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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: November 27, 2017

Pronounced on: January 05, 2018

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CRL. A 565/2013

MOHD. MOHSIN

...Appellant

Through: Mr. Neeraj Bhardwaj, Advocate.

versus

STATE

...Respondent

Through: Ms Radhika Kolluru, APP for State with
Inspector Ajit Singh PS Madhu Vihar, Delhi.

CORAM:

**JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

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JUDGMENT

Dr. S. Muralidhar, J.:

1. This appeal is directed against the impugned judgment dated 13th December, 2012 passed by the learned Additional Sessions Judge ('ASJ') East, in SC No. 53/2010 arising out of an FIR No.173/09 registered at Police Station ('PS') Madhu Vihar convicting the Appellant of the offence under Section 302 Indian Penal Code ('IPC') and the order on sentence dated 20th December, 2012 whereby the Appellant was sentenced to undergo imprisonment for life and pay a fine of Rs.15,000/-; and in default to undergo one year rigorous imprisonment ('RI').

Case of the prosecution

2. The case of the prosecution is that at around 6.38 pm in the evening of 31st December, 2009 information was received from Budh Prakash (PW7) at the Police Control Room ('PCR') stating that at house no.F-28, Ram Gali at the Madhu Vihar Gurudwara Wali Gali '*ek lady ki gardan kaat di hai*' .

3. The PCR form recorded the report received from the police van that one Khushboo (deceased) aged around 20/23 years residing alone in the aforementioned rented accommodation and who was working at a mall in Nand Nagri was lying dead with her neck having been cut. This report was received at 7.04 pm.

4. On the basis of the above information Daily Diary ('DD') No.33A was recorded and Assistant Sub Inspector ('ASI') Balraj Singh (PW17) along with Constable Vijender (PW20) proceeded to the spot. Inspector Anand Kumar (PW27) and Constable Ravinder Kumar (PW1) also rushed to the spot. Thereafter the crime team was called at the spot and photographs of the scene of crime were taken.

5. In the meanwhile, Preeti Verma (PW1) (the sister of the deceased) reached the spot and identified the body to be that of her younger sister Khushboo @ Avantika Singh. She gave a statement that she and her sister were living on rent at the said place and that the deceased was working at Big Bazaar. PW1 stated that she had gone for duty to Noida and at around 6.45 pm her '*dharambhai*', Budh Prakash, (PW7). had informed her on telephone about the murder of the deceased.

6. FIR No. 173/09 was registered at PS Madhu Vihar. Inspector Anand Kumar (PW27) prepared the site plan and sent the body of the deceased to the LBS Hospital mortuary. On 1st January, 2010, Dr. Vinay Kumar (PW16) conducted the post-mortem of the deceased at the LBS hospital. On examination, he found that the head was separated from the body, and rigor mortis was present all over. On external examination he found that injury No.1 was a cut-throat injury and the head was separated from the body at 145 cm from the heel, horizontally placed, margins sharp and all neck structures including muscles, cervical, vertebra no.3 and spinal cord were incised. Injury No.2 was an incised wound 2 x 0.5 cm obliquely present over dorsum of right index finger. As far as the genital organs were concerned, the hymen was torn. He opined the cause of death as 'shock due to cut-throat injury caused by knife/sharp-edged weapon'.

7. PW27 who was the Investigating Officer ('IO') recorded a supplementary statement of PW1 on that very date. He also recorded the statement of PW7 who stated that the deceased and PW1 were like his sisters (*muhboli* sisters). PW7 stated that he had been informed on the phone by PW1 that the deceased had not been answering her phone for a long time. PW7 stated that he had arranged the house on rent for PW1 and the deceased and one key of the house used to remain with him. He, therefore, came back to the house to check on the deceased and found her lying dead. He accordingly informed the police.

8. After the post-mortem was conducted and the body was handed back to the relatives, PW-1 gave PW27 a mobile phone of 'Tata Pentek', the number

of which she did not remember, stating that it was the phone of the deceased Khushboo. PW1 further told PW27 that the deceased used to carry two mobile phones and that a gold chain and a travel bag of the deceased had been found missing. Thereafter, PW27 further interrogated PW7, Subodh (PW3), a friend of deceased and Satish (PW5) a supervisor of the deceased.

9. On obtaining the call detail records (CDRs) of the mobile number of the deceased, PW27 noticed that one number whose last digits were 267 was in regular touch with the deceased for the past one week and also in touch with her on the date of the incident from 8 am till the afternoon. On getting the call details of this number, it was found to be of the Appellant/accused.

10. PW27 learnt from the interrogation of PWs 3 and 5 that at around 10.30 am on 31st December, 2009 the deceased had called them from the same number of the accused and on their asking as to whose number it was, she disclosed that it was of the Appellant who with her. PW27 then called the Appellant at that very number and asked him to join the investigation. However, the Appellant did not join the investigation.

11. PW27 then collected the details from the service provider where the application form submitted by the Appellant showed that he had provided a photocopy of his voter identity card showing his address as Village Satla, District Meerut. The customer application form also contained the photograph of the Appellant. A team was then sent to Village Satla from where the Delhi address of the Appellant viz., N-118, Twenty Feet Road, Batla House was ascertained.

12. On 7th January, 2010, PW27 along with Sub Inspector ('SI') C.L. Meena (PW18), Constable Gurdeep and Constable Pradeep (PW23) went to Zakir Nagar for tracing the Appellant. There an informer told them that the Appellant had been seen in the area. They then reached the aforementioned address where a person on seeing them got perplexed. He was then apprehended and revealed to be the Appellant. He was arrested and his personal search was conducted. He was thereafter taken to the spot where he pointed out the flat where the murder had taken place.

13. On 10th January, 2010 a raiding party was constituted consisting of PW27, SI Abhey Narayan (PW26), HC Subhash (PW21), Constable Deepak, and Constable Vinay left from Delhi to Meerut in a private vehicle. On reaching PS Brahmpuri at Meerut they took the assistance of the local police i.e. Constable Tej Bahadur and Constable Kuldeep. The Appellant who accompanied them led them to the house of his aunt at Isheetganj, Meerut. While she was not present, her children were present. The Appellant is stated to have taken out a bag from under the cot in the room. The bag was brownish colour and had the word 'Flightway' written on it. On checking, it was found to contain a crystal stainless steel knife which had blood stains. The sketch of the knife was prepared and it was put in a pullanda and sealed. The bag was also found containing a polythene in which there was a burnt residue of two burnt mobile phones. This was also sealed.

14. The Appellant was then brought back to Delhi and examined at LBS Hospital by Dr. Shalini Gupta (PW11) and samples of blood, semen and hair

of the head and pubic hair were taken and sealed.

15. On 3rd February, 2010, Constable Sonu Kaushik (PW4) was called from the crime branch. At the spot, PW4 prepared a scaled site plan. During the investigation, a Test Identification Parade ('TIP') for the case property was conducted.

16. On the conclusion of the investigation, a charge-sheet was filed by PW27 on 1st April, 2010. The charge was framed on 29th April, 2010 to the effect that at around 6.30 pm on 31st December, 2009 the Appellant had caused the death of the deceased and thereby committed an offence punishable under Section 302 IPC.

Statement of the Appellant under Section 313 Cr PC

17. On behalf of the prosecution 28 witnesses were examined. The case was one of the circumstantial evidence. The circumstances were put to the Appellant at three stages under Section 313 Cr PC. The first statement was recorded on 10th October, 2011. The first circumstance and the answer of the accused read as under:

“Q1. It has come in evidence against you that on 31.12.09 PW1 Preeti Verma along with her younger sister Khushbu Verma @ Avantika Singh (deceased) used to work in Big Bazar Market near CBO ground Karkardooma Court. Same day, PW1 left her house for Noida at about 6.00 AM. Deceased used to leave the house at about 10.30 AM. When PW1 left the house, Khushbu (deceased) was there. What you have to say?

A. I was called by PW1 at her house and reached there at 7.00 AM. At that time, Khushbu was also present in the house. PW1 told me that she is going to collect clothes from the tailor, she left the house and

returned after half an hour. During this period, I and Khushbu remained together in the house. At 8 AM, we left the house and reached Big Bazar Market CBO Ground Karkardooma. In the mall, I purchased a jacket and thereafter I left for the house. Preeti remained in the Mall.”

18. From the above answer it is clear that the accused did not deny that on the date of the incident i.e. 31st December, 2009 he was called by PW 1 at 7.00 a.m. and at that time the deceased was also present in the house and then he and the deceased remained together when PW1 left the house. According to him they left the house at 8 a.m. and reached Big Bazar Market where he purchased a jacket and thereafter he left for his house while PW 1 remained in the mall.

19. Question No.3 put to the Appellant and his answer thereto read as under:

“Q3. It has come in evidence against you that PW1 reached her house at about 8.15 PM. In the room, she found beheaded body of her sister (deceased). The body was smeared in the blood. Police had already reached at the spot when PW1 reached there. One key of the house used to remain with PW7. Police recorded statement of PW1 which. Is Ex. PW1/A. What you have to say?

A. One key of the house used to remain with PW7 Budh Prakash. I do not know about the other facts in the question.”

20. The above answer shows that the Appellant also knew about PW 7 having a key to the house of the deceased. The Appellant denied the remaining circumstances put to him. As regards the mobile number ending with the digits 267 issued in his name, and from which the deceased had called PWs 3 and 5 on the morning of the fateful date, Questions 14 and 16 and the Appellant's answers thereto are relevant and read as under:

“Q14. It has come in evidence against you that during interrogation of Subodh (PW3) and Satish (PW5), PW27 came to know that at about 10.30 AM, deceased had called them from the same number of you. On asking, they asked Khushbu whose number is this, since it was a new number, Khushbu told that it is of you and you were with her. What you have to say?

A. I was having family relations with Preeti and Budh Prakash and we often used to meet each other. They also used to visit my house. My photos and other documents used to lie in my house and probably they got issued this sim fraudulently by forging signatures on my name. I never used this sim number.

Q16. It has come in evidence against you that from the service provider, the details of the application form submitted by you were taken. You have submitted a copy of your voter-I card where your address of village Satla District Meerut was mentioned. On customer application form, your photograph was affixed. What you have to say?

A. I do not know. As stated by me, PW1 and PW7 had forged my signatures and had taken SIM card on my names.”

21. As regards his arrest, Question Nos. 15 and 17, and the Appellant's answers thereto read as under:

“Q.15. It has come in evidence against you that PW27 called you at the same number and asked you to come to PS for investigation of this case but you did not come. What you have to say?

A. I received a call from the police at my number, I do not remember the number. I was called by the police in the PS for interrogation on 1.1.10. I reached at PS at 8-9 AM. Budh Prakash and Preeti were also there. Police was asking Preeti and Budh Prakash that why they have done this murder. In the meantime, parents of Preeti also reached there and requested the IO to save PW1 as their one daughter has already been killed. Thereafter, Preeti and Budh Prakash were let off

by the police in collusion with family of Preeti and I was detained and falsely implicated in this case.

Q17. It has come in evidence against you that on 07.01.10, PW27 along with SI C.L. Meena (PW18), Ct. Gurdeep, Ct Pradeep (PW23) went to Zakir Nagar for your search. There an informer met them and told that you were seen in the area. Thereafter they reached at house No. N-118, 20 Foota Road, Batla House, Delhi where you met them and on seeing them you got perplexed. You were apprehended and your name was revealed as Mohd. Mohsin. What you have to say?

A. It is incorrect I was detained in the PS since 01.01.10.”

22. The Appellant denied having admitted his guilt and maintained that his signatures were taken on blank papers and that he had not made any disclosure statement as alleged by the police. He also denied having gone to Meerut with the police and got recovered the bag containing incriminating articles.

23. When asked whether he wanted to say anything else, the Appellant replied:

“A. Majid S/o. Sh Rashid Hasan, R/o. R-13 Top Floor, Near Hari Masjid was my friend as well as friend of Khushbu and Preeti. Preeti used to send messages through Majid. Majid told me that Preeti wants to marry with me, I used to refuse since I was already married. Khushbu also started liking me. Due to this reason, both sisters PW1 and deceased Khushbu had quarrelled with each other. Preeti was indulging in prostitutions through PW7 and customers used to be entertained at the flat of PW1 and deceased. Khushbu used to object to all this, which resulted into enmity between Budh Prakash and Khushbu. While I was in Jail Preeti sent me message through, Majid stating that if I am interested to marry her, then she deposed in the court to save me. But I refused. Even in the court, when I came to attend hearing, Preeti asked me that what I have decided regarding the proposal to marry her. Preeti further told me that she is seeking

adjournments to get my answer, but it is not possible to seek further adjournments.

On 31.12.09 under a conspiracy, PW1 took me to mall so that in our absence, PW7 may murder Khusbhu to avoid my sudden presence. While I was detained in the PS, I was forced to make calls from number 9953022767 at different numbers from different locations. On my request, police did not take CDRs of PW1 and PW7. In the PS, in my presence, police showed the gold chain to Preeti (PW1).”

Defence evidence

24. The above statement was recorded on 10th October, 2011. Thereafter, on 1st November, 2011, the Appellant examined Majid son of Rashid as DW-1. In his examination-in-chief, DW-1, *inter-alia*, stated that after about 8 days of the incident, PW-1 had come to his house and asked him to go to the Tihar and convey to the Appellant that “he should not worry about anything and she is with accused and finance to engage any lawyer of his choice”. DW-1 then went to Tihar Jail and conveyed this to Appellant who got angry and told him that all this had been done by PW-1.

25. DW-1 further disclosed that the accused had told him that when the police took the accused to the PS “there parents of Preeti and her family members and Budh Prakash, were present, the family members of Preeti were weeping and requesting the police stating that their one daughter has died and if Preeti is arrested this case, they will be ruined in this case, accused in the bone of contention for this dispute.” DW-1 further stated that in 2006, PW-1 and the deceased had visited his house for the birthday of his daughter. The Appellant had also come there. PW-1 had bought a plastic cycle for his daughter and when asked why she had brought such an

expensive gift PW-1 told DW-1 that she wanted to marry the Appellant and she expected DW-1 to support her as he was a common friend. When the deceased heard this, she and PW-1 started quarrelling. The deceased told PW-1 that she was indulging in prostitution with PW-7 and that she would disclose everything to the Appellant to which PW-1 replied that she would forget that the deceased was her sister and would kill her.

26. DW-1 further stated that after the Appellant had been arrested PW-1 had visited him twice or thrice and that despite being summoned by Court she was seeking adjournments on one pretext or the other. She asked DW-1 to go to Tihar Jail and convey to the Appellant that if the Appellant did not marry her, PW-1 would depose against him. DW-1 stated that he never passed on this message to the Appellant. He added that prior to the incident the Appellant had met him and disclosed to him that he was going to the house of PW-1 for purchasing a jacket since she had told him that she will get him a jacket at a cheap price as she was working in a mall. On that day in the evening at 5 pm the Appellant had informed DW-1 that he had purchased a jacket from the mall.

27. In his cross-examination by the APP, DW-1 stated that he was working as a driver and around two years prior to the incident the deceased had introduced him to PW-1. As far as the deceased is concerned, he met her by chance at Shahdara while he was sitting in his vehicle. He disclosed that the deceased used to visit his house and was working in a showroom and he knew the Appellant as he was introduced by the deceased. He stated that he never met the police in relation to the case. He reiterated what he has stated

in the examination-in-chief about the deceased and PW-1 quarrelling in his presence when they had visited his house on the birthday of his daughter.

Supplementary statements of the Appellant

28. After DW-1 was examined, two supplementary statements were recorded of the Appellant under Section 313 Cr PC. In the first supplementary statement recorded on 22nd August 2012, the CDRs of mobile phone 9312188177 of Reliance Communication were put to him. These were produced by Sanjeev Lakra (PW-9). The Appellant stated that it was a matter of record.

29. Further, the Cell ID chart of Vodafone which had been produced by Israr Babu (PW-10) pertaining to the second mobile phone was put to him and he again stated that it was a matter of record. This mobile number was 9953022767. The tower-location details of this phone were put to him. Again he stated that it was a matter of record. He reiterated that he had been falsely implicated in the case. He added:

“I knew the deceased Khushbu who was the friend of my wife and used to talk to her on telephone occasionally but never visited her house.”

30. The third supplementary statement was got recorded on 3rd November, 2012 where again the CDR details were put to him and he stated that it was a matter of record. He maintained that he had been falsely implicated in the case.

Impugned judgment of the trial Court

31. The trial Court, on an analysis of the evidence, held in the impugned

judgment that the prosecution had been able to prove the following circumstances:

“i) Motive - Accused is a married person and was having love affair with deceased Khushbu but deceased started blackmailing her to marry her and give her money.

ii) Telephone call made by the deceased from the mobile phone of accused to the mobile phone of PW-3 Subodh Kumar at 10.00 - 10.30 am telling him that she was calling from the phone of Mohsin, husband of her friend who was present at her house.

iii) Mobile conversation between the deceased and PW-5 Satish from the mobile phone of accused Mohsin.

iv) At the time of exchange of mobile phone calls, the location of the mobile phone of accused was Madhu Vihar/Patpar Ganj;

v) The recovery of the bag of deceased at the instance of accused from the house of his Bua at Smith Ganj, Meerut;

vi) Recovery of weapon of offence i.e. blood stained knife from the aforesaid bag;

vii) Recovery of blood stained T-shirt and pant at the instance of accused;

viii) Recovery of blood stained gold chain of deceased at the instance of accused from his house;

ix) Absence of explanation from accused as to how he came into possession of belongings of deceased and about the presence of blood on them as also about the presence of blood on his clothes.”

32. The trial Court proceeded to convict the Appellant for the aforementioned offence under Section 302 IPC and sentenced him by the separate order on sentence in the manner noticed hereinbefore.

Submissions of counsel

33. This Court has heard the submissions of Mr. Neeraj Bhardwaj, learned counsel for the appellant and Ms. Radhika Kolluru, learned APP for the State.

34. It was submitted by learned counsel for the Appellant as under:

- (i) The prosecution had not been able to prove the motive for the crime as set out in the charge sheet. The trial Court had referred to the disclosure statement of the Appellant (Ex. PW-18/C) where he is supposed to have admitted to being intimate with the deceased and having sexual relations with her consent and when she started pressing him for marriage and also started blackmailing him for money, he decided to kill her. However, PW-1 in her statement did not at all disclose anything about the deceased having a love affair with the Appellant. In fact, in her cross-examination, she replied “it is wrong to suggest that Khushboo was having love affair with accused.” Neither PW-3 nor PW-5 stated anything about the deceased having an affair with the Appellant. PW-7 went to the extent of stating that he had never met the accused till date and did not know him.
- (ii) Several material witnesses who ought to have been examined were, for some reason not examined by the prosecution. This included Sonia, the wife of the Appellant, the landlord of the house where the deceased was found murdered, the police witnesses from PS at

Meerut, the driver of the private vehicle in which PW-27 and the police team travelled to Meerut with the Appellant, witnesses to the recoveries at Meerut, the examiner at the FSL.

- (iii) The FIR did not mention any person who was suspected to have killed the deceased.
- (iv) Although the trial Court, in Para-4 of the impugned judgment set out in detail the evidence of DW-1, while analysing the evidence, the trial Court in para 32 wrongly observed “accused has not led any evidence to prove his defence”.
- (v) The inconsistencies and contradictions in the evidence of PWs 1 and 7 or the crucial aspect of PW-1 calling up PW-7 at 5.30 pm to check if the deceased was present was, in fact, denied by PW-7. It is submitted that the trial Court failed to examine the alternative theory suggested to the two witnesses, PWs 1 and 7, that both sisters loved the Appellant and wanted to marry him but when PW-1 came to know of the love affair between the accused and the deceased, she decided to eliminate the deceased with the help of PW-7 who was her partner for soliciting customers. It is submitted that the evidence of DW-1 was important in this context but not discussed by the trial Court.
- (vi) It was further submitted that there were inconsistencies in the deposition of PW 3 making him an unreliable witness. The recovery of the bag from Meerut was in fact was not proved by the prosecution and therefore the recovery of the weapon and the blood stained T shirt

also lost significance. The mere fact that there were blood stains on the clothes of the Appellant could not by itself complete the chain of circumstances.

35. The learned APP on the other hand, supported the judgment of the Trial Court by pointing out that the CDRs clearly point to the location of the deceased at the time of the commission of the crime. It was the mobile phone of the Appellant that was being used by the deceased to make calls to PWs 3 and 5. According to her, there was no occasion to disbelieve PW 3 who stated that the deceased told him about the presence of the Appellant. She submitted that the contradictions in the evidence of PWs 1 and 7, if any, about the involvement of the Appellant, were not material and that the recoveries at the instance of Appellant were sufficient to bring home the guilt of the Appellant beyond reasonable doubt.

Law relating to circumstantial evidence

36. This is a case of circumstantial evidence. In ***Sharad Birdhichand Sarda v. State of Maharashtra 1984 (4) SCC 116***, the Supreme Court explained that a case based on circumstantial evidence should satisfy the following tests:

“(1) The circumstances from which the conclusion of guilt is to be drawn should be fully 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 and 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 show that in all human probability the act must have been done by the accused.”

Motive

37. The Court would first like to begin with the motive for the commission of the crime. In para 10 of the impugned judgment, the trial Court begins discussing what was said by the Appellant in his disclosure statement while at the same time correctly noting that this was inadmissible in evidence under Section 24 of the Indian Evidence Act, 1872 (IEA). The trial Court also noticed that in his cross-examination the IO (PW-27) stated that during investigation it came to his knowledge that the Appellant and the deceased were having an illicit relationship; that the Appellant was already married and having a child and that the deceased used to demand money from Appellant and blackmail him that she would disclose to his wife about their relationship. However, PW-27 “found no evidence that the deceased used to demand money from the accused”. The trial Court, therefore, concluded “from the prosecution point of view, that no witness has been able to prove that either accused or deceased were having any kind of illicit relationship or that deceased was blackmailing the accused”.

38. However what weighed with the trial Court on this crucial aspect were the suggestions put by the defence lawyer to PWs 1 and 7 which each of them denied viz., that the deceased was having an affair with the Appellant

and that the deceased used to ask PW-1 not to come close to the Appellant. PW-7 also denied that the deceased used to blackmail the Appellant for money. He even denied that the Appellant and the deceased used to love each other. The mere fact that the above suggestions were denied by PWs 1 and 7 persuaded the trial Court to conclude that “it becomes absolutely clear that the accused himself admits that he and Khushboo were having love affair with each other and that Khushboo was blackmailing him for money”. The Court fails to appreciate how the above denials by PWs 1 and 7 of the suggestions put to them could constitute a positive evidence of admission by the Appellant of the prosecution case or prove beyond reasonable doubt the motive for the commission of the crime.

39. In this regard, it requires to be noticed that the trial Court has simply declared that:

“The failure to prove motive is not fatal as a matter of law. Proof of motive is never indispensable for conviction. When facts are clear, it is immaterial that no motive has been proved. The absence of proof of motive does not break the link in the chain of the circumstances connecting the accused with the crime, nor militates against the prosecution case..”

40. In coming to the above conclusions, the trial Court has relied on the decision in *State of U.P. v Babu Rao (2011) II AD 285*. However, in the considered view of the Court, the above is not the correct legal position. In order that failure to prove the motive can be considered not fatal to the prosecution, it must be shown that the other circumstances have been clearly established by the prosecution. The correct legal position was explained by the Supreme Court in *Arjun Mallik vs. State of Bihar 1994 Supp (2) SCC*

372 in the following words:

“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 anybody 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.”

41. It is, therefore, not as if proof of motive is unnecessary or irrelevant in all cases. While in the case of direct evidence, motive may not assume much significance, in a case of circumstantial evidence, the failure to prove motive would not be fatal only if all other circumstances have been established beyond reasonable doubt by the prosecution.

42. In the present case, the trial Court itself notes that the prosecution has failed to prove the motive. The mere fact that some suggestions were given by the defence counsel to the two key prosecution witnesses on the aspect of motive will not, in the considered view of the Court, amount to an admission by the Appellant that he had a motive to kill the deceased.

43. In this context, the evidence of DW-1 assumes significance. His cross-examination has not been able to create any grave doubt on the truth of his version that PW-1 asked him to visit Tihar Jail to convey to the Appellant that he should marry her failing which she would depose against him. This witness has not even been discussed much less disbelieved by the trial

Court. This is a fatal flaw in the judgment of the trial Court. Despite paraphrasing the entire evidence of DW-1 in the Para 4 of the judgment, the trial Court commits the fatal error in the analysis portion in Para 32 of observing that “accused has not led any evidence to prove his defence.”

PWs 1 and 7

44. The prosecution relies on two witnesses i.e., PW-1 (the sister of the deceased) and PW-7 (the *muhboli bhai* of PW-1 and the deceased) neither of whom, for the reasons explained hereafter, can be said to be trustworthy. The circumstances under which PW-7 happened to find the deceased dead in her house on the evening of 31st December, 2009 requires to be carefully examined. According to PW-1, at about 6.45 pm in the evening she received a call from PW-7 that the deceased had been murdered. PW-7 asked PW-1 to come to the house. According to PW-7, at around 6.30 pm he just happened to go to the house of the deceased. Since one key of the house was with him, he opened the lock and found the dead body of the deceased.

45. There is a contradiction in the above version in as much as PW-27 in his evidence states that when he first interrogated PW-7 he told PW-27 that it was PW-1 who had told him on phone that the deceased had not been answering her mobile phone for a long time. This important fact is not mentioned either by PW-1 or by PW-7 in their deposition in Court.

46. It is a surprise that both PWs 1 and 7 deny even knowing the Appellant. Considering that the deceased and PW-1 are sisters, it is highly unlikely that PW-1 would not know the Appellant or mention him at all. The flat denial by PW-1 that the deceased was having any love affair with the Appellant

contradicts the very foundation of the case from the point of view of the prosecution. Likewise the denial by PW-7 that he does not even know who the Appellant is seems highly improbable and unbelievable.

Last seen evidence

47. Another aspect is the following statement by PW-7:

“I had not given the key of the lock, which was under main gate of that house to police. Vol. After opening the lock with key, I had kept it on the table in the room and I do not know if it was seized by the police or not. I do not know the company/make of that lock and key. I was having original key with me.”

48. That PW-7 had access to the house of the deceased at all times is an important factor for the purposes of the last seen evidence. In fact, it makes the evidence of last seen as projected by the prosecution, doubtful. The prosecution has been able to show from the CDRs that at 10.30 am calls were made by the deceased to PWs 3 and 5 from the mobile phone ending in the numbers 267. The prosecution has placed on record evidence to show that the said mobile connection stood in the name of the Appellant.

49. However, this by itself does not establish the presence of the Appellant at the house of the deceased for two reasons. One is the version of the Appellant in his statement under section 313 Cr PC that he was with the deceased at around 7.30 am and then left for the Big Bazaar mall where he purchased a jacket. The other is the stand taken by him that he in fact never used the said mobile phone and the SIM card was issued by PWs 1 and 7. If PW-7 is to be believed he saw the deceased much later in the evening at around 6.30 pm. PW-7 had a duplicate key to the house by his own

admission. He therefore did have access to the house at all times. Strangely, the prosecution did not collect the CDRs of the mobile phones of PWs 1 and 7. It would not be safe to conclude that it was the Appellant who was last seen with the deceased.

50. The CDR is in any event only a corroborative piece of evidence. To substantiate that the Appellant was present with the deceased at around 10.30 am the prosecution relied on the evidence of PWs 3 and 5 to whom the deceased is supposed to have made calls using the mobile phone of the Appellant around 10.30 am on 31st December 2009. It is not as though the PW-3 and 5 actually saw the Appellant at the house of deceased. Of these two witnesses PW-5 declined to support the prosecution and was declared hostile. That leaves PW-3.

51. From the deposition of PW-3 it appears that the deceased called him to wish him for the New Year. The deceased did have another mobile phone (the Reliance connection which stood in the name of her brother PW-2). It must be recalled that this phone was found in the house next to her dead body and was handed over by PW-1 to the police. This is evident from the following statement made by PW1 during her examination in the court on 6th July, 2010, where she states that on 1st January, 2010 she had handed over to the police one mobile phone of TATA make in which a Reliance Sim Card was being used. The Court observation in that context is as under:

“The mobile phone of Tata is in a broken condition and it is in two parts. Mobile phone shown to the witness, it is correctly identified by the witness which was handed over by her to the police. The same is Ex. P1. Further examination of the witness is deferred as case property sent to FSL is not received back.”

52. Further, the said mobile phone 9312188177 was in fact issued in the name of one Rahul Dev, the brother of the deceased, who was examined as PW 2 and identified her dead body. Beyond that, why his mobile phone was being used by the deceased has not been explained by the prosecution. The CDRs of this mobile phone were got proved by PW9. The other mobile phone of which the CDRs were obtained was 971102951 which was in fact issued in the name of the deceased. Why the deceased did not use this mobile phone to make the calls to PWs 3 and 5 is not clear. These are all unanswered questions which go to the very root of the matter.

53. As already noticed, why the deceased would, when she had her own mobile phone and one issued in her brother's name, use the phone of the Appellant to wish PW-3 for the New Year is a mystery. PW-3 was working as a sales consultant at Hyundai Motors India Ltd. According to him, the deceased used to refer customers to him as she was also into sales. That she should call him suddenly on new year's eve from somebody else's mobile and volunteer that such a person was present with her at her house seems unusual. While wishing known friends for the New Year or some such occasion by calling them on their mobile phones, a person would not use somebody else's phone unless there was no alternative. Mobile numbers cannot be recalled from memory if calls are not made to a number frequently. PW-3 was not a person who the deceased used to call frequently. She would have stored the 10 digit mobile number of PW-3, if at all, in her own phone, which was with her. It was highly unlikely that for the purpose of wishing PW-3, the deceased would first note down the number of PW-3 from her own phone and then use the phone of the Appellant who was only

visiting her.

54. Also, since PW-3 was not known to the Appellant there was no need for the deceased to tell PW-3 that the Appellant, who was Sonia's husband, was with her at that time. All this seems unbelievable. PW-3 is not a natural witness. His evidence appears to be for the sole purpose of fixing the location of the Appellant and does not inspire confidence.

55. If indeed in her call to PW-3, the deceased mentioned that Sonia, the wife of the Appellant, was her friend, there was no reason for the prosecution not to have recorded the statement of Sonia or produced her as a witness. That would have also enabled the prosecution to explore whether in fact the deceased and the Appellant were having an affair which led the deceased to blackmail the Appellant. The lapse on the part of the prosecution to examine Sonia is indeed a serious one.

Recovery evidence

56. Likewise, the failure to properly prove the recovery of the brown bag from the house of the aunt of the Appellant at Meerut must be held to be a serious lapse. In ***Thulia Kali v. State of Tamil Nadu AIR 1973 SC 501***, in similar circumstances, the Supreme Court declined to believe the recovery since the person from whose house the recovery was made was not examined as a witness. Here, admittedly the recovery was made from house of the aunt of the Appellant and yet she was not examined. The two local policemen at Meerut, who are stated to have accompanied the police from Delhi, were not examined. The driver of the private vehicle in which the police team travelled to Meerut was not examined. Therefore, the trial Court

was not justified in its conclusion that the prosecution proved the recovery of the bag which in turn contained the bloodstained knife beyond all reasonable doubt.

Arrest of the Appellant

57. The arrest of the Appellant is also shrouded in mystery. If they did arrest him from his house why they did not effect the recoveries from his house in the first place, before going to Meerut, is not clear.

58. The alternative theory put forth by the Appellant that he was kept in the PS from 1st January, 2010 itself has not been completely eliminated as a possibility by the prosecution. The failure by the trial Court to discuss from the evidence DW-1 has further compounded this problem.

Conclusion

59. This Court is not satisfied that the prosecution has been able to prove all the material circumstances forming a continuous chain which unerringly proves the guilt of the accused alone and no one else or that each such circumstance has been proved beyond all reasonable doubt. In a case of circumstantial evidence, suspicion can never take the place of proof.

60. For the aforementioned reasons the impugned judgment and the order on sentence of the trial Court are hereby set aside. The appeal is allowed. The bail bond and the surety bond of the Appellant are hereby discharged. He is directed to be released forthwith, unless required in any other case. The Appellant will comply with the requirements of Section 437 A Cr PC to the satisfaction of the trial Court.

61. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

JANUARY 05, 2018

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