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

+ CRL.A. 648/2013

% *Judgment dated 23rd March, 2016*

RABBANI @ SAMEER Appellant
Through : Mr.Riaz Mohd., Adv.

versus

STATE Respondent
Through : Ms.Aashaa Tiwari, APP for the State.
SI Khem Chand, P.S. Welcome.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present appeal has been filed by the appellant under Section 374 of the Code of Criminal Procedure against the judgment dated 5.3.2013 and order on sentence dated 8.3.2013 passed by learned District & Sessions Judge, Incharge, N.E District, Delhi, in Session Case No.51/2011, arising out of FIR No.184/2011 registered under Section 302 of the Indian Penal Code, whereby the appellant was convicted for an offence punishable under Section 302 of the IPC and sentenced to undergo imprisonment for life and also directed to pay fine of Rs.1,000/-, and in default of payment of fine he was directed to undergo further imprisonment for a period of six months.
2. The brief facts of the case, as noticed by the learned trial court, are as under:

“DD-11B was recorded in PS Welcome at 8.02 am on an information from control room to the effect that some person has killed a lady in L-block, Janta Majdur Colony, Idgah road, gali no.28. Insp. Yogesh Malhotra SHO PS Welcome PW-18 on receiving this DD information along with staff reached the spot i.e. house no. L-96, Janta Colony, Welcome, Delhi, first floor. As he entered inside the premises he saw a female lying on the floor of the room and blood was seen coming out of mouth of that female and some blood had come on the pillow. Inspector Yogesh Malhotra called SDM and SDM Rajiv Shukla PW-16 also arrived and observed visible injury marks on the left eye of victim which was swelling and blackish. Liyakat Ali and Amina, father and mother of deceased were present there and name of deceased was revealed as Famida. SDM recorded statement of Liyakat Ali and Amina. According to statement of Liyakat Ali as Ex.PW1/A he was auto driver by profession residing in a house H-78, Janta Colony, Welcome, Delhi. He had got Famida married about 3 years before to Rabbani and a 1½ year old male child had also born to Famida.

4. Liyakat Ali further reported that on the previous evening of 16.05.2011 at around 4.00 pm, his son in law came to his house and he took out Rs.200/- from the purse of victim Famida. On that issue a quarrel took place between Rabbani and Rabbani had given beating to Famida quite extensively. Liyakat Ali and his wife intervened. Rabbani took food in the house of Liyakat Ali and at around 11.30 pm Rabbani and Famida left the house. On next morning i.e. 17.05.2011 Liyakat Ali sent Naushad PW-4 to visit house of his daughter to know her well being and Naushad came back and informed Liyakat Ali that Famida was lying dead. Liyakat Ali further alleged that his son in law had murdered his daughter by pressing mouth of deceased with a pillow. Almost identical was the statement of Amina which is Ex.PW16/A. Accordingly, on the basis of statement of Liyakat Ali which is Ex.PW1/A that present case FIR was registered which is Ex.PW6/A and investigation was taken up by Insp. Yogesh Malhotra. Crime team arrived and took photographs of the scene of the incident and these photographs are now Ex.PW15/9 to Ex.PW15/16. A piece of cloth on which body of the victim was found lying which was seized through a cloth parcel affixed with seal YM and its seizure memo Ex.PW1/E was prepared. A pillow found lying and bearing blood stain marks was seized through a sealed pulanda and its seizure memo Ex.PW1/G was

prepared. Sample of blood and blood stained concrete and earth control sample were lifted and seized through memo Ex.PW1/I.

5. Victim's body was subjected to postmortem on 18.05.2011 and postmortem report Ex.PW12/A opined cause of death as asphyxia as a result of ante-mortem smothering and compression of neck. 16 number of injuries were also noticed on the body of the victim and PW-12 doctor who had conducted postmortem has stated those injuries in evidence and it were recorded in the postmortem report also. All these injuries were abrasions and bruises on various parts of the body. Postmortem report further showed that stomach contained semi digested food. Exhibits prepared during postmortem comprised blood sample of deceased on the gauze, clothes of deceased taken into sealed pulanda and swabs and slides taken and these parcels were affixed a seal MK and were seized through memo Ex.PW7/A.

6. Some broken glass bangle pieces and one ear-ring were found lying nearby body which were seized through a pulanda and seal YM was affixed and seizure memo Ex.PW1/D was prepared.

7. Accused Rabbani was found absent from the scene of the crime. According to the information provided by Liyakat Ali, deceased had a mobile phone and that mobile phone was also found not available. That mobile phone was operating on number 9953321304.”

3. Statement of appellant was recorded under Section 313 of the Code of Criminal Procedure wherein he pleaded innocence.
4. To prove its case, the prosecution has examined 18 witnesses. No evidence has been led by the defence.
5. Learned counsel for the appellant submits the impugned judgment dated 5.3.2013 is against the law and facts. Counsel further submits that material witnesses have turned hostile and there are no circumstances which connect the appellant to the crime, the judgment is thus liable to be set aside. Counsel also contends that despite PW-1 to PW-5 having been declared hostile, the trial court has wrongly relied upon the testimonies of

these witnesses. It has further been contended that the appellant could not have been convicted on the basis of last seen with the deceased as PW-5, Abir Ali, has not support the version of having last seen the appellant with his wife. It has also been contended that the medical evidence does not support the version of strangulation as in case of manual strangulation or in case the deceased was smothered with the pillow, there would have been bruises, scratches or abrasions, whereas there are no signs of struggle. It has also been urged before this Court that the deceased had in fact died a natural death on account of Tuberculosis.

6. Ms.Tiwari, learned counsel for the State/respondent, submits that the prosecution has been able to prove its case beyond any shadow of doubt. Counsel further submits that the evidence on record would show that the appellant was last seen with his wife (deceased herein). It is further submitted that the prosecution has been able to prove the quarrel between the appellant and the deceased. It is also submitted that after the incident, the appellant was found absent from the scene of crime and the scene of the crime was the residential house of the appellant itself.
7. We have heard learned counsel for the parties and considered their rival submissions. We have also examined the trial court record and the impugned judgment passed by the learned trial court.
8. Before we deal with the rival submissions of the parties, we deem it appropriate to refer to the testimonies of the material witnesses in detail. Material witnesses in this case are PW-1, Liyakat Ali, and PW-3, Amina, (father and mother, respectively, of the deceased); PW-2, Anil Kumar, ex-employee of the appellant; PW-4, Naushad; and PW-5, Abid Ali, who is a neighbourer of the appellant and who turned hostile.
9. We may notice that PW-1 and PW-3 turned hostile on the point as to whether there was any dispute or quarrel between the deceased and the

appellant. They visited the house of PW-3 the previous evening.

10. From the testimony of PW-1, the father of the deceased, it is seen that a day prior to the incident the appellant and his deceased wife (daughter of PW-1) had visited the house of PW-1 around 4.00 p.m. At about 10.30 p.m., the appellant and the deceased had left the house of PW-1. The daughter of PW-1 was a Tuberculosis patient and was suffering from fever. Next morning, wife of PW-1 had requested Naushad to go and find out about the condition of Famida. Famida was found dead by Naushad. This witness has also testified that he did not perceive any motive or reason that the appellant would kill his daughter. The appellant was apprehended by the Police from Bombay 10 or 15 days after the incident and at that point PW-1 suspected that since the appellant was absent from his house, where his daughter was found dead, he may have committed the murder. In his cross-examination, PW-1 completely denied any incident of quarrel. PW-1 was confronted with various portions of the statement made under Section 161 of the Cr.P.C.
11. PW-3, mother of the deceased, has also testified on the lines of her husband, PW-1.
12. PW-2, Anil Kumar, has testified that the appellant was his ex-employee. PW-2 has further testified that on 16.5.2011 he had received a phone call from the father-in-law of the appellant seeking his assistance on account of a quarrel between the appellant and his wife. PW-2 had mediated and intervened in the matter, and advised the couple.
13. Another important witness is PW-4, Naushad, who has testified that he was told by PW-1, Liyakat Ali, to go and wake up his daughter. PW-4 reached the house of the deceased and gave a call to the deceased, but she did not wake up. PW-4 sensed that Famida was no more. PW-4 has also testified that although the child of Famida was present in that room, her

husband (appellant herein) was not present in the room. This witness was not cross-examined.

14. It would also be useful to refer to the testimony of PW-12, Dr. Meghali Kelkar, Senior Demonstrator, Department of Forensic Medicine, UCMS & GTB Hospital, Delhi. The injuries described by PW-12 on the body of the deceased read as under:

- “1. Brown scabbed abrasion 1.5 x 1 cm present on right forehead. 3.5 cm above right orbital ridge and 2 cm from midline horizontally placed.*
- 2. Brown scabbed abrasion 1.5 x 0.5 cm horizontally present on right forehead. 6.5 cm from midline surrounded by bluish contusion in an area of 2 x 1.5 cm, 2 cm above right orbital ridge.*
- 3. Reddish contusion 2 x 1 cm present on left orbital ridge 2 cm from middle.*
- 4. Reddish scratch abrasion 1 x 0.2 cm present on left upper eyelid, 3 cm from midline and 1.2 cm below left orbital ridge.*
- 5. Reddish scratch abrasion 1.2 x 0.2 cm present on left side neck, 6 cm from midline and 7 cm below chin.*
- 6. Reddish abrasion on tragus of left ear.*
- 7. Reddish scratch abrasion 1.5 x 0.3 cm present on back of left pinna ear 2 cm above left mastoid up.*
- 8. Reddish scratch abrasion 1 x 0.2 cm present on left ala of nose, 2 cm lateral to tip and near margin.*
- 9. Reddish abrasion present on septal region of nose near root 1 x 0.5 cm.*
- 10. Reddish abrasion 2 x 1 cm present on ventral aspect of left forearm obliquely 2.5 cm below left elbow.*
- 11. Reddish bruise 4 x 0.5 cm present on medial aspect of right arm, 7 cm above right elbow joint obliquely placed.*
- 12. Reddish bruise 2.5 x 1.5 cm present on left lower abdomen, 11 cm from midline, 18 cm below costal margin.*
- 13. Reddish bruise 4 x 1.5 cm present on left groin region, 13 cm from midline and 7 cm below anterior superior iliac spine.*
- 14. Reddish abrasion 2 x 1 cm on upper leg just below knee joint.*

15. *Reddish abrasion 1.5 x 0.5 cm present on lateral aspect left upper leg 5 cm below knee joint.*
16. *Incised wound measuring 2.5 x 0.1 x 0.2 cm present on left thumb on the palmer aspect obliquely, margins were partially healed and surrounded by bluish contusion."*

15. During cross-examination PW-12 has testified as under:

"Injury No.1, 2 and 16 in this were found about two days old before the death of the victim and rest other injuries were fresh. I do not know, if the deceased had a history of tuberculosis disease. In the present case, blood found on the nostrils and mouth of deceased could not be said to be blood came out of that TB disease as in that situation the blood would have been in respiratory track also. One lung of deceased was found with some infection but without microbiology examination of that infection, it was not possible to describe that infection as TB. It was not possible to ascertain as to what extent of percentage that infected lung was damaged. In the report no further description, if the blood was of a blackish colour has been mentioned as no such fact that blood was of blackish colour must have been found. It is wrong to suggest that that infected lung of the victim/deceased was extremely damaged or to say was in the last stage of its tuberculosis disease. It is wrong to suggest that it was not possible that deceased felt herself suffocated because of one lung was infected to a great extent or that she fell down because of that self suffocated feeling or that it could be a natural death. In the present case, I had not noticed any microscopic blood stained on the wearing clothes of deceased and that is how that aspect was not examined by seizing the clothes of the deceased."

16. It may be noticed that the appellant in the statement made by him under 313 Cr.P.C. admitted the fact that he had been married to Famida 3-4 years before the incident and that he was residing with Famida in the house at L-96, Janta Colony, Welcome, Delhi, which was at the first floor. The appellant did not deny that Famida was found lying dead on 17.05.2011 at around 7 O' clock in the morning on the floor of the room of the house but with regard to rest of the incriminating evidence and

circumstances he sought to explain that Famida was suffering from Tuberculosis and on account of which she might have died. The appellant had also admitted that he and Famida had visited the house of his in-laws on the evening of 16.05.2011 but he denied having any quarrel or dispute. The appellant has also admitted that he along with Famida left the house of his father-in-law at around 10.00 p.m. or 10.30 p.m. and explained that both of them returned to the house where they were residing. The appellant raised a defence that after having food in their house, where they were residing, they both slept. The next morning, the appellant, after waking up, carried out his regular daily routine work, he went outside and brought milk. After his return, he tried to wake up Famida but she did not respond. Other occupants from the nearby house also found Famida dead. The appellant himself went to his in-laws and informed them about the incident. He had been present on the scene of the incident.

17. The case of the prosecution is based on circumstantial evidence. In the case of *Sharad Bidri Chand Sharda vs. State of Maharashtra*, reported at AIR 1984 SC 1622, the following principles have been culled out by the Supreme Court of India:

- “i) Circumstances from which conclusion of guilt is to be drawn should be fully established. Circumstances concerned “must or should” and not “may be” established.*
- ii) Facts so established should be consistent only with the hypothesis of guilt of accused. They should not be explainable on any other hypothesis except that accused is guilty.*
- iii) Circumstances should be of a conclusive nature and tendency.*
- iv) They should exclude every possibility of hypothesis and except the one to be proved.*

v) *There must be a chain of circumstances so complete as not to leave any reasonable doubt for conclusion consistent with the innocence of accused."*

18. The testimonies of PW-1 and PW-3 read with the statement made by the appellant under Section 313 of Cr.P.C. would clearly establish that the deceased and her husband had visited the house of PW-1 and PW-3 on 16.5.2011 in the evening and left their house at around 10.30 p.m. for their own house and as per the statement of the appellant made under Section 313 Cr.P.C. they reached their house.
19. As per the testimony of PW-4, at 7.00 a.m. when he reached the house of Famida, he found Famida lying in a room. While the child of Famida was present, her husband (appellant) was missing.
20. While explaining his position in the statement made under Section 313 Cr.P.C. not only does the appellant admit that he reached the house the previous evening and slept, but in the morning after waking up he carried out with his daily routine and went out to bring milk, and when he came back he found his wife lying dead.
21. As per the post-mortem report, the cause of death was asphyxia as a result of ante-mortem smothering and compression of neck. The stomach contained semi-digested food. There is no explanation from the appellant as to in what circumstances such an incident occurred.
22. The Court cannot lose track of the fact that when Famida was found dead at 7.00 a.m. in her house, where she was residing with the appellant, the appellant was present in that house in the night. Thus, in such a situation, it was for the appellant to explain the circumstances, if any, which would suggest possibility of somebody else committing the murder.

23. In *Mohan Singh Vs. Prem Singh and Anr.* reported in (2002) 10 SCC 236, the Hon'ble Supreme Court held that the statement made by the accused under Section 313 of the Code of Criminal Procedure can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. In this connection, reference may also be made to *Devender Kumar Singla v. Baldev Krishan Singla* (2004) 9 SCC 15 and *Bishnu Prasad Sinha and Anr. v. State of Assam* (2007) 11 SCC 467 in which it was observed that the statement of the accused under Section 313 of the Code of Criminal Procedure for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.
24. In *Ashok Debbarma @ Achak Debbarma vs State of Tripura* reported in (2014) 4 SCC 747, the Hon'ble Supreme Court observed that the admission of guilt under Section 313 of Code of Criminal Procedure cannot be brushed aside and held as under:

"21. We are of the view that, under Section 313 statement, if the accused admits that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. This Court in State of Maharashtra v. Sukhdev Singh and Anr. (1992) 3 SCC 700 held that since no oath is administered to the accused, the statement made by the accused under Section 313 Code of Criminal Procedure will not be evidence stricto sensu and the accused, of course, shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 Code of Criminal Procedure. But, Sub-section (4) says that the answers given by the

accused in response to his examination under Section 313 Code of Criminal Procedure can be taken into consideration in such an inquiry or trial. This Court in Hate Singh Bhagat Singh (supra) held that the answers given by the accused under Section 313 examination can be used for proving his guilt as much as the evidence given by the prosecution witness. In Narain Singh v. State of Punjab (1963) 3 SCR 678, this Court held that when the accused confesses to the commission of the offence with which he is charged, the Court may rely upon the confession and proceed to convict him."

25. In the case of ***N.B. Subbarao vs. State***, reported at 2012 (11) scale 614, the Supreme Court of India has held that a statement made under Section 313 Cr.P.C. can be a relevant consideration for a Court to examine particularly when the prosecution has been able to establish the chain of events.
26. It has been held in the case of ***Balaji Gunthu Dhule vs. State of Maharashtra***, reported at 2012 (9) Scale 451, that the statement made by the accused under Section 313 Cr.P.C. cannot be put against the accused, but reliance may be placed by the Court upon such a statement and find him guilty in consideration of other evidence brought by the prosecution against him. The statement made by the accused should not to be considered in isolation but in conjunction with the evidence adduced by the prosecution.
27. In the case at hand, the statement made by the appellant under Section 313 Cr.P.C. that he along with Famida left the house of parents of Famida on the night of incident and they reached their own house is to be considered in the context of circumstance of the deceased having last seen in the company of the appellant.
28. In a case of charge of murder based upon circumstantial evidence the issue with regard to absence of explanation by the accused came up for consideration in the case of ***Jainoddin vs. State of Maharashtra***, reported

at 2012 (11) scale 316 . In the said case, wife and child of the accused were found murdered in their house and the accused was charged with murder. Probable time of death was found to be before the accused left for work. There was no other person present in the house. In such circumstances absence of explanation by the accused as to the cause of death of his wife and child was held to be sufficient to conclude that offence was committed by the accused. In another case, where the accused were chargesheeted with the offence of murder, the case was based upon circumstantial evidence of last seen and that circumstance found being proved and established. Absence of explanation by the accused was held to suggest involvement of appellant and his conviction was found sustainable (*Nagesh vs. State of Karnataka*, 2012 AIR Supreme Court 1965).

29. Applying the law, laid down in the case of *Balaji Gunthu Dhule* (supra) to the facts of the present case, it may be noticed that the testimony of PW-1 and PW-3 clearly establish that on 16.5.2015 around 10.30 p.m. the deceased and her husband (appellant herein) had left the house of the parents of Famida for their own house. The appellant has failed to render any explanation as to under what circumstances the deceased suffered homicidal death in her matrimonial home. This, in our view, is a strong adverse inference, which is to be drawn against the appellant.
30. A faint argument has also been raised before us that the death was not homicidal but a natural death on account of the fact that the deceased was suffering from Tuberculosis. This submission of learned counsel for the appellant is without any force on account of the scientific evidence, which proves on record that the deceased died due to asphyxia.
31. PW-12, Dr.Meghali Kelkar, who had conducted the postmortem of the deceased, had specifically stated in her cross-examination that the blood

found in the nostrils and mouth of the deceased could not be said to be the blood, which have come out because of the TB disease. PW-12 had further explained that in such a situation, blood would have been in the respiratory track also. She had further testified in her cross-examination that though one lung of the deceased was having some infection but without microbiology examination of that infection it would not be possible to describe that the said infection is due to Tuberculosis. The Doctor explained the suggestion to be wrong that the deceased herself felt suffocated because of lung infection and due to that suffocation she fell on the ground and met with a natural death.

32. Another reason why this submission of the appellant is without any force is on account of the number of injuries, which was noticed on the person of the victim as per the post mortem report and the testimony of PW-12. All these circumstances, rather suggest that as if there was a struggle and a scuffle, wherein the deceased tried to rescue herself till she became helpless because of asphyxia, as a result of smothering.
33. We may also notice another incriminating circumstance, which stands established and proved against the appellant is his absence from the spot when the death of his wife took place inside his house in the dead of the night.
34. In their cross-examination PW-1 and PW-2, had testified that both did not find the appellant present in the house when they reached there. PW-4 had also testified that when he reached the house of Famida at 7.00 a.m. he only found her child in the room and the appellant was not present. This is also supported by the testimonies of the Police Officers i.e. PW-9, SI Mohd.Faizan Ghani; and PW-18, Inspr.Yogesh Malhotra, who have deposed that on reaching the place of the incident, they did not find the appellant present there. No explanation has been rendered by the appellant

in this regard.

35. In our view, the prosecution has been able to establish its case beyond any reasonable doubt. The trial court has carefully analysed the testimonies of the witnesses. We find no infirmity in the impugned judgment of the trial court. There is no merit in the appeal and the same is accordingly dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 23, 2016 msr