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

+ **CRL.A. 186/2003**

YAMIN

..... Appellant

Through: Mr. M. L. Yadav, Advocate.

versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL

JUDGEMENT

% **26.07.2018**

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 27th February, 2003 passed by the learned Additional Sessions Judge ('ASJ'), Karkardooma Courts, Delhi in Sessions Case No.88/2001 arising out of FIR No.172/2001 registered at Police Station ('PS') Kalyan Puri convicting the Appellant for the offence under Section 302, 201 & 404 IPC and the order on sentence dated 28th February, 2003 whereby for the offence under Section 302/201 IPC he was sentenced to imprisonment for life along with a fine of Rs.5000, and in default of payment to undergo rigorous imprisonment (RI) for six months. For the offence under Section 404 IPC, he was sentenced to the

period already undergone along with a fine of Rs.3000/-, and in default of payment to undergo RI for three months.

2. At the outset it requires to be noticed that the Appellant who was Accused No.1 (A-1) was sent up for trial along with Suresh Kumar (A-2) and Suresh Chand (A-3). However, A-2 and A-3 were held guilty only for the offence under Section 404 IPC and sentenced to the period already undergone with some fine amounts and default fines, which are not relevant for the present appeal.

3. The charge against the Appellant, A-2 and A-3 was that on or before 16th May, 2001 they entered into a criminal conspiracy to commit an offence punishable with death and thereby committed an offence punishable under Section 120 B IPC. Secondly, at an unknown time on 16th May, 2001 at the slip road near a Gurudwara in Vinod Nagar on the National Highway ('NH-24') all of them in furtherance of their common intention murdered Khazano Devi and thereby committed an offence punishable under Sections 302/34 IPC. Thirdly, that they caused evidence of the commission of the offence to disappear and thereby committed an offence punishable under Section 201/120 B IPC.

4. Separately, each of the accused was charged with the offence punishable under Section 404 IPC. As far as the present Appellant is concerned with respect to Section 404 IPC, he was charged with having dishonestly misappropriated and converted to his own use articles as mentioned in Mark A and B which were in possession of the deceased at the time of her death.

Information to the police

5. Information was received at PS Kalyan Puri at around 9.08 pm through the Police Control Room (PCR) that the dead body of a lady was lying at NH-24, Khichripur near Vinod Nagar bridge. This information was reduced into writing as DD No. 26A and was entrusted to Sub-Inspector (SI) Janki Prasad (PW-13) who left for the spot along with Constable (Ct.) Komesh (PW-18). Ct. Ashok Kumar (PW-22) also joined them. They found the dead body of the woman lying 100 yards away from NH-24 on the slip road.

6. Meanwhile, Inspector S.N. Khan (PW-23) the Station House Officer ('SHO') reached there. The crime team was also called. The dead woman was found wearing two *chutkis* (silver) on her feet made of silver and copper. She was also wearing two rings. The said ornaments were packed in a *pulanda* and sealed. There was a separate *pulanda* for two broken bangles which were also taken in possession. One visiting card of Vishwajit Mangla, Advocate was also found and seized. The name Khazano Devi and one flower was engraved on the right hand of the body. One white coloured net *dupatta* and one wire/cable which was 2 feet 9 inches long were found wrapped around the neck of the deceased. There were injury marks on the dead body apart from ligature marks on the neck. While she was wearing five bangles on the left hand, she wore none on the right. The right thumb impression of the deceased was having an ink mark. The thumb impression appeared to have been affixed somewhere recently. PW-23 stated that subsequently the deceased was identified as Khazano Devi, the widow of Roshan Lal, by her daughter Laxmi and her sister Murti Devi (PW-5).

Post mortem

7. The post-mortem of the deceased was conducted by Dr. L. C. Gupta (PW-10) who noticed seven external injuries which included abraded bruises. PW-10 also noticed as under:

“Ligature mark in form of abraded bruise was present around the neck and around to this there was nail scratch mark and on dissection underneath tissue found markedly contused.”

8. The opinion as to the cause of death was given as:

“Asphyxia resulting from manual strangulation and neck constriction with help of ligature material by the other party which was sufficient to cause death in ordinary course of nature where involvement of more than one person cannot be ruled out.”

Version of PW-5

9. According to PW-23, on the night of 18th/19th May, 2001 he visited the house of Murti Devi (PW-5) the sister of the deceased. She is stated to have produced an agreement exhibited as Ex.PW-5/B. This agreement was purportedly dated 3rd August, 2000 and stated that the present Appellant had borrowed a sum of Rs. 50,000/- from the deceased and had promised to return it by 3rd March, 2001. The number ‘03’ in the month column of the date “03.03.2001” appeared to have been overwritten. According to PW-5, she and the deceased were to attend a marriage in Bhopal on 16th May, 2001. At around 4 to 4.30 pm she received a call from the deceased who told her that she was going to the Appellant to collect the money. PW-5 waited for the deceased the whole of the night. According to PW-5, Head Constable Madan Pal (PW-2) told her that he had seen the deceased with

the Appellant at the Maujpur Chowk and they had left from there in a vehicle. Later Laxmi, the daughter of the deceased told PW-5 that the dead body of the deceased had been recovered in the Kalyan Puri area. PW-5 then went to the Kalyan Puri Hospital at around 1.30 pm on 18th May, 2001 and identified the dead body.

10. The APP mistakenly got not only the agreement dated 3rd August, 2000 exhibited through PW-5 but also a subsequent purported agreement dated 15th May, 2001 (Ex.PW-5/C), although the said subsequent agreement was in fact not recovered from PW-5. That agreement purported to record that the Appellant had repaid to the deceased a total sum of Rs. 60,000/- including the additional amount of Rs.10,000/- as interest. The said subsequent agreement order dated 15th May, 2001 was signed by the Appellant and had the thumb impression of the deceased. It has also been signed by one Rajender Singh, Advocate and Notary, who was examined as PW-14. It is not clear how the subsequent agreement came into the possession of the Investigating Officer ('IO') of this case particularly since there is no seizure memo in respect thereof.

Investigation

11. According to PW-23 on 20th May, 2001 he searched for the Appellant and "on the basis of source, accused Yamin was apprehended at Maujpur Chowk". He was purportedly interrogated and made a disclosure statement. He then led the police to his house at Brahmpuri. He is stated to have brought out two earrings. The Appellant then led the police back to the Maujpur area and also pointed out the co-accused, Suresh son of Chunni

Lal, who got recovered a wrist watch with metallic strap which purportedly belonged to the deceased. PW-23 further stated that one Phatphat Sewa vehicle was searched at Maujpur Chowk near Salhar restaurant of which one Harcharan was the driver (PW-3). A tube containing blood was recovered. Both the vehicle and the tube were seized. Both the accused were medically examined and their blood samples were taken (Ex.PW12/A). The other co-accused, Suresh son of Prakash Chand surrendered before the Court on 23rd May 2001 and was thereafter arrested. A TIP was held as regards the articles of the deceased.

Trial

12. On the completion of the investigation a charge sheet was filed and charges were framed against the Appellant and the two co-accused as indicated hereinbefore. 27 witnesses were examined for prosecution. When the incriminating circumstances were put to the Appellant under Section 313 Cr PC, he denied them. However, to the following questions, he answered in the affirmative:

“Q.7 It is also in evidence against you that you accused – Yamin wanted Rs.50,000/- as loan from Khazano Devi, what have you to say?

Ans: It is correct.

Q.8 It is also in evidence against you that Khazano Devi paid the same to you accused –Yamin and you agreed to pay the interest @ 5% p.m. and the agreement Ex.PW5/B was executed about it, what have you to say?

Ans: It is correct.”

“Q.13 It is also in evidence against you that you accused – Yamin promised to pay the same but did not fulfil the same, what have you to say?

Ans: It is correct.”

13. The above answer to the question No.13 has to be read along with the subsequent questions which were answered in the negative as under:

“Q.14 It is also in evidence against you that on 15.5.01 you accused – Yamin went to Rajinder Singh, Advocate and asked him to attest the agreement Ex.PW5/C but he refused to do so on the ground that it did not bear the thumb impression/signatures of Khazano Devi, what have you to say?

Ans: It is incorrect.

Q.15 It is also in evidence against you that then on the same date you - accused Yamin along with Khazano Devi and typist went to Rajinder Singh again and then that lady – Khazano Devi put her thumb impression, what have you to say?

Ans: It is incorrect.”

14. The Appellant answered in the affirmative the question about his specimen signatures (Ex.PW-23/E & F) being obtained. When asked if he had anything else to say, he answered as under:

“Ans: I am innocent. No such crime was ever committed by me. I have been implicated falsely in this case. Nothing was recovered from me or at any instance. I did not lead the police party to anywhere. I have been implicated merely in this case falsely because of agreement Ex.PW5/B.”

Impugned judgment of the trial Court

15. In the impugned judgment, the trial Court came to the following conclusions:

- (i) The three circumstances relied upon by the prosecution were: (a) motive; (b) last seen evidence; and (c) recovery of articles.
- (ii) As regards the last seen evidence, the prosecution case was dependent on the depositions of PWs 2,3,4,6, 7 and 21.
- (iii) Although PW-2 has stated that the Appellant was not known to him previously, Ct. Shailender (PW-6) stated that both parties were known to him. Both PWs 2 and 6 stated that the deceased and the Appellant were present at the Maujpur Chowk which fell within the jurisdiction of PS, Seelampur. No clarification was sought from these two witnesses as to the difference in the distance between Maujpur crossing and the area of their patrolling. PW-3 (Harcharan) was an independent witness, who saw the Appellant with the co-accused Suresh at Maujpur Chowk at 6 pm and this was noted by the trial Court as “this emboldens the story of last seen evidence”.
- (iv) As regards the motive, the story that the prosecution had made the Appellant affix his signatures and then exhibited them as Ex.PW-5/C “does not just stack up”. This story was not adverted to during the cross-examination of Rajender Singh (PW-14), who was the Advocate notary and Devender Kumar (PW-17). PW-14 had clearly stated that the Appellant had signed the document in his presence. Although PW-14 did not identify the Appellant in Court, the Appellant himself admitted that Ex.PW-5/C bore his signatures.

(v) The trial Court concluded that “it therefore clearly stands proved that the accused Yamin and nobody else signed these documents in the presence of Rajender Singh (PW-14) and the defence story stands falsified.” Ex.PW-5/B in conjunction with Ex.PW-5/C established a strong motive on the part of the Appellant.

(vi) As regards the recovery of document Ex.PW-5/C which was not identified by the witnesses to the recovery i.e. Ct. Komesh (PW-18), SI Dharamvir (PW-20) and Inspector S.N. Khan (PW-23), it was assumed that the document had been recovered from Suresh Chand (A-2).

(vii) Mere non-presence of public witnesses for the recoveries did not mean that the police witnesses had to be rejected. Reference was made to the decision in *State of NCT of Delhi vs. Sunil 2001 1 CC Cases (SC) 6*.

(viii) The question of not holding TIP was not of much significance since PW-5, the sister of the deceased and the husband (PW-8) identified the jewellery worn by the deceased in the Court and there was no need to doubt them. Consequently, all the three circumstances were held to be proved. Further, the accused had failed to explain as to how the human blood was found on the tube recovered by the police. The chain of circumstances was complete and it was held to point unerringly to the guilt of the Appellant.

16. This Court has heard the submissions of Mr M.L. Yadav, learned counsel for the Appellant and Mr Kewal Singh Ahuja, learned APP for the State.

Law relating to circumstantial evidence

17. This is a case based on circumstantial evidence. The law regarding circumstantial evidence has been explained in a number of decisions. Illustratively, in ***Mahmood v. State of UP (1976) 1 SCC 542***, the Supreme Court observed:

“It is well settled that in a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the basis thereof must be firmly satisfied –

(a) that the circumstances from which the inference of guilt is to be drawn, have fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

18. In ***Anjan Kumar Sarma v. State of Assam (2017) 14 SCC 359***, the Supreme Court reiterated the above principles thus:

“(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature of tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

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

Last seen

19. The Court would like to first dwell on the evidence regarding last seen. There are no independent witnesses in this regard. The sister of the deceased Smt. Murti Devi (PW-5) only referred to the phone call received from the deceased on 16th May, 2001 at around 4.30 pm stating that she was going to the Appellant for collecting the money. Thereafter PW-5 was told by PW-2 i.e. HC Madan Pal, posted at PS Seelampur that the dead body of the deceased was recovered from the Kalyanpuri area. However, it was on 18th May, 2001 at around 1.30 pm that PW-5 went to the Kalyanpuri hospital to identify the deceased. This delay is indeed significant.

20. Be that as it may, the evidence about the deceased being last seen with the Appellant is in the form of depositions of two police officials i.e. HC Madan Pal (PW-2) and Constable Shailender (PW-6). PW-2 states that while he was on beat duty at around 5.30/6 pm, he noticed the Appellant and the deceased standing near the Salaar Rest, Maujpur Chowk. The deceased is supposed to have told PW-2 that “they were going to attend a marriage at Bhopal”. He then noticed that the Appellant and the deceased “went towards Bhajanpura side in Phatphat Sewa, the number of the vehicle was DL-1Q-

0088.” In his cross-examination PW-2 admitted that he did not know the Appellant previously and yet he did not take part in the TIP of the Appellant.

21. Turning now to PW-6, he states that when he inquired from the deceased, who was standing at Maujpur Chowk, as to why she was there, she replied that “she would go to Bhopal”. When he asked her as to why she was carrying an *attaché* (suitcase), the deceased replied that “she is waiting for someone and he has to come with *gadi* (vehicle) and she was to take money from someone.” Even after 15/20 minutes, when he again noticed her, the deceased replied that the vehicle had not come. This time, the Appellant was also present with her. In the meantime, the vehicle came and the deceased and the Appellant left by the said vehicle. In his cross-examination, PW-6 claimed that he used to know the Appellant and the deceased before the incident. According to him, he is used to go to the house of the deceased since her son, Sanjay, was a bad character of the area.

22. The above evidence does not inspire confidence particularly since PW-2 and PW-6 do not corroborate each other on material particulars. It must be remembered that PW-5 stated that she and the deceased were going to Bhopal for a marriage. This is not consistent with the deceased telling PW-2 that she and the Appellant were going to Bhopal. Then again PW-6 states that when asked, the deceased told him that she was waiting for someone “and he has to come with *gadi*.” Yet, after 15/20 minutes, when she informed PW-6 that the vehicle had not come, he noticed the presence of the Appellant with her already. When the vehicle ultimately came, both the Appellant and the deceased left for some place in the vehicle. This was

contrary to the statement by PW-6 that the Appellant had to come with a *gadi*.

23. With both PW-2 and PW-6 being police witnesses and with there being no independent witness, it would be unsafe to rely on their evidence to conclude that the prosecution has conclusively proved the last seen circumstance. In other words, the prosecution has not been able to conclusively prove that the deceased was last seen in the company of the Appellant. This Court, therefore, is unable to concur with the conclusion of the trial Court on this aspect.

Motive

24. The circumstance of motive is even more problematic. According to the trial Court, the prosecution had been able to show that it was the Appellant who had signed Ex.PW-5/C. The case of the prosecution rested on the fact that the Appellant had to repay a loan to the deceased on the 15th and that on the next day i.e. 16th May, 2001, in order to avoid making the payment, the Appellant murdered the deceased.

25. In the first place, it is required to be noticed that Ex.PW-5/C which is a typed receipt, has not been proved to have been seized. There is no seizure memo for this document. It was got wrongly marked through PW-5 although it was not found in her possession. If it was recovered from some other accused, the prosecution had to show how it reached such other accused.

26. Be that as it may, PW-14 does not support the prosecution as in his cross-examination he admitted that the deceased put her thumb mark on the document in his presence. The case of the prosecution, on the other hand, is that after killing her, her thumb mark was somehow affixed on the agreement by the Appellant. Significantly, in his replies under Section 313 Cr PC, while the Appellant does not deny having borrowed a loan, he certainly denies Ex.PW-5/C.

27. The trial Court, therefore, erred in holding that the testimony of PW-14 proved the said document. As already noticed, PW-14 was clear that “no document was produced by the person who signed and thumb marked on Ex.PW-5/C about its contents and the money exchanged between them”. It must be recalled that in his statement under Section 313 Cr PC, the Appellant does not dispute having borrowed the sum of Rs.50,000/- from the deceased and that he had promised to pay back the same but he denied the second document dated 15th May, 2001. The prosecution has not satisfactorily explained how the second document proves the motive for the Appellant to kill the deceased.

28. In a case where the other circumstances have not been satisfactorily proved, it is necessary to prove the motive for the commission of the crime. In *Arjun Marik v. State (1994) Supp 2 SCC 372* the Supreme Court observed as under:

"... mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is

circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anyone else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

29. The prosecution has in this case failed to prove the motive for the Appellant to murder the deceased.

Other circumstances do not point to guilt

30. The blood stains on the tube recovered did not match the blood group of the deceased. Therefore the recovery of said tube did not provide a link in the chain of circumstances that might point to the guilt of the Appellant.

31. Even the medical evidence contradicts the evidence of PWs 2 and 6 about last seen. The post-mortem report shows that the deceased died between 12.30 pm on 15th May, 2001 and 12.30 pm on 16th May, 2001. If that was indeed the case, she could not have been seen alive by PW-2 at the Maujpur Chowk at 5.30 pm on 16th May, 2001.

32. The Court also notes that the recovery of so called petty articles like nose pin and copper ring is unbelievable particularly since there was no proper test identification of the articles recovered. Also jewellery, much more valuable than that recovered, was found on the dead body when it was discovered by the police. Why the accused would take items of little or no

value from the victim while leaving the expensive items untouched has not been explained by the prosecution.

Conclusion

33. For all of the aforementioned reasons, the Court is of the view that the Appellant is entitled to the benefit of doubt. He is acquitted of the offences under Sections 302/201 IPC and Section 404 IPC. The order on sentence passed by the trial Court is also set aside.

34. The appeal is allowed. The bail bond and personal bond furnished by the Appellant stand discharged.

35. The Appellant will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record be returned along with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 26, 2018

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