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

+ **CRL. A. 1667/2014**

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Judgment reserved on : 13th May, 2016
Judgment pronounced on: 30th May, 2016

AZIM KHAN

..... Appellant

Through: Mr. G.S Singh, Advocate
Versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State with
SI Amit Kumar, PS Burari.

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. The present criminal appeal has been filed under Section 374 of the Code of Criminal Procedure against the impugned judgment dated 31.10.2014 and order on sentence dated 01.11.2014 passed by Ms. Savita Rao, Additional Sessions Judge, Tis Hazari Courts in Sessions Case No. 65/2011, by virtue of which the appellant has been convicted and sentenced to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code and to pay Rs. 10,000/- as fine and in default of payment of fine to further undergo simple imprisonment for a period of four months.
2. It would be necessary to set out the brief facts of the case which gave rise to the present criminal appeal. The brief facts as noted by the trial court are as under:

“1. On 08.04.2010, on receipt of DD no. 33 PP Jharoda, P.S. Burari, regarding admission of deceased Asma in Jaipur Golden Hospital and she having been declared brought dead by the doctors, Inspector Hari Kishan alongwith his staff reached at the spot at House no. 673, Gali no-4 Sangam Vihar and conducted investigation during which it transpired that some scuffle had taken place between accused and deceased immediately before the incident. No eye witness to the incident was found and on the basis of MLC of deceased, instant FIR u/s 302 IPC was registered. During investigation of the case, IO prepared site plan, got the scene of crime inspected through crime team, recorded statements of witnesses, got the postmortem examination on dead body of deceased conducted, arrested accused Aazim Khan and made efforts to search co-accused Nazim@Nasim Mulla but he could not be traced. Exhibits of the case were sent to FSL for expert opinion and after completion of investigation, instant charge sheet u/s 302/34 of the IPC was filed in the court.”

3. It is pertinent to mention at this stage that as per the case of the prosecution the deceased was murdered by the appellant herein with the assistance of his friend Nazim. He was also arrayed as a co-accused in the FIR but as on date he is absconding from the clutches of law.
4. After the investigation was complete, charges under Section 302 and 34 of the Indian Penal Code were framed against the appellant, to which he pleaded not guilty and claimed to be tried.
5. To bring home the guilt of the appellant and to prove its case, the prosecution examined as many as 19 witnesses in all. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure wherein he denied all the incriminating evidence and claimed to be falsely implicated in the case. However, no evidence

was led in his defence. It was admitted by the appellant in his statement that on the day of occurrence i.e. on 08.04.2011, he left his home at about 08.30 am to go to his work place which is at a distance of 14 kilometers from his house where he remained throughout the day and on being informed telephonically regarding the incident at about 4 pm, he came back to his house and reached the clinic of Dr. Asif at about 4.30 pm. The appellant further stated that a robbery was committed in his house six months prior to the incident and may be it was a second attempt in which the deceased had resisted the robbery and was murdered.

6. Mr. G.S. Singh, learned Counsel for the appellant contended that the impugned judgment and order on sentence cannot be sustained in law and that the Trial Court had not considered the evidence on record in its proper perspective. Further, he submitted that the case was based on circumstantial evidence and the prosecution had failed to prove the motive and last seen circumstance as well as the presence of the appellant at the spot. To substantiate his arguments, counsel relied upon the judgment of this bench in the case of *State (Govt. of NCT of Delhi) Vs Raj Kumar and anothers* reported in **2015 (2) JCC 1471** as also the judgment of the Apex Court in the case of *Tomaso Bruno &Anr. Vs. State of UP 2015(2) JCC 884*.
7. Counsel for the appellant further contended that the Trial Court has erred in relying upon the statement of PW11 mother of the deceased as there are major contradictions in her statement recorded by the police under Section 161 of the Code of Criminal Procedure and the statement recorded by the court.

8. Counsel for the appellant further submitted that the Trial Court erred in holding that the motive is proved as the prosecution witnesses categorically admitted that the appellant had no love affair or physical relationship with the younger sister of the deceased namely Soni @ Shabana.
9. Counsel for the appellant further submitted that the age of the appellant is about 29 years and he is quite young and has liability of his two daughters and because the appellant has never absconded from the proceedings and has till today joined the investigation, the appellant deserves to be acquitted.
10. Per Contra, Ms. Aashaa Tiwari, learned counsel for the respondent contended that the impugned judgment and order on sentence do not call for any interference as the Trial Court has properly considered the material on record and has rightly convicted the appellant.
11. Counsel for the State further submitted that the prosecution has proved the motive as well as last seen circumstance and therefore, the circumstances proved by the prosecution clearly establish the guilt of the appellant.
12. Counsel for the State further submitted that as per the postmortem report all the injuries were ante-mortem in nature and the cause of death, as opined was asphyxia as a result of ante-mortem strangulation which was sufficient to cause death in the ordinary course of nature.
13. We have heard learned counsel for the parties and also examined the judgment in detail rendered by the Trial Court. In the present case the prosecution relied on chain of circumstances to bring to the fore that the appellant committed the murder of the deceased. In our view

when the prosecution case rests upon circumstantial evidence, the circumstances should be conclusively proved and point to the guilt of the accused. The circumstances so proved should not be compatible with any hypothesis except with the guilt of the accused.

14. Law is well settled with regard to circumstantial evidence. In ***Padala Veera Reddy Vs State of Andhra Pradesh and others : AIR 1990 SC 79***, it was observed that:

“...this Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

15. In case of ***Dr. Sunil Clifford Daniel Vs. State of Punjab : (2012) 11 SCC 205***, the Hon'ble Apex Court has held :

"In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached.

Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it."

16. Undoubtedly, in a case of circumstantial evidence the prosecution has to show that all the links in the chain of circumstances must be complete and should be proved through cogent evidence. Now, let us examine whether all the links in the chain of circumstance are complete in the present case.
17. Before delving into the merits of the case, we deem it appropriate to determine whether the Trial Court was justified in convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code or not. For this purpose firstly, we would analyze the medical evidence adduced in the present case.
18. PW12 Pradeep Dua who prepared the MLC report Ex.PW12/A in his examination in chief deposed as under:

"On 08.04.2011, at about 5 pm, Ms. Asma Khatoon W/o Azim Khan was brought by Mr. Gore Khan (brother) in a casualty with no response to vocal command. Her heart sound, respiratory efforts were absent and pupils were fixed and bilateral and dilated. Peripheral pulses were not palpable and B/P was not recordable. ECG was showing straight line. On local examination, strangulation mark on her neck. Patient declared brought dead and body handed over to police. I prepared MLC No. 10558/11 which is Ex. PW 12/A bearing my signature at point."

19. PW18 Dr. Asitesh Bajwa who conducted the postmortem examination on the deceased on 09.04.2011 deposed in his examination in chief that:

“On 09.04.2011 he was posted as a Sr. resident, Subzi Mandi Mortuary, AAA Hospital, Delhi and conducted the postmortem examination on the dead body of Asma Khan, 26 years female, wife of Asma Khan.

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External Injuries:

Reddish brown imprint abrasion was en-circling the neck. It was horizontally placed at the level just below thyroid cartilage, spring areas over left side of neck just lateral to midline of neck at front, at areas over nap of neck and right side of neck, 5.3 cm below right ear. Width of ligature mark at front of midline of neck was 0.5 cm, 7 cm below center of chin, 1.1 cm at right side of neck, 5.6 cm below right angle of mandible, 2.1 cm at left side of neck, 5.5 cm now left angle of mandible, 1.5 cm at nap of neck , 7 cm below posterior hair line.

- 1. Reddish brown presented crescentric abrasion 0.6 cm X 0.4 cm was present at left side of nose, 0.8 cm from tip of nose.*
- 2. Reddish brown presented crescentric abrasion 0.5 X 0.4 cm was present at left side of face, 3.8 cm lateral to chin at midline.*
- 3. Bruise 2.1 X .5 cm was present at bridge of nose on dissection infiltration of blood was present.*
- 4. Bruise 3.7 X 1.7 cm was present at left cheek 2.4 cm below left eye on dissection infiltration of blood was present.*
- 5. Linear reddish brown abrasion 3.5 X 0.1 cm horizontally placed at left side of neck , 2.5 cm below left angle of mandible and 2 cm below injury No.1 .*

6. *Linear reddish brown abrasion 3.3 X 0.1 cm was present at midline of neck, vertically placed just below the ligature mark and 4.5 cm above sternal notch.*
7. *Linear reddish brown abrasion 4.5 X 0.1cm was present at 2.5 cm above sternal notch, 2.1 cm below injury No.1.*

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OPINION:

All the injuries were ante-mortem in origin. The cause of death in this case in my opinion was asphyxia as a result of ante-mortem strangulation which was sufficient to cause death in an ordinary course of nature. Time since death was about 12-24 hours. Viscera for chemical analysis, blood in gauze piece and nail clippings along with inquest papers were handed over to IO. My detailed report is Ex.PW18/A which bears my signature at point A.”

20. PW18 in his cross examination stated as under:

“It is correct that postmortem was conducted on 09.04.2011 at about 12:45 pm and the time since death was assessed about from 12 hours to 24 hours. It is correct that the approximate duration of death of deceased comes to be from 08.04.2011 at about 12.45 pm to 12.45am, the intervening night of 08.04.2011/09.04.2011. If the deceased was declared brought dead by Dr. Asifa, the PW8 at about 4 pm on 08.04.2011 and the deceased was further declared brought dead by PW12 Dr. Pradeep Dua at about 5 pm in Jaipur Golden Hospital vide MLC Ex. PW12/A then the period of occurrence comes from 08.04.2011 12.45 pm to 4 pm on 08.04.2011.”

21. The evidence of PW12 and the contents of the postmortem show that the deceased had died due to asphyxia as a result of ante-mortem

strangulation. Indisputably, the death of the deceased is homicidal in nature.

Motive

22. Learned counsel for the appellant vehemently argued that the appellant was living heapily with the deceased and his two children and there was no reason or motive for the appellant to commit the murder of his own wife. In this context, it is relevant to examine the evidence of the relevant witnesses i.e. PW3 Gore Khan (brother of the deceased), PW6 Aamir Khan (brother of the deceased) and PW11 Amir Jahan (mother of the deceased).
23. PW3 Gore Khan, brother of the deceased in his examination in chief deposed as under:

*“On 8.4.2011 my younger sister Soni made a telephone call on my mobile and she told that face of Asma had swelling. I told Soni to take Asma to Jaipur Golden Hospital for medical examination. My mother Amir Jahan and some neighbours brought Asma to Jaipur Golden Hospital. There was mark on the neck of Asma. Police was called and the police official made enquiries from me. **I told to the police that my sister had strained relations with my brother in law Azim Khan.** I told them that my sister was living with her husband from last 8 years. I used to visit the house of my sister Asma. About four days ago before the death of Asma, I had gone to the house of my sister Asma. She was normal on that day. She did not tell me anything. I also visited the house of my sister two days prior to her death, she was normal on that day also.”*

24. This witness in his cross examination stated as under:

“It is wrong to suggest that on 8.04.2011 at about 4.00 p.m. in the evening I myself had informed accused Azim Khan had no love affair with my younger sister Soni @

Sabana nor he was having any physical relationship with my younger sister. It is correct that none of my family member has stated any such thing to the police and police themselves had made the story to solve the case and to create a motive. It is correct that as per religious laws, four marriages are permissible without divorce."

25. PW6 Aamir Khan, brother of the deceased in his examination in chief deposed that:

"Accused Azim Khan used to harass my sister Aashma Khatoon and accused used to say my sister that he would marry with some other female and would leave her. Accused used to say my sister that she is not of his liking. Whenever I visited at the house of my sister Aashma Khatoon, accused used to abuse my sister."

26. Witness in his cross examination also deposed in the same line and stated that:

"I had stated to the police that accused used to say that my sister was not of his liking and accused would desert her.

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My sister used to be harassed by the accused off and on but I cannot tell the specific dates of such instance."

27. From the perusal of the above testimonies, it has come on record that all the aforesaid witnesses have deposed on the same lines and stated that the deceased was subjected to cruelty and atrocities at the hands of the appellant. It has further emerged from their testimony that the appellant disliked the deceased and even tried to poison the deceased on an earlier occasion. On conjoint reading of the above testimonies, would show that both the appellant and deceased had a strained relationship and the appellant had adequate motive to eliminate his wife.

Last Seen Theory

28. Learned counsel for the appellant argued that the prosecution had failed to establish the last seen theory. Learned counsel for the State rebutted the arguments raised by the counsel for the appellant with regard to last seen theory and laid emphasis on the testimony of PW11 mother of the deceased.
29. The settled law with respect to 'last seen theory' has been reiterated in various cases and has been succinctly elucidated in ***State of Karnataka Vs. Chand Basha : 2015 (9) SCALE 809***, wherein the Hon'ble Apex Court has observed :

"This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established."

30. In ***Mahavir Singh Vs. State of Haryana : 2015 (4) SCJ 161***, the Hon'ble Apex Court has observed :

"Undoubtedly, it is a settled legal proposition that last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead. Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime."

31. In ***State of UP Vs Satish (2005) 3 SCC 114*** the Apex Court has observed on last seen theory as under:

“23. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases....”

32. In **Arvind @ Chhotu and Ors.Vs. State** reported in **ILR (2009) Supp.(1) Delhi 704** this court observed as under:

“103. We may summarize the legal position as under:

- (i) Last-seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last-seen theory has to be applied.*
- (ii) It is not necessary that in each and every case corroboration by further evidence is required.*
- (iii) The single circumstance of last-seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last-seen.*
- (iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the*

solitary circumstance of last-seen, a conviction can be sustained.

- (v) *Proximity of place i.e. the place where the deceased and the accused were last seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.*
- (vi) *Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last-seen theory.*
- (vii) *The relationship of the accused and the deceased, the place where they were last seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last-seen theory.*

The above circumstances are illustrative and not exhaustive. At the foundation of the last-seen theory, principles of probability and cause and connection, wherefrom a reasonable and a logical mind would unhesitatingly point the finger of guilt at the accused, whenever attracted, would make applicable the theory of last-seen evidence and standing alone would be sufficient to sustain a conviction.”

33. Without doubt, 'last seen' evidence being a circumstantial evidence the courts must exercise caution. However, if the evidence is forthright and unambiguous and is also corroborated by supportive evidence there is no reason for the court to rule it out on an application of a ritualistic formula that the time duration was lengthy. To establish the fact of last seen it would be necessary to go through the testimony of PW11 mother of the deceased. PW11 in her examination in chief deposed under:-

“My daughter Asma Khatoon and her husband/accused came to my house. They stayed together for 8-10 minutes and accused alone left my house and my daughter remained with me. After 10-15 minutes, accused came to my house and took the key of his house from my daughter and he left my house. My daughter Asma Khatoon followed him. At about 11.30 am accused came again to my house and asked me to prepare yellow rice, I prepared the same. It was Friday, I asked my younger daughter to call accused and my daughter Asma. My younger daughter made a call on the mobile of Asma which was attended by the accused who told me that Asma is sleeping and I may come alone. I asked him to come with children and to eat yellow rice. Accused along with children came and ate the yellow rice. I asked him why he is sad. Accused along with children went from my house. Thereafter I addressed Friday prayer and I made a call on the mobile of my daughter to enquire about her. Accused again attended the call and replied back that Asma is still sleeping BEKHABAR. I thought there maybe a quarrel between them and that is why my daughter is not talking to me. Thereafter the accused disconnected my mobile. Thereafter I went to my bed and slept. At about 3.30 pm, accused came to my house and woke me up and asked me to come to his house and to see Asma. Accused told me that colour of body of Asma has turned blue. I along with accused rushed to his house and on

reaching there I saw my daughter was lying on bed and her head was hanging downside. I also saw blood oozing from her nose and mouth. I started weeping. I asked accused what happened to her and even I slept (sic) accused. I came back to my house for taking dupatta which I was not wearing at that time.”

34. PW11 in her cross examination deposed as under:-

“it is correct that the facts deposed by me on 08.10.2012 regarding visits of deceased and accused at my home, stayed for 8-10 minutes, accused left my house alone, my daughter remained at me at 11:30 am. Accused came again and asked me to prepare yellow rice and accused came again to my house at 03:30 pm are pertaining to the zumma one week prior to the day of occurrence.

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I had told to the police in my statement that my daughter Asma Khatoon and her husband/accused came to my house and they stayed together for 8-10 minutes and accused alone left my house and my daughter remained with me (confronted with Ex-PW11/DA and Ex-PW11/DB where it is not so recorded.) I had told to the police in my statement that after 10-15 minutes accused came to my house and took the keys of his house from my daughter and he left my house and my daughter Asma Khatoon followed him. (confronted with Ex-PW11/DA and Ex-PW11/DB where it is not so recorded). I had also told to the police that at about 11:30am accused came again to my house and asked me prepare yellow rice (confronted with Ex-PW11/DA and Ex-PW11/DB where it is not so recorded). I had told to the police in my statement that I thought that there may be a quarrel between them and that is why my daughter is not talking to me and thereafter accused disconnected my mobile, thereafter I went to my bed and slept. (confronted with Ex-PW11/DA and Ex-PW11/DB where it is not so recorded). I had also told to the police in my statement that at about 03:30pm accused came to my house and woke me up. (confronted with Ex-PW11/DA and Ex-

PW11/DB where it is not so recorded). I had also told to the police in my statement that I alongwith accused rushed to his house and on reaching there I saw that my daughter was lying on bed and her head was hanging to the down side and I also saw blood oozing from her nose and mouth and I started weeping and I asked accused what happened to her and even I slapped accused.

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It is also wrong to suggest that on the day of occurrence, it was not told by the accused Azim Khan to me that the deceased was sleeping at her matrimonial home BEKHABAR"

35. From the scrutiny of the above testimonies we find that PW11 mother of the deceased deposed in her examination in chief that '*After 10-15 minutes, accused came to my house and took the key of his house from my daughter and he left my house. My daughter Asma Khatoon followed him*' again in the cross examination she reiterated her stand by deposing that '*after 10-15 minutes accused came to my house and took the keys of his house from my daughter and he left my house and my daughter Asma Khatoon followed him*'. Deposition of mother establishes the fact that on the fateful day when the appellant left the house of PW11, the deceased followed him. PW11 further deposed that '*I made a call on the mobile of my daughter to enquire about her. Accused again attended the call and replied back that Asma is still sleeping BEKHABAR*' in her cross examination she reiterated her stand and affirmed that '*it was not told by the accused Azim Khan to me that the deceased was sleeping at her matrimonial home BEKHABAR*'. This portion of the testimony goes on prove that there was an admission on the part of the appellant that the deceased was

present in his house and was sleeping. As per the postmortem report also the deceased died on 08.04.2011 between 12.45 pm to 4 pm.

36. What is to be seen is whether the version of PW11 presented in the court was substantially similar to what was said during investigation. It is only when exaggeration fundamentally changes the nature of the case, the court has to consider whether the witness was stating the truth or not. In our view PW11 mother of the deceased the witness to last seen evidence categorically and explicitly described all the events which took place on the date of the incident. Her testimony establishes the fact that the deceased was last seen in the company of the appellant and the time gap was not so long to make the last seen theory redundant. Thus the prosecution has been fairly successful in proving the circumstance of last seen against the appellant.

Plea of alibi

37. Learned counsel for the appellant argued that appellant has taken a categorical stand that on the day of incident he left the home at about 08:30 am and returned from his workplace at 04:00 pm on being informed telephonically about the incident.
38. To dwell upon the argument raising a plea of alibi, it is relevant to discuss the testimony of PW6 and PW8. PW6 Aamir Khan brother of the deceased deposed in his examination in chief that:-

“In the month of April in 2011, in the first week of that month, I do not remember the date, at about 03:30-04:00 pm accused made a call at my mobile no. 7428232624 and told me that Aashma Khatoon is not feeling well and she is being taken to Jaipur Golden Hospital.”

39. PW8 Dr. Asifa who initially examined the deceased deposed in her examination in chief that:-

“Accused Azim, present in the cover today (correctly identified) who resides in our back lane came to my clinic on 08.04.2011, at about 4 pm and asked me to medically examine his wife at his residence as she was not well. I reached at his residence and found his wife Asma dead. I told this fact to some persons who had already collected there.”

40. This witness in her cross examination stated as under:

“ I am running my clinic along with my husband for last 7 years, I am B.U.M.S. It is correct that I did not examine the pulse rate, blood pressure, heart beat and status of pupils of deceased Asma. Volunteer, on the basis of color of her skin which had turned bluish, I opined her to be dead. It is wrong to suggest that the deceased had already been brought to my clinic by her family members or that subsequently at about 4.30 pm, accused Azim came to my clinic. I cannot tell whether accused Azim accompanied the deceased to Jaipur Golden Hospital. It is wrong to suggest that I am deposing falsely with regard to presence of accused at my clinic at 4 pm. It is further wrong to suggest that I am deposing falsely with regard to presence of accused at my clinic at 4pm. It is further wrong to suggest that accused Azim brought the deceased to my clinic.”

41. From the perusal of the testimonies of the aforesaid two witnesses it has come on record that at about 03:30 pm the appellant was with the deceased and he had informed the brother of the deceased that Aashma Khatoon was not well and was being taken to the hospital. PW8 Dr. Asifa who initially examined the deceased in her examination in chief as well as cross examination categorically took a firm stand that the appellant had visited her clinic at 04:00 pm.

Moreover, a conjoint reading of testimonies of PW6, PW8 and PW11 establishes the fact that the appellant was present at his house in the company of the deceased from 08:00am to 04:00 pm. Thus, the argument raised by the counsel for the appellant in relation to presence of the appellant at his workplace does not hold ground.

Presumption under Section 106 of the Evidence Act.

42. In criminal cases the burden of proof is always on the prosecution but there may be certain facts in relation to the offence in question which are known only to the accused or are impossible for the prosecution to prove. These facts have to be explained by the accused, failure of which becomes a strong circumstance pointing towards the guilt of the accused. Since it stands established that the deceased was last seen with the appellant in his house, according to Section 106 of the Indian Evidence Act the onus of proving the facts especially within the knowledge of any person, is upon the appellant.
43. In *Trimukh Maroti Kirkan Vs. State of Maharashtra* reported in (2006) 10 SCC 681 it was observed as under:

“16. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of Himachal Pradesh: 1972CriLJ1317 it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact

that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra: 1992CriLJ1545 the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation were held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal: 1992CriLJ3693 the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of Tamil Nadu v. Rajendran 1999CriLJ4552 the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on

account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.”

44. Hon’ble Supreme Court in another case of ***State of Rajasthan Versus Thakur Singh, 2014 (8) SCALE 82*** has held that:

“22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. This fact need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.”

45. In the instant case, prosecution has successfully proved that shortly before the commission of the crime the deceased was in the company of the appellant in his house where he normally resided therefore the appellant should have offered an explanation for the injuries sustained to his wife which was not done. Thus, this is a strong circumstance which indicates that the appellant is responsible for the commission of the offence.
46. Lastly, counsel for the appellant contended that the age of the appellant is about 29 years and quite young and has liability of his two daughters and because the appellant has never absconded from the proceedings and till today joined the investigation, the appellant deserves to be acquitted, we find no force in this argument. These compassionate grounds would always be present in most of the cases and in the present case is not relevant for interference.

47. For the reasons stated above and on the basis of the testimonies of the witnesses and in congruence with the last seen theory it stands established that none else but the appellant is the author of the crime. The appellant has failed to explain the circumstances in which the death of the deceased took place and the prosecution has successfully proved motive and last seen theory against the appellant.
48. Hence, in view of the above, we do not find any infirmity in the impugned judgment and the order on sentence passed by the learned trial court against the appellant. Accordingly, present appeal stands dismissed.
49. Copy of the Judgment be sent to Superintendent, Tihar Jail. Trial Court record be sent back.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

MAY 30 , 2016
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