

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 06.07.2017
Judgment pronounced on: 06.12.2017

CRL.A.84/2012

SURINDER @ BHOLA

..... Appellant

versus

STATE (NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Ms. Saahila Lamba, Advocate

For the Respondents : Ms. Rajni Gupta, APP

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE NAJMI WAZIRI

J U D G M E N T

SIDDHARTH MRIDUL, J

1. The present appeal under section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C') assails the judgment and order on sentence dated 29.11.2011 and 20.12.2011, respectively, rendered by the Ld. Additional Sessions Judge/Special Judge (NDPS), Dwarka Courts, New Delhi in Sessions Case No. 55/1/10, thereby, convicting the

appellant for the offence punishable under section 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

2. By way of the order on sentence dated 20.12.2011, the appellant has been sentenced to undergo life imprisonment and pay a fine of Rs.10,000/- for the offence punishable under Section 302 of the IPC.

3. Charge was also framed against the appellant as well as his mother and sister under Section 498A/34 of the IPC, however, they were all acquitted of the same by the Trial Court by way of said judgment and order on sentence dated 29.11.2011 and 20.12.2011, respectively.

4. The fulcrum of the case of the prosecution is that on 27.02.2010 the appellant by way of manual strangulation caused the death of the deceased at her matrimonial house i.e. House No.A-1/387, Gali No.3, Madhu Vihar, Delhi (hereinafter referred to as the 'matrimonial house'). The situs is the first floor of the matrimonial house.

5. On 27.02.2010 around 6:41 P.M., a call on 100 number was made by a relative of the deceased, namely, Shiv Kumar (PW-10), concerning death of a lady at the matrimonial house. Subsequent thereto, the information was sent to the Zebra net and a report was received from Zebra-88 net officers confirming the factum of death of the deceased. On the basis of the report

received, DD No.40B [Ex.PW4/B] was recorded by Constable Upendra Mann (PW-3) at Police Station Dabri (hereinafter referred to as 'Police Station'), and marked to Constable Brij Mohan (PW-6) and ASI Daya Shankar (PW-11).

6. PW-6 and PW-11 proceeded to the matrimonial house where the deceased was found lying dead at the first floor of the premises. The information about the incident was given to the SDM and pursuant to his directions the dead body of the deceased was sent to the Mortuary, DDU Hospital, where it was preserved for 72 hours. The family members of the deceased in Nepal were also informed about the incident.

7. On 02.03.2010, the brother of the deceased, Sh. Ram Shamsher Paswan (PW-9) arrived at Delhi from Nepal and identified the body of the deceased at the DDU Hospital. Statement of PW-9 was recorded by the SDM [Ex PW4/I] and post-mortem was conducted. On the basis of the statement of PW-9, the subject FIR No.55/10 was registered under the provisions of sections 498/304B of the IPC [Ex.PW2/A].

8. The scaled site plan [Ex.PW12/B] was prepared and the receipt of jewellery was seized [Ex.PW6 and 7]. In the post mortem report [Ex.PW4/J], it was opined that it was a case of throttling and the pressure over the neck

was sufficient to cause death in the ordinary course of nature. The time of death was opined to be approximately 72 hours prior to the time of starting the autopsy i.e. at 4:55 PM on 27.02.2010.

9. On 02.03.2010, disclosure statement of the appellant was recorded [Ex.PW11/A], admitting to the demands of dowry and causing murder of the deceased. Pursuant to the disclosure statement, the appellant was arrested vide arrest memo Ex.PW7/D.

10. After completion of investigation charge-sheet was filed and charges were framed under section 498A/34 IPC, against the appellant as well as his mother and sister. In addition, charge under section 302 IPC was also framed against the appellant. Thereafter, the matter was committed to trial.

11. At the trial, the prosecution examined 12 witnesses in support of its case.

12. The appellant in his statement under section 313 Cr.P.C has stated that he was not present at the matrimonial house at the time of the incident and had reached there from work around 6:00 P.M. It has been stated that when he arrived at the matrimonial house public persons and police officers were gathered there. Further, it has been stated by him that the door of the

matrimonial house was lying broken, which fact he brought to the notice of the police officers but to no avail.

The appellant in his defence has also summoned Mr. Shobh Ram (DW-1), his neighbour. DW-1 has deposed to the effect that the appellant as well as his mother and sister were not present at the matrimonial house at the time of the incident and the back gate of the matrimonial house was lying broken, showing signs of forcible entry. It was further deposed by him that the matrimonial house was ransacked.

13. Learned counsel appearing on behalf of the appellant whilst placing reliance on the testimony of DW-1 would urge that the appellant has been falsely implicated in the present case, inasmuch as, the murder has been committed by an intruder(s) who forcibly entered the matrimonial house by breaking open the rear door thereof.

14. It would further be urged that the appellant was not present at the matrimonial house at the time of the incident. The offence was committed at a time when the appellant was expected to be working for his livelihood. In support of this submission reliance would be placed on the decisions of a Division Bench of this Court in *Bhupender @ Kale v. State* arising out of

Crl. Appeal No. 1397/2010, and *Vijay Pal v. State* reported as **ILR (2009) Supp. (7) Delhi 297**.

15. Further, it would be submitted that since there were other members residing in the matrimonial house, it would not be safe to conclude that the appellant alone might have committed the offence.

16. It would then be asserted that there has been a delay of 3 days in the registration of FIR, giving rise to suspicion of subsequent deliberation in the registration of the FIR.

17. Further, learned counsel would urge that non-examination of Montu (neighbour of the deceased), casts a serious doubt on the case of the prosecution.

18. Learned counsel would then invite the attention of the Court to the statement of PW-9 under section 161 of the Cr.P.C, which has been recorded belatedly on 10.03.2010, to urge that the appellant has been falsely implicated in the present case.

19. Lastly, it would be urged that no motive has been proved for the appellant to commit the murder of the deceased.

20. Per contra, learned Additional Public Prosecutor appearing on behalf of the State whilst supporting the impugned judgment in its entirety would

urge that the findings of the Trial Court require no interference. It would be submitted that the delay of 3 days in the registration of the subject FIR was occasioned because prior to 02.03.2010 no cogent reason was demonstrated for the registration of the case.

21. We have heard learned counsel appearing on behalf of the parties and perused the entire case record.

22. There is admittedly no eyewitness to the murder of the deceased. No direct evidence has been brought to the notice of the Court in the present case. The present is a case of circumstantial evidence and, therefore, it would be profitable to refer to the legal position with respect to proving a case based on circumstantial evidence. The Hon'ble Supreme Court of India in *Sharad Birdhichand Sarda v. State of Maharashtra* reported as 1984 (4) SCC 116, has laid down five golden principles, which are stated to constitute the “panchsheel” of the proof of a case based on circumstantial evidence. These five principles are as follows:

- (i) that the circumstances from which the conclusion of guilt is to be drawn must be or should be and not merely “may be” fully established;

- (ii) that 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;
- (iii) that the circumstances should be of a conclusive nature and tendency;
- (iv) that they should exclude every possible hypothesis except the one to be proved; and
- (v) that 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.

23. The incident in the present case has transpired within the confines of the matrimonial house and therefore it would also be relevant to refer to the dictum of the Hon'ble Supreme Court in *Trimukh Maroti Kirkan v. State of Maharashtra* reported as 2006 (10) SCC 681, wherein it was observed as follows:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for

the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

(Emphasis supplied)

24. Therefore, there is no gainsaying the legal position that the courts while adjudicating a case of circumstantial evidence would be guided by the principles laid down by the Hon'ble Supreme Court in *Sharad Birdhichand Sarda* (supra) and the initial burden to prove the guilt of the accused would be on the prosecution, however, the principles of circumstantial evidence need not be applied in the strictest sense, inasmuch as, under Section 106 of the Indian Evidence Act, 1872, there would be corresponding burden on the accused to give a cogent explanation as to how the crime was committed.

25. PW-9, the elder brother of the deceased, has deposed that on 27.02.2010, when he was in Nepal, the appellant telephonically informed him about the death of the deceased.

26. PW-10 has deposed that on the date of the incident he received a call from PW-9 asking the former to verify the factum of death of the deceased. Subsequent thereto, PW-10 made a call to 100 number apprising them of the information received by him regarding the death of the deceased and reached at the matrimonial house.

27. PW-1 has deposed that around 6:41 P.M., pursuant to receiving the PCR call from PW-10; concerning death of a lady at the matrimonial house, police officers reached at the matrimonial house within 5 minutes. As per the

report received therefrom, the deceased complained of headache around 1:30 PM and at 2:00 PM she fainted, pursuant to which she was taken to a doctor where she was declared dead.

28. PW-11, has deposed that after DD No.40B was marked to him around 6:50 PM on the date of the incident, he along with PW-6 went to the house of the deceased, where the appellant as well as his mother and sister were also present. The dead body of the deceased was discovered on the first floor of the matrimonial house. PW-11 has further deposed that on 27.02.2010 he didn't conduct inspection of the matrimonial house to ascertain whether there was any forcible entry. Further, that neither the appellant nor his mother or sister complained to him of forcible entry.

29. It has been deposed by PW-6 that on receipt of DD No.40B he alongwith PW-11 reached the matrimonial house where the dead body of the deceased was found.

30. Inspector Satbir Singh (PW-12) joined the investigation on 02.03.2010. The appellant was arrested by PW-12 on 02.03.2010 [vide memo Ex.PW7/C]. The disclosure statement of the appellant was also recorded. It has been deposed by PW-12 that he had not investigated if there was any forcible entry in the matrimonial house for theft or any other

offence. However, he had inspected the matrimonial house, including, doors, windows, etc. thereof.

31. DW-1 has deposed that around 4 PM on the date of the incident he went out for a walk and when he came in front of the matrimonial house, he found the rear iron gate thereof broken and lying on the ground. The gate was lying broken half on the inside and half on the outside. Further, that there was even a crowd at the front of the matrimonial house along with whom he entered the premises and found the dead body of the deceased. It has been further deposed by him that neither the appellant nor his mother or sister were present at the matrimonial house at that time, and the mother and sister of the appellant returned around 5:30 PM, whereas, the appellant returned around 6:30 P.M. As per the testimony of DW-1, the matrimonial house was also lying ransacked.

32. The Trial Court whilst rejecting the possibility of there being forcible entry and holding DW-1 to be an unreliable witness, observed as follows:

“At this stage, the defence taken by the accused vide the testimony of DW 1 Shobh Ram is relevant to be discussed. DW 1 testified that at about 4pm on 27.2.2010 while he was going for a walk he saw crowd in the house of accused persons and the rear gate of the house was found broken and lying on the ground. That on entering the house he found the deadbody of the wife of accused Surender @ Bhola and none of the accused persons were present at house at that time. The mother and sister of accused Surender came there at 5:30pm

whereas accused Surrender came there at 6:30pm. However, the said defence as already discussed above, was neither put to PW 6 nor to PW 11. So far the second IO i.e. PW 12 Inspt. Satbir Singh is concerned, it was suggested to him that the accused had complained to him about forcible entry in his house by some unknown person. It is important to observe that PW 12, had joined the investigation of this case on 2.3.2010 being the second IO but no such suggestion was given to PW 11 who had initially investigated the matter on 27.2.2010 itself when the incident had taken place and had reached there alongwith PW 6. In such circumstances the defence taken by the accused that there was some forcible entry in his house by some person appears to be after thought and concocted. Moreover DW 1 is also not a reliable witness as, as per the prosecution the deceased was residing alongwith the accused on the first floor of the house but DW 1 did not testify that he had gone to the first floor of the house and then seen the dead body of Sadhana, rather as per his testimony there were two iron gates at the house of the accused, one on the front side and other in the rear portion and it is the rear gate which was found broken and lying on the ground half inside and half outside the house and his such testimony leads to the inference that he was talking about the ground floor of the house, whereas accused was residing at first floor. PW 11 ASI Daya Shankar has categorically testified that in pursuance of DD No 40B he alongwith Ct Brij Mohan reached the spot i.e. on the first floor of the house and he has nowhere testified about any iron gate lying broken on the ground floor nor any suggestion was given to this effect to the witness that the dead body was lying in a room on the ground floor and the broken door was lying half inside and half outside the house. Besides, DW 1 has testified in his cross examination by Ld. Addl. PP for State that when he saw the dead body of the deceased there was small injury mark on her right side forehead but he did not notice any other injury. His said testimony is contrary to the post-mortem report Ex. PW 4/J wherein no injury has been shown to be found on the forehead of the deceased as deposed by DW 1 to the contrary there were three other injuries found on her person i.e. Nail mark over anterior aspect, bruises on the outer aspect of right forearm and bruises on the inner aspect of left arm. In view of

such material discrepancies in the testimony of DW 1 and the postmortem report Ex PW 4/J no reliance can be placed on the statement of DW1 and he appears to be a false witness introduced by the accused to save himself. Besides, though it is the defence of accused Surrender that there was forcible entry by some unknown person in his house resulting in death of his wife but till date the accused has never alleged that there was any theft or robbery effected in his house or any article was found missing nor it is alleged that there was any attempt of any sexual assault on the person of his wife, so what can be the motive of the person who had forcibly entered the house, particularly, when the accused has not alleged that he had enmity with anyone who could commit such offence with his wife for any reason. At the same time, it is observed that though the accused has taken defence of forcible entry but he has nowhere lodged complaint with the police or with any other authority in this regard till he was arrested by the police on 2.3.2010 from the date of incident nor he gave any such information about forcible entry even to PW 9 on telephone that she was killed by someone who had forcibly entered the house, particularly in view of the fact that he has not disputed the testimony of PW 9 that he had received telephone call from accused Surrender regarding the death of his wife. If the defence of the accused is believed to be correct, then PW9 was the first person to whom he had given the information regarding the death of his wife and definitely he could inform him the manner in which she had been killed by someone after entering the house forcibly in his absence. At the same time, it is observed that the defence of forcible entry is taken by the accused for the first time during the testimony of PW 12 but prior to that during the entire investigation the defence taken by the accused was that the deceased was feeling unwell and she had been taken to the private doctor at 2pm and she was declared brought dead. As per the testimony of PW 10 Shiv Kumar, after he received the information from PW 9 regarding the death of Sadhana he informed the police on 100 number and went to the matrimonial house of Sadhana at Madhu Vihar where he found Sadhana lying dead. He inquired from accused Surrender as to how she had died, to which he replied that she was having headache and was given medicine for the same

due to which she died. Though, a suggestion was given to the witness that accused had not made any such statement before him, however, the testimony of PW 10 to this effect finds corroboration from the PCR form Ex PW 1/A wherein it is mentioned :

“LADY Sadhana W/O SURENDER AGE 22 YEARS ADDRESS SAME SHADI KO 4 YEARS HUYE HAIN 1 LADKI 8 MACHINE KIHAI 1.30 PM PARSIR ME DARD BATAYA 2.00PM PAR BEHOSH HO GAI PRIVATE DOCTOR KE PAAS LE GAYE. JAHAN DOCTOR NE DEAD DECLARE KAR DIYA WLP 27/02/2010 19.06.13 RCD 5 MIN.”

PW 1 Ct. Sanjeev Negi who recorded the PCR form Ex PW 1/A has proved the same but he was not subjected to cross examination by the accused and no suggestion was given to him that no such information was received by him from Zebra 88 Net Officers who had visited the spot on receipt of PCR call. At the same time accused made different statement before PW 11 ASI Daya Shankar as he informed him that the deceased was suffering from heart disease and blood pressure and for this reason she died, though PW 11 was confronted with his statement U/s 161Cr. PC Ex. PW 11/D1 wherein this fact does not find mention, however merely for this reason his testimony cannot be disbelieved as this fact is mentioned in the brief facts Ex PW 4/C prepared by PW 11 on 2.3.2010. In the brief facts, it is categorically mentioned by PW11 that accused during interrogation disclosed to him that she was suffering from blood pressure and on this account she had expired. However, PW 11 has not been cross examined regarding the mentioning of this fact in the brief facts Ex PW 4/C, on being informed by the accused and this fact stands proved on record that he had taken this defence during investigation that she had died on account of illness. Thus it is seen that the accused has taken different plea of defence during investigation and during the trial, for which adverse inference is liable to be drawn against the accused.”

33. The Trial Court in our considered view, has rightly held that DW-1 is not a reliable witness and that there was no forcible entry in the matrimonial house on the date of the incident, inasmuch as:

- (i) The call made by PW-10 to 100 number has been proved by the PCR information form [Ex.PW1/A]. Neither in the initial report received by PW-1; pursuant to the call made by PW-10 to the police, nor the testimony of either PW-6 or PW-11; police officers who first arrived at the matrimonial house from the police station, is there any mention of forcible entry or a broken gate.
- (ii) In the cross examination of PW-6 and PW-10, no suggestion was put concerning forcible entry.
- (iii) PW-11 has denied of any complaint made to him by the appellant or his mother or sister concerning forcible entry in the matrimonial house.
- (iv) The testimony of PW-12 cannot be discredited on the sole basis that the factum of inspection of the matrimonial house does not find mention in the case diary. PW-12 having inspected the

doors, windows, etc. of the matrimonial house has denied the suggestion put to him that an intruder murdered the deceased.

- (v) It is incomprehensible that DW-1 or the purported crowd was able to notice the rear gate of the matrimonial house from the front of the premises. Furthermore, nowhere has it been deposed by DW-1 that they proceeded to the first floor of the matrimonial house, where the dead body of the deceased was found.
- (vi) Contrary to the deposition of DW-1 that there was an injury mark on the forehead of the deceased; post-mortem report does not record any such injury.
- (vii) Even assuming the version of DW-1 to be truthful, it is inconceivable that no one from the crowd of citizens thought it to be prudent to inform the police authorities about the incident; having discovered about it at as early as 4 PM. The first call to the police authorities was made by PW-10 around 6:40 PM.
- (viii) As per the testimony of DW-1 the appellant arrived at the matrimonial house at 6:30 P.M., whereas, the latter himself in

his statement under section 313 Cr.P.C has stated that he returned to the matrimonial house from work at 6:00 P.M.

- (ix) No complaint has been made by the appellant or his family members concerning robbery or theft from the matrimonial house. There is no evidence on record to support the version of DW-1 that the matrimonial house was lying ransacked. In the post-mortem report it has nowhere been mentioned that the deceased was subjected to sexual assault. Further, it has not been alleged by anyone that the appellant or deceased shared enmity with anyone. Therefore, there was no motive for any person on the outside to commit the murder of the deceased.

34. Having ruled out the aspect that an outsider caused the murder of the deceased, we shall now proceed to examine whether the appellant was present at the matrimonial house during the time of the incident.

35. It is a settled law that the conduct of the accused preceding and subsequent to the commission of the offence are relevant facts. [**Ref:** *Ganesh Lal v. State of Maharashtra* reported as (1992) 3 SCC 106]

36. In the statement of PW-9 recorded by the SDM [Ex.PW4/I], the latter has stated that the appellant telephonically informed him that the deceased has committed suicide. No suggestion was put to PW-9 in this behalf.

37. PW-10 has deposed that when he reached the matrimonial house on the date of the incident the appellant as well as his mother, father and sister were already present. The dead body of the deceased was also lying there. It has been further deposed by PW-10 that upon enquiry from the appellant vis-à-vis the circumstances leading to the death of the deceased, the latter informed him that the deceased died as a result of taking medicine for headache. On further enquiry PW-10 was told by the sister of the appellant that the deceased was taken to a doctor after the deceased took the medicine, however, due to non-availability of a doctor she was later taken to a hospital, where she died. PW-10 has further testified that there was no hue and cry at the matrimonial house. The suggestion put to PW-10 that he was not told by the appellant that the deceased died by taking medicine for headache was also denied by him.

38. PW-11 has deposed that on 27.02.2010, upon inquiry from the appellant, it was disclosed by the latter that the deceased was suffering from heart disease and blood pressure problem and for this reason she died. It

would further be relevant to refer to the brief facts [Ex.PW4/C] prepared by PW-11 on 02.03.2010. In the said document it has been recorded by PW-11 that on the date of the incident, during the course of investigation at the matrimonial house, it was disclosed that the deceased was suffering from blood pressure and she was taken to a nursery home where she was declared dead. However, the fact about the deceased suffering from blood pressure or heart disease does not find mention in the statement of PW-11 under section 161 Cr.P.C.

39. Further, it would be relevant to refer to the testimony of PW-1 in this behalf. PW-1 has also testified on the lines of the contents of the said document Ex.PW4/C. PW-1 has deposed that the report received by him pursuant to the call made by PW-10 on 100 number, also records that the deceased was not feeling well on the date of the incident and she fainted around 2:00 P.M. Thereafter, she was taken to a doctor where she was declared dead. The appellant has put no suggestion to PW-1 in relation to the said report.

40. Reference may also be made to the response of PW-12 to a court question put to him. It has been deposed by PW-12 that he made enquiries from one Dr. Jain, the doctor to whom the deceased was taken to on the date

of the incident. The doctor informed him that the deceased was already dead when she was brought to the hospital. But this fact was neither mentioned in the case diary nor was the statement of the doctor recorded by PW-12. However, in this behalf, no suggestion was put to PW-12.

41. The appellant in his statement under section 313 Cr.P.C has stated that he was not present at the matrimonial house at the time of the incident and reached there at 6:00 P.M. from work. It has been further stated by him that when he reached back at the matrimonial house he found police officers and public persons gathered there.

42. The Trial Court with respect to the presence of the appellant at the matrimonial house during the time of the incident has held as follows:

“As per the case of the prosecution vide DD No 40B the information was received in the PS Dabri at 06:41pm from Control Room to the effect that the information was received by PCR from Shiv Kumar from telephone No. 9910133383 that one lady had died at house No. A1/387 Gali No.3 near Sunrise School, Madhu Vihar and it appeared to be a dowry death. PCR form Ex.PW 1/A was filled in to this effect. The PCR was sent to the spot and the information was received back in the Delhi Police Control Room. DD No. 40 B recorded subsequent to receipt of the information through PCR was marked to PW11 ASI Daya Shankar who alongwith PW 7 Ct. Vinod Kumar reached the spot and found that the dead body of the deceased was lying on the first floor of the house inside the room. All the three accused persons were also present in the house and on enquiry accused Surender informed him that deceased was suffering from heart disease and blood pressure and for this reason she had died. DD No. 40B has been proved as Ex. PW 3/A. As per the case of the

prosecution, it is the accused Surender who had given the information on telephone to PW 9 Ram Shamsher Paswan, the brother of deceased Sadhana about her death and consequently PW 9 gave information in this regard to PW 10 Shiv Kumar, his relative at Delhi who immediately on receipt of this information informed the PCR from his mobile phone bearing No. 9910133383 regarding which the prosecution has proved on record the PCR form as Ex PW 1/A and the information was sent by the PCR to the concerned PS whereby DD No 40B Ex PW 3/A was recorded. PW 9 has categorically testified in his examination in chief that he was telephonically informed by accused Surender that Sadhana had died and that on receipt of this information he passed it on to his uncle. The aforesaid testimony of PW 9 has not been disputed or rebutted in any manner during cross examination by the defence. No suggestion was given to the witness that accused Surender had not given any such information to him. Similarly, PW 10 Shiv Kumar has also categorically testified regarding receipt of the above information on telephone from PW 9 and that thereafter he informed the police on 100 number but the testimony of this witness too was not rebutted during cross examination as neither any question was put in this regard nor any suggestion was given that the accused had not given any such information to PW 9. Though it is claimed by the accused that he was not present at the spot at the time of incident in his statement U/s 313 Cr.PC and has denied that he had made any call to PW 9 informing that Sadhana had died. However, the said defence was not put either to PW 9 or PW 10 that since he was not present at the spot and as such he could not have intimated about the death of Sadhana to PW9. Besides, it is seen that the accused had taken the defence in his statement U/s 313 CrPC that on that day he was not present at his house and had reached there at about 6pm and found that public had collected there and police was also there and he saw the door of his house was lying broken and he brought this fact to the notice of the police but they did not listen to him. However, it is PW 6 and PW 11 who had initially visited the house of the accused after the incident on receipt of DD No 40 B Ex PW 3/A. PW 6 was not subjected to any effective cross examination, it was not suggested to him that when police reached there the accused Surender was

not present there or that he arrived at the spot after the arrival of the police and that the door of the house was found broken. Similarly, so far PW 11 is concerned, though he was suggested that the accused persons were not present at the spot on 27.2.2010 and had arrived there at about 6pm but no suggestion was given to the effect that the gate of the house was lying broken and the attention of PW 11 was drawn to this effect.”

43. A bare perusal of the testimonies of the witnesses, as discussed hereinabove, would show that the appellant has adopted two different defences, one at the time of his statement under section 313 Cr.P.C and other prior to that.

44. *Firstly*, the defence taken by the appellant prior to his statement being recorded under section 313 Cr.P.C was that the appellant died due to ill health. Whereas, PW-10 was informed by the appellant that the deceased died due to *medicine taken for headache* and further by the sister of the appellant that the deceased was declared dead when taken to the hospital, PW-11 was informed by the appellant that the reason for untimely death was *heart disease and blood pressure problem*. The testimony of PW-11 in this behalf cannot be rejected on the ground that it was not so recorded in his statement under section 161 Cr.P.C, inasmuch as, it has been so recorded in the brief facts [Ex.PW4/C] prepared by him on 02.03.2010. The contents of this document Ex.PW4/C are further substantiated by the testimony of PW-1.

Furthermore, it would be relevant to observe that the appellant had telephonically informed PW-9 that the deceased has *committed suicide*. The factum of this call can be reasonably inferred from the call made by PW-9 to PW-10 and thereafter the call made by the latter to 100 number, which have been proved by the call detail records of the former and form Ex.PW1/A, respectively. The call on 100 number was made by PW-10 around 6:40 P.M. The time of death is opined to be 4:55 P.M. PW-9 was staying in Nepal, if it had not been for the appellant, there was no way for PW-9 to get to know about the death of the deceased so early in point of time; in order to enable him to inform PW-10 about the same.

Moreover, no suggestion was even put to PW-10 vis-à-vis his testimony on the aspect that the sister of the appellant told him that the deceased was declared dead when taken to the hospital after taking medicine for headache. In addition, it would be relevant to note that no suggestion was put to PW-12 in relation to his response to the court question on the doctor to whom the deceased was taken on the date of the incident, where she was declared dead.

45. *Secondly*, the defence taken by the appellant at the time of trial in his statement under section 313 Cr.P.C was that he was not present at the

matrimonial house during the time of the incident, and the murder was committed by an outsider who forcibly entered the matrimonial house by breaking open the rear gate. The plea of forcible entry has already been disbelieved. Insofar as the plea that the appellant was not present at the matrimonial house during the time of the incident is concerned, it would be relevant to note that the appellant had stated that he had gone out for work and came back at 6:00 P.M., whereas, DW-1 had stated that the appellant came back at 6:30 P.M. In addition, there is no evidence on record to show that the appellant was working somewhere and he normally used to return back home around 6:00 P.M.

46. In view of the foregoing discussion, it is evident that the appellant tried to resort to varying defences at different points in time. Till the time the statement of the appellant under section 313 Cr.P.C was not recorded, it was not his stand that he was not present at the matrimonial house during the time of the incident. It was only after the false story concerning illness set up by the appellant was brought to light by the post-mortem report that the appellant was arrested on 02.03.2010, and he resorted to the stand that he was at work during the time of the incident. However, this plea is also not substantiated, inasmuch as, no proof of work is available on record and the

defence witness himself has discredited the statement of the appellant in relation to the time when he returned back home. The conduct of the appellant in taking varying defences at different points in time is inconsistent with the hypothesis that he was not present at the matrimonial house during the time of the incident.

47. The *alibi* sought to be set up by the appellant that he was not present at the matrimonial house during the time of the incident and reached there only at 6:00 PM, appears to be an afterthought and is liable to be rejected. An adverse inference is to be drawn that the appellant was present at the matrimonial house during the time of the incident.

48. Insofar as the reliance has been placed by learned counsel for the appellant on the decision of this Court in ***Bhupender @ Kale*** (supra), it would be relevant to refer to the classification made therein of the decisions of the Hon'ble Supreme Court on the point of death of a wife in her matrimonial home:

- (i) In the first category fall the decisions where it is proved by the prosecution that the husband was present in the house when the wife suffered a homicidal death and rendered no explanation as to how his wife suffered the homicidal death;

- (ii) In the second category are the decisions where the prosecution could not prove the presence of the husband in the house when the wife suffered a homicidal death but the circumstances were such that it could be reasonably inferred that the husband was in the house and the husband failed to render any satisfactory explanation as to how his wife suffered a homicidal death. The circumstances wherefrom it could be inferred that the husband was in the house would be proof that they lived in the house and used to cohabit there and the death took place in such hours of the night when a husband was expected to be in the house i.e. the hours between night time and early morning;
- (iii) In the third category would be proof of a very strong motive for the husband to murder his wife and proof of there being a reasonable probability of the husband being in the house and having an opportunity to commit the murder; and
- (iv) In the fourth category are the decisions where the wife died in her matrimonial house but there was no evidence to show presence of the husband in the house at the time of the death of the wife and the time when the crime was committed was not of

the kind contemplated by the decisions in category II and was of a kind when husbands are expected to be on their job and there was either no proof of motive or very weak motive being proved.

49. The reliance placed by learned counsel for the appellant on the fourth category of cases is misplaced, inasmuch as, the presence of the appellant has been proved at the matrimonial house at the time of the incident and no rational explanation is forthcoming from him as to how the incident transpired. Therefore, the present case falls under the first category of cases mentioned hereinabove.

50. The decision in *Vijay Pal* (supra) is of no aid to the appellant and is distinguishable on the facts of the present case, inasmuch as, in that case the incident transpired in the wee hours in the room where the accused used to sleep with the deceased. Further, in that decision the accused (husband) was convicted for the murder of his wife.

51. PW-4 on external examination of the deceased found, *inter alia*:

- a) “ Nail marks present over anterior aspect of neck just lateral to thyroid cartilage 3 in number on right side and 4 in number on

left side. They were all separate to each other by 2x4mm of size 4x9mm reddish brown in colour”

- b) “Bruises present on outer aspect of right forearm 2 in number of size of 2.2x1.0 cm and 2.5x1.4 cm muscle deep under collection of clotted blood, dark reddish colour”
- c) “Bruise present on inner aspect of left arm size 3.0x1.8 cm muscle deep under collection of clotted blood, dark reddish colour”

52. From the external examination it can be reasonably inferred that in order to prevent resistance, while pressure was being imparted on the neck of the deceased, the arms of the deceased were caught hold by another person(s), leading to bruises. Therefore, the appellant was not acting alone. The assistance could very well be from the other inmates of the matrimonial house, however, that question has neither been investigated by the police nor dealt with by the Trial Court. Be that as it may, we are not to decide the involvement of other inmates of the matrimonial house, inasmuch as, only the appellant has been charged for the offence punishable under section 302 IPC. Although, this possibility will not lead to the acquittal of the appellant if

other circumstances inconsistent with the innocence of the appellant are proved.

53. In this behalf reliance may be placed on the decision of the Hon'ble Supreme Court in *Ganesh Lal v. State of Maharashtra* reported as (1992) 3 SCC 106, wherein, on appreciation of the evidence on record it was concluded that inmates alone have committed the murder of the deceased wife. However, in the absence of appeal against acquittal of other inmates of the house, the conviction of appellant husband was confirmed.

54. Insofar as the question concerning non-examination of Montu, neighbour of the appellant, is concerned it would be relevant to observe that his deposition may have been relevant to prove or disprove the presence of the appellant at the matrimonial house during the time of the incident.

55. However, the non-examination of Montu would not create a dent in the case of the prosecution, inasmuch as, the presence of the appellant has otherwise been proved by the evidence on record.

56. Delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the court must take notice of the fact that the report was lodged belatedly. This fact has to be considered in the background of the facts and circumstances in each case and is a matter of

appreciation of evidence. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. [Ref: *Ramdas & Ors v. State of Maharashtra* reported as (2007) 2 SCC 170]

57. In the present case, the fateful incident occurred on 27.02.2010. PW-9, the brother of the deceased was a resident of Nepal. PW-9 had informed PW-11 that it would take him 2-3 days to reach Delhi. Pursuant thereto, under the directions of the SDM, the dead body of the deceased was got preserved in the DDU Hospital for 72 hours. PW-9 arrived at Delhi on 02.03.2010 i.e. the date of the registration of FIR, and identified the body of the deceased. The statement of PW-9 [Ex.PW4/I] was recorded by the SDM (PW-8) at the DDU Hospital on 02.03.2010 itself. Allegations of demand of dowry and physical assault at the hands of the appellant as well as his mother and sister were leveled in the said statement. An endorsement [Ex.PW8/A] was made by the SDM (PW-8) on the statement, directing the Station House Officer of the Police Station to take necessary action as per the law. Consequent thereto, the subject FIR was registered on the basis of the said statement of PW-9.

58. Prior to the recording of the statement of PW-9 by the SDM there was no cogent material on record against the appellant as well as his mother and sister in support of the charge under Section 498A IPC. Furthermore, prior to the autopsy (conducted on 02.03.2010), there was no material available before the police authorities to register an FIR under Section 302 IPC. It was only after the post-mortem report that the said story concocted by the appellant concerning the circumstances leading to the death of the deceased was found to be false and the cause of death was found to be otherwise. Even otherwise, there was no reason for the police officials to falsely implicate the appellant.

59. In view of the foregoing discussion, the delay in the registration of the subject FIR does not adversely affect the case of the prosecution. The delay does not appear to be a result of subsequent deliberations.

60. It is a settled proposition that unless the investigating officer is in clear terms asked about the delayed examination of a witness, the defence cannot gain an advantage therefrom [**Ref :Ramanand Yadav v. Prabhu Nath Jha** reported as (2003) 12 SCC 606].

61. In the present case, although the statement of PW-9 was recorded by the investigating officer belatedly i.e. on 10.03.2010, no suggestion was put

to the latter concerning the reason for such delay. Furthermore, the delay of 8 days in recording the statement of PW-9 cannot be said to be substantial so as to give rise to any suspicion, more so when the statement of PW-9 was recorded by the SDM (PW-8) on 02.03.2010 itself.

62. Therefore, the appellant is not entitled to gain any advantage from the delayed examination of PW-9.

63. No doubt that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence thereof would dislodge the prosecution story in its entirety is perhaps giving the factor of motive an importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. [Ref: *Ujjagar Singh v. State of Punjab* reported as (2007) 13 SCC 90].

64. In the present case, the Trial Court has disbelieved the allegations of cruelty against the appellant. If the Trial Court would have held otherwise, it would have explained the motivation behind the commission of the offence. Be that as it may, we are not called upon to review those findings, inasmuch as, no appeal has been preferred against the acquittal of the appellant as well as his mother and sister from the charge under section 498A IPC. The motive is locked deep inside the mind of the accused. However, as other

circumstances unerringly point towards the guilt of the appellant, merely because the prosecution has not been able to establish the motive behind the commission of the offence, it would not dislodge the case of the prosecution in its entirety.

65. The Hon'ble Supreme Court in *State of W.B. v. Mir Mohammad Omar* reported as (2000) 8 SCC 382, has succinctly laid down the principle of presumption of a fact from certain other proved facts, as follows:

“ 33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”

66. Furthermore, there is another principle of law which must be kept in mind in a case based on circumstantial evidence. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be

untrue, then the same becomes an additional link in the chain of circumstances to make it complete. [Ref: *Trimukh Maroti Kirkan* (supra)]

67. It has been proved that the appellant was present at the matrimonial house during the time of the incident. The time of death has been opined to be 4:55 P.M. The first call was made by the appellant to PW-9 around 6:30 P.M., i.e. more than one and half-hours belatedly, fabricating a story that the deceased committed suicide. Thereafter, defence was taken that the deceased died due to ill health. Subsequent thereto, it was stated by the appellant that he was not present at the matrimonial house during the time of the incident. No steps were taken by the appellant to inform either the police authorities or the neighbours about the incident. There was no effective cross-examination by the appellant with respect to the incriminating circumstances against him. All the varying defences taken by the appellant at different points in time have been disbelieved. Moreover, no rational explanation has been forthcoming from the appellant as to what transpired on the fateful day within the confines of the matrimonial house.

68. Section 106 of the Evidence Act postulates that where any fact is within the exclusive knowledge of a person, the burden of proving that fact is on him. The appellant has failed to discharge the burden on him under

section 106 of the Evidence Act vis-à-vis the sequence of events leading to the death of the deceased. Moreover, the appellant has tendered false explanations with respect to his whereabouts at the time of the commission of the offence and the circumstances leading to the death of the deceased; thus providing an additional link in the chain of circumstances to make it complete.

69. The evidence on record suggests the involvement of more than one person in the commission of the crime. The absence of charges under section 302 IPC against anyone else but the appellant negates the examination of this question in appeal.

70. Therefore, in our considered view, the Ld. Trial Court after close and judicious scrutiny of the circumstantial evidence on record has correctly arrived at the conclusion with regard to the guilt of the appellant. There appears to be no circumstance that warrants interference by this Court with the decision of the Ld. Trial Court.

71. Consequently, the conviction of the appellant as recorded in the impugned judgment as well as the sentence awarded to him by way of the order on sentence, are upheld.

72. The present appeal is accordingly dismissed, with no order as to costs.

73. Copy of the judgment be supplied to the appellant through the Superintendent, Tihar Jail and also be sent for updation of the records.

**SIDDHARTH MRIDUL
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

DECEMBER 06, 2017
dn/ap/ns

