu, maternal grandfather of the deceased that she would resist having to go back to the matrimonial home when she came to her parents' house.

5. Two doctors have opined that the deceased was first killed by either smothering or throttling attributing death to asphyxia, both of which was homicidal and the body then placed on the railway track to give it the nature of an accident or suicide as sought to be suggested on behalf of the Appellant. In view of the opinion of not one but two medical experts, there is no occasion to speculate that the death was not due to asphyxia. If the death was homicidal it was hardly relevant whether it was by throttling or smothering. Emphasis was also laid on Exhibits P-8, 9, 9A, 10 and 10A with regard to the queries made by the Investigating Officer and

the reply given by the doctors reiterating that death was due to asphyxia. Reference was also made to the evidence of PW-8, Dr. Rakesh Kumar Sharma explaining that congestion of both lungs and face pointed to death due to asphyxia. Alibi was a weak defence. It was for the Appellant to lead the best evidence in support of the same. No independent customer of the flour mill of DW-1, Ramu Prasad Goswami has been examined. On the contrary the answers to the questions put to the Appellant under Section 313 Cr.P.C., being both false and evasive are additional incriminating circumstances against him. Undigested food was found in the small intestine of the deceased with the doctors opining that it was possible that the deceased had eaten approximately four hours earlier. The Appellant claims to have gone to the house of his in-laws at 10:00 pm looking for the deceased while DW-1, Ramu Prasad Goswami, the owner of the flour mill deposed that the Appellant left the mill between 10:30 – 11:00 P.M. The sequence of events reveal that the deceased had her dinner around 8:00 pm or thereafter, was killed by the Appellant who came back from the flour mill and put the dead body on the railway track to destroy evidence and then went allegedly looking for his wife in an effort to cover-up his own deeds. These are all incriminating factors against the Appellant. The time of death approximately four hours after meals also coincides with the post mortem report which opines that death had taken place 24 to 36 hours earlier.

6. We have considered the submissions on behalf of the parties and perused the evidence available on record.

7. The deceased was the wife of the Appellant. They were married approximately two years prior to the date of occurrence. The deceased was only 16 years of age on the date of occurrence. Considering that the deceased was a very young girl, newly married, would keep her face covered and not speak in front of her husband even, a very natural

phenomena in the rural countryside, the possibility that the deceased left home voluntarily late at night is extremely remote. No suggestion has been made on behalf of the Appellant that she had any reason to do so either because of extra-marital affair or even to answer the call of nature or that she had done so earlier also. The possibility that the deceased left home voluntarily has therefore to be completely ruled out.

8. PW-3, Ramlal, father of the deceased deposed that his daughter had told him that she was not allowed to go out of the house alone. Likewise, PW-4, Smt. Ramkunwar, mother of the deceased had deposed that the deceased would not disclose any specific instance of ill-treatment but would cry all the time. PW-5, Bhagalu, maternal grandfather of the deceased also deposed that the deceased was reluctant to go back to the matrimonial home. The prosecution has therefore led sufficient evidence to establish that the deceased was not treated well by the Appellant.

9. PW-3, Ramlal and PW-4, Smt. Ramkunwar have deposed that the Appellant came looking for the deceased at 10:00 pm on 10.7.1995. It signifies that the Appellant left the flour mill earlier to the same. But, DW-1, Ramu Prasad Goswami, owner of the flour mill, where the Appellant was working has deposed that on the fateful night there were extra customers because of which the Appellant was at the flour mill till 10:30 – 11:00 pm. In a rural background it is difficult to believe that the flour mill was open at this extremely late hour. The variation in time, in the facts of the case cannot be considered trivial especially when the Appellant took a plea of alibi but did not lead independent evidence of a single customer at the allegedly crowded flour mill who may have been the reason for his having to work extra that fateful night except for his employer DW-1, Ramu Prasad Goswami, who was undoubtedly an interested witness to save the Appellant considering that the latter was his employee. Alibi is a very weak defence and the onus lay on the accused

who takes it as a defence to lead the best evidence in support and establish it beyond doubt. The Appellant undoubtedly failed to do so. In (1997) 1 SCC 283 (Binay Kumar Singh v. State of Bihar) referring to Section 11 of the Evidence Act with regard to the plea of alibi and the burden of proof being on the accused it was observed :-

“23.....But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi....”

10. The post mortem report confirms death was homicidal due to asphyxia caused either by smothering or throttling. So long as death was not natural it is hardly relevant whether it was by way of one or the other. PW-8, Dr. Rakesh Kumar Sharma also explained why death was opined due to asphyxia because both the lungs and the face were congested. The post mortem was conducted by him together with Dr. Kalawati Patel, who had signed the post mortem report also. Her signature was duly proved by the former. The police made sufficient queries with regard to the cause of death which was reiterated by the doctors as due to asphyxia. A clear medical opinion was given that the dismemberment of the body into four pieces was post mortem in nature. The head was decapitated from the torso. The right hand was amputated and was lying 18” from the center of the track. The right leg was amputated from the thigh and was lying 2’ from the center of the track. The torso was lying on the outer right side of the track and the chappals of the deceased were

lying in the middle of the track. In view of the expert medical opinion by not one but two doctors, the question of our doubting the same can hardly arise on a mere speculated submission that it may have been a suicidal death when no evidence in this regard was led by the Appellant nor any such defence was taken before the Court below. There can be no copy book interpretation of medical jurisprudence with regard to symptoms in a particular case. Each post mortem report will have to be considered on its own merits giving primacy to the opinion of the Doctors who conducted the post mortem unless the opinion be contradictory or completely contrary to medical jurisprudence. No such conclusion is possible presently.

11. That primacy had to be given to the opinion of the doctor who conducted the post mortem with regard to the cause of death as opined was noticed in (1994) 2 SCC 677 (*Eshwaraiah v. State of Karnataka*) observing :-

“9.....On the contrary, two doctors who had held the post-mortem on the deceased had occasion to look and examine the injuries on the person of the deceased and they had given a clear opinion that the death was due to asphyxia and it was a case of homicidal death. We agree with the High Court in accepting prosecution case that it was a case of homicidal death.....”

The issue again fell for consideration in (2011) 4 SCC 249 (*Sahebrao Mohan Berad v. State of Maharashtra*) observing as follows :-

“14.....In our opinion, the doctor who examined the deceased and conducted the post-mortem is the only competent person to opine the nature of injuries and the cause of death. It is only in a case, where the opinion is inherently defective, the Court will discard its evidence.

15. Reference in this connection can be made to a decision of this Court in *Mafabhai Nagarbhai Raval v. State of Gujarat* in which it has been held as follows:

“3. ... It is needless to say that the doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective the court cannot substitute its opinion for that of the doctor.”

12. The deceased is stated to have cooked food, given it to her mother-in-law, DW-2, Sahodari Bai, eaten her dinner and then gone to sleep. The Appellant claims that he came home before 10:00 pm but did not find her home. The post mortem report opines that food had been consumed by the deceased approximately four hours prior to death which was estimated to be 24 to 36 hours earlier. PW-3, Ramlal and PW-4, Smt. Ramkunwar, the parents of the deceased deposed that the Appellant came to their house looking for the deceased about 10:00 pm on 10.7.1995. But DW-1, Ramu Prasad Goswami, the owner of the flour mill, where the Appellant worked deposed that the Appellant left the flour mill at about 10:30 – 11:00 pm. The evidence cumulatively considered objectively leads us to opine that the deceased consumed food and was killed by throttling or smothering within four hours of the same. The body was recovered the next morning and post mortem done the day after that. The time elapsed since death opined in the post mortem coincides with the death four hours after the deceased had her meal. The evidence thus reveals that the deceased was killed and her dead body then laid on the railway track to conceal evidence of a homicidal death. The fact that the Appellant may have gone to the house of his in-laws looking for the deceased appears to have been a ploy by him to deflect suspicion against himself which is corroborated by the variation in time when he left the flour mill and that when he went to the house of his in-laws. The conduct of the Appellant vis-a-vis the cause of death therefore becomes an additional incriminating factor against the Appellant.

13. The aforesaid view taken by us also finds support from the reasoning of the Trial Judge with regard to the manner in which the chappals of the deceased, Exhibit P-6 were found kept neatly in between the railway track. Had it been an accidental or suicidal death, in all probabilities, the chappals would have been on the feet of the deceased.

14. The Trial Judge in paragraph 16 has collectively and objectively considered the evidence available commencing from the ill-treatment of the deceased, that she did not suffer from any abnormality when she had dinner and went to sleep after which her dead body found dismembered on the railway track. The Appellant had offered no explanation for this homicidal death of his wife.

15. Motive is not always necessary to establish guilt. In cases where direct ocular evidence may not be available, it may be a corroborative factor, but cannot be material by itself conclusively either for acquittal or conviction.

16. It is not possible to hold that the Trial Judge has convicted the Appellant on speculation only. In his defence under Section 313 Cr.P.C. a specific question was put to the Appellant with regard to the medical opinion that death was occasioned due to asphyxia and the body was then placed on the railway track. In his answer, the Appellant stated that it may be possible. Likewise, in answer to the question, whether he was taken into custody on 29.7.1995 by PW-9, Sada Ram Diwan, the Appellant answered that he did not know. No evidence whatsoever has been led by the Appellant of the circumstances under which the deceased may have left home or died on the railway track. It is true that merely because the Appellant is the husband of the deceased, we cannot reach to any presumptive conclusion that he had killed her and then put the body on the railway track. But, if the prosecution has successfully established a *prima facie* case of a homicidal death and there are incriminating factors against the Appellant the onus shifted to him under Section 106 of the Evidence Act to establish how his wife may have died an accidental or suicidal death. He has offered no explanation.

17. Varun Chaudhary (*supra*) discusses the basic principles of circumstantial evidence which is not in dispute but applicability of which

will depend on facts and circumstances of each case.

18. In Subramaniam (supra), the post mortem report did not mention congestion of the face and both lungs as a consequence of smothering or throttling in which circumstance it was held that the symptoms mentioned in the post mortem report did not fully match with the views expressed in medical jurisprudence, the benefit of which was given to the accused thereon. Death had taken place inside the house. There was no external injury on the deceased while in the present case both internal and external injuries to the private parts of the deceased with swelling of the labia majora was noticed also suggesting use of violence. The observation that failure to prove the plea of alibi may not be sufficient to arrive at a finding of guilt was made in the facts of the case and has no application as a general proposition of law.

19. In Anilachandran alias Madhu (supra), the genesis of the incident itself was doubted including the manner in which it may have been suggested by the prosecution. It was in those circumstances it was held that even if the plea of alibi is not established, it will remain the duty of the prosecution to prove beyond doubt the guilt of the accused. It again has no application to the facts of the present case.

20. In conclusion, we find no reason to interfere with the conviction of the Appellant. The bail bonds of the Appellant are cancelled and he is directed to surrender forthwith and/or be taken into custody for serving out the remaining period of sentence.

21. The appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE