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

+ **CRL.A. 706/2017 & CRL.M.(Bail) 374/2018**

FIROZ

..... Appellant

Through: Ms.Archna Sharma, Advocate with
Mr.T.S.Varun and Mr.Nishant,
Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr.Amit Chadha, APP for State.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER
04.04.2018

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Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 25th April 2017 passed by the learned Additional Sessions Judge-05 (ASJ) (South-East), Saket Courts, New Delhi in Sessions Case No.2353/2016 arising out of FIR No.86/2011 registered at Police Station Jaitpur, convicting the Appellant for the offence under Section 302 IPC and the order on sentence dated 15th May 2017 whereby he was sentenced to imprisonment for life and to pay fine of Rs.3,000/-.

Transfer of case to JJB

2. At the outset, it requires to be noticed that by an order dated 19th August 2011, the charge was originally framed against the Appellant

and one Afsana, wife of the deceased Rafedeen. The charge was to the effect that during the period between (9:30 pm on 6th April 2011 and 4:35 pm on 7th April 2011) at the play ground near Samosa Chowk, Madanpur Khadar, New Delhi, both of them, in furtherance of their common intention, committed the murder of the deceased and thereby committed an offence punishable under Section 302 read with Section 34 IPC.

3. As noticed in para 4 of the impugned judgment of the trial Court, subsequent to framing of the above charge, by an order dated 20th April 2012, the case was transferred to the Juvenile Justice Board ('JJB') for determination of the age of both the accused persons. The JJB, by its order dated 21st June 2012, declared the co-accused Afsana to be a juvenile and, therefore, the trial against her got separated. There is no intimation on the outcome of the trial against her before the JJB.

4. By an order dated 4th July 2012, the JJB declared the present Appellant not to be a juvenile and, therefore, the trial against him continued before the learned ASJ.

Background

5. The background to the case is that the deceased was married to co-accused Afsana. He was a carpenter by profession. Three children were born to the deceased and Afsana at the time of the incident. They were living in the premises at C-128, Gali No.10, Kachhi Colony, Madanpur Khadar, New Delhi near Badi Masjid which was owned by Dildar Ahmad (PW-2) for about one year until 18-20 months prior to the incident, when they shifted to Gali No.17 in the house of Hawaldar Khan (PW-20). The accused

was apparently working in a bakery shop owned by Shakeel. According to PW-2, Shakeel told him that Firoz and Afsana would make gestures to each other and that anything may happen in the future. On coming to know of this, he got vacated the tenanted premises from the deceased and Afsana.

6. The criminal law was set in motion when Inspector Surender Singh (PW-26), who was also the Station House Officer (SHO) of PS Jaitpur, received information on his mobile phone from the duty officer at 4:36 pm on 7th April 2011 that a dead body was lying at the play ground near the gas plant near Samosa Chowk in Madanpur Khadar. Accompanied by Assistant Sub Inspector ('ASI') Ram Kumar and HC Kedar Lal (PW-15), PW-26 went to the spot and found one male dead body aged about 30 years lying at the play ground near the gas plant. He also noticed that Sub-Inspector (SI) Sher Pal Singh (PW-21), Ct. Vikas (PW-22) and Ct. Dharmender were already present at the spot. A shirt was lying on the dead body. There was a ligature mark of strangulation on the dead body. There were injuries like scratches on the right hand of the deceased.

7. The nephew of the deceased, whose name was disclosed as Sharif Ahmed (PW-9), was also present at the spot and identified the dead body of his maternal uncle Rafedeen. PW-26 recorded the statement of Sharif Ahmed (PW-9), prepared the *rukka* and handed it over to PW-15 for registration of FIR. The crime team was called to the spot and photographs were taken of the scene of crime and the dead body. After PW-15 returned at the spot along with a copy of the registered FIR, PW-26 proceeded to seize the shirt of the deceased and one chain in the pocket of the shirt. On searching the

person of the deceased, he found a purse and a mobile phone, the IMEI number and SIM card of which were noted. These were also taken into possession.

8. On 8th April 2011, at the mortuary of the All India Institute of Medical Sciences ('AIIMS'), the body was further identified by the brother of the deceased, i.e. Nasir (PW-1). The post mortem was performed by Dr. Karthik Krishna (PW-6) under the supervision of Dr. Sudipta Ranjan Singh both of whose signatures were identified by Dr. Hari Prasad (PW-23). The cause of death was determined to be asphyxia due to strangulation.

Arrest and seizures

9. According to PW-26, he began looking for the present Appellant on 7th April 2016 but could not locate him. However, on the evening of 8th April 2011, when PW-9 joined them, they came to know that the accused was "standing at Samosa Chowk". PW-26 along with his staff members reached Samosa Chowk and apprehended the Appellant.

10 After his arrest, the Appellant apparently made a disclosure statement (Ex.PW-21/E) and two mobile phones were got recovered from his possession. He is supposed to have disclosed that the mobile phones were used by him and co-accused Afsana. One mobile phone had a Vodafone SIM card (9540227214) and the other had a G-5 SIM card (9891107696). An extra Idea SIM card was also recovered. These were seized.

11. Thereafter, on the next day, i.e. 9th April 2011, accompanied by W/Ct. Sonia Rana (PW-14), PW-26 went to the house of Afsana, interrogated her,

and arrested her and she too gave a disclosure statement (PW-14/C). As she was a juvenile, she was produced before the JJB.

12. PW-26 prepared a rough site plan (Ex.PW-9/B) on 7th April 2011, and a scaled site plan (Ex.PW-5/A) on 10th April 2011. The statement of Shabnam (PW-17) a neighbour of co-accused Afsana, was recorded on 24th April 2011. The statement of her husband Jalaluddin (PW-4) was recorded on 28th June 2011.

Trial

13. On the completion of the investigation, the charge-sheet was filed and by an order dated 19th August 2011, charges were framed against both the accused, as noted earlier.

14. In the trial that proceeded against the Appellant, the prosecution examined twenty-seven witnesses. The case of the prosecution was based essentially on circumstantial evidence. In order to prove the circumstance of 'last seen', the prosecution relied on the evidence of Sharif Ahmed (PW-9) and Mohd. Sayeed (PW-19). In order to show that both the accused were having an affair, the prosecution relied on the evidence of Shabnam (PW-17) and her husband Jalaluddin (PW-4).

15. When the incriminating circumstances were put to the Appellant under Section 313 Cr PC, he denied them. He claimed that on 6th April 2011, he did not visit the house of the deceased between 9 and 9:30 pm as claimed by PW-9 and that he was at his residence at that time. He denied that he was arrested from Samosa Chowk. He claimed that he was called to the PS and

was forced to sign some blank papers after his father had been taken to the PS. He claimed to have been falsely implicated in the case due to business rivalry. When asked whether he had anything else to say, the Appellant stated as follows:

“On the night of 06.04.2011, I was at my place along with my family members and thereafter on 07.04.2011 since 5:00AM, I was working along with my brother namely Mohd. Shafi in his bakery. On 07.04.2011 in the evening, my father was called to the police station and police pressurized my father to call me in the police station, else, they will implicate my family in false cases. Therefore, I went to the PS and the police demanded Rs.2 Lacs, else they would implicate me in this case as I refused to pay Rs.2 Lacs to the police, therefore, I have been falsely implicated in this case. All the investigation has been done in the police station and I was forced to sign some blank papers.”

Evidence led by the Appellant in defence

16. The Appellant took the plea of *alibi*. According to him, on the night of 6th April 2011, he was at his residence with his family. Further, he claimed that he was working along with his brother, Mohd. Shafique (DW-1), in the bakery since 5 am on 7th April 2011.

17. In support of this plea, he examined his brother as DW-1. The deposition of DW-1 was to the effect that the Appellant was with him on 6th April 2011 from 8:30 pm at night until the next morning and at 5:00 am on 7th April 2011, the Appellant accompanied DW-1 to the bakery for work where both of them along with two other workers were working till 8:00 pm. When the Appellant returned to the residence, two police officials came to the bakery and enquired about the family.

18. First, the father of the Appellant was taken by the police officials to PS Jaitpur. Then, DW-1 called the Appellant and informed him about what had happened. Thereafter, he along with the Appellant went to PS Jaitpur. After an hour and a half, the Appellant was taken into custody. At 11:30 pm, DW-1 was informed by the police officials that the Appellant was calling him. When he met the Appellant, the latter stated that the police officials were asking for a bribe for releasing the Appellant from custody. As DW-1 did not have money, he declined to pay.

19. In his cross-examination, DW-1 stated that they were running the bakery for about one year prior to the incident. He further stated that the accused Afsana was residing in front of the bakery in the house of Dildar on rent. He admitted to not having made any complaint with regard to the demand of money made by the police officials for release of his brother. He, however, stated that he had been threatened by the police officials but did not complain to senior officers as he was afraid.

Judgment of the trial Court

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

- (i) The prosecution had been able to prove that the deceased had died a homicidal death. There was no delay in the registration of the FIR and sending it to the learned MM
- (ii) The deceased and Afsana were husband and wife. They were initially residing in the house of Dildar Ahmed (PW-2). After PW2

was told by Shakeel, the owner of the bakery shop in which the Appellant worked, that the Appellant and Afsana used to make gestures to each other, PW-2 got vacated the house from them.

- (iii) The prosecution was able to prove that pursuant to the arrest of the Appellant, two mobile phones were seized from him. PW-9 had identified the Appellant as being the same person who had taken the deceased between 9:00 and 9:30 pm on 6th April 2012. The recovery of two mobile phones with one extra SIM card from the possession of the Appellant has been proved.
- (iv) The testimony of DW-1 did not inspire confidence as two co-workers with whom he claimed to have been working with the Appellant in the bakery were not examined. The medical evidence proved the homicidal death.
- (v) From the evidence of PWs 4 and 17, it was proved that the phone being used by PW-17 was in fact used by Afsana to talk to the Appellant. Even on the date on which the deceased expired, the Appellant had called Afsana on the said mobile phone.
- (vi) The evidence of Tarun Khurana (PW-10), the Nodal Officer of Bharti Airtel who brought CDRs in respect of mobile number 8826472263 showed that such calls were in fact made.
- (vii) The evidence of PWs 9 and 19 proved that the deceased was last seen with the Appellant.

21. The trial Court concluded that the circumstances proved by the prosecution formed a continuous chain and unerringly pointed to the guilt of the accused.

Law relating to circumstantial evidence

22. This Court has heard the submissions of learned counsel for the Appellant as also the learned APP for the State. This being a case of circumstantial evidence, the law in relation to appreciation of circumstantial evidence requires to be recapitulated. 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.”

23. In ***Ram Avtar v. State 1985 Supp SCC 410***, the Supreme Court explained that:

“...circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g., where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In

other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.”

24. In *State of Tamil Nadu v. Rajendran (1999) 8 SCC 679*, the Supreme Court held:

“... the law is fairly well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. It has been held by a series of decisions of this Court that the circumstances proved must lead to no other inference except that of guilt of accused.”

25. In *Trimukh Maroti Kalan v. State of Maharashtra (2006) 10 SCC 681*, the Supreme Court held:

“The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.”

26. In *Brajesh Mavi v. The State (2012) 7 SCC 45* the Supreme Court explained:

“From the several decisions of this court available on the issue the said principles can be summed up by stating that not only the prosecution must prove and establish the incriminating circumstance(s) against the accused beyond all reasonable

doubt but the said circumstance(s) must give rise to only one conclusion to the exclusion of all others, namely, that it is accused and nobody else who had committed the crime.”

Purported affair between the two co-accused

27. The first circumstance which is sought to be proved by the prosecution is the alleged illicit affair between the Appellant and the co-accused. In order to prove this circumstance, the prosecution has sought to show that the mobile phone which actually belonged to PW-17 was being used by the co-accused Afsana to call the Appellant and that the Appellant was also making calls on the said mobile phone. The husband of PW-17, Jalaluddin (PW-4), is also supposed to have corroborated this.

28. In the first place, it requires to be noticed that according to PW-4, the said Airtel mobile number ending in 2263 which was being used by his wife (PW-17), was actually in the name of his friend, Akhtar. A pointed question was asked to him as to how he came to know that it was Afsana who talked to the Appellant using that phone. PW-4 replied stating that one day he was at home and received a call from a certain number. Upon enquiring from his wife as to the caller's identity, his wife told PW-4 that Afsana had taken her mobile phone to call that number. Later on, his name was revealed as Firoz. PW-4 added: "My wife also told me that his name was Firoz."

29. However, this statement of PW-4 was completely demolished in his further cross-examination by the learned counsel for the Appellant. A pointed question was put to this witness that “you had come to know about the name of Firoz only when the police met you”. His answer was “it is

correct that I came to know the name of Firoz at the police post and before I visited police post I did not know the name of Firoz”. “It is correct that if police had not informed me I could not come to know that Firoz was calling on my wife’s mobile number”.

30. A significant part of the deposition of PW-4 which has been completely overlooked by the trial Court is that PW-4 and his wife (PW-17) went to their village between 20th/22nd April 2011 and returned only on 10th/11th May 2011. When they returned from the village, their landlord informed them that the police was looking for them. The police then visited their house and took them both to the PS.

31. A careful reading of the evidence of PW-4, therefore, shows that he had no knowledge whatsoever that it was the Appellant who was calling Afsana on the mobile phone used by his wife (PW-17). He had no direct knowledge of this at all up until the police told him that it was the Appellant who was making calls. PW-4, therefore, was an entirely unreliable witness to prove that there were calls being exchanged between the co-accused and the Appellant on the mobile phone used by his wife.

32. Likewise, when one turns to the evidence of Shabnam (PW-17), the situation is no different. According to PW-17, Afsana used to use her mobile phone to speak with the Appellant. Further, PW-17 states that she used to arrange telephonic conversations between the two. When asked the about the identity of the person calling her number to speak with Afsana, PW-17 named the Appellant. Strangely, however she could not remember the name

of Afsana's husband. While she could identify Afsana, she stated "I did not see any other person, who used to come to meet her".

33. In her cross-examination, PW-17 conceded, "I came to know the name of Firoz on the day when my statement was recorded by the police. Police told me the name of Firoz, before that I did not know the name of Firoz. If the police would not have informed me, I would not have known the name of Firoz". The above answer of PW-17, therefore, again makes this witness totally unreliable to prove the circumstance of the Appellant and the co-accused having an affair with each other.

34. The evidence produced through the Nodal Officer of Bharti Airtel, Mr. Tarun Khurana (PW-10), shows that calls were made on the mobile phone of PW-17 by the Appellant. However, CDRs can at best be a corroborative piece of evidence. Since the said mobile phone was not in the name of co-accused and for that matter not even in the name of PW-17, the mere fact that there have been calls to the said phone will not constitute a substantive piece of evidence to show that the two co-accused were having an affair. It is too farfetched to base that conclusion on such a weak piece of evidence.

35. As far as Dildar Ahmed (PW-2) is concerned he speaks about the bakery owner Shakeel (not examined) telling him that the two accused were exchanging gestures. This too does not carry the prosecution case any further. In the first place, Shakeel himself was not examined as a prosecution witness. Secondly, in his cross-examination, PW-2 conceded, "I had never seen any exchange of gestures between Afsana and Firoz".

Furthermore, he admitted, “I have no personal knowledge that if there was any illicit relationship between Afsana and Firoz”. The evidence of PW-2 was only in the nature of hearsay. It ought not to have been relied upon at all by the trial Court to reach the conclusion that the circumstance of an illicit affair between the two co-accused stood proved.

Absence of proof of motive

36. Therefore, an important link in the chain of circumstances, viz., that there was illicit affair between the two co-accused, cannot be said to have been substantiated by the prosecution. This circumstance, in fact, supplied the motive for the killing, according to the prosecution. Therefore, with this circumstance not being proved, there is a lack of motive for the crime.

37. In order that failure to prove motive can be considered non-fatal to the prosecution, it must be shown that the other circumstances have been clearly established which, in the present case, has not been done. The legal position in this regard was explained by the Supreme Court in *Arjun Mallik v. State of Bihar 1994 Supp (2) SCC 372* in the following terms:

“...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.”

Circumstance of ‘last seen’

38. As regards the circumstance of ‘last seen’, the legal position in this regard is required to be recapitulated. The legal position is that by and of itself, the circumstance of ‘last seen’ cannot constitute the basis for conviction particularly in a case where the offence is punishable under Section 302 IPC. The gap between the time when the deceased was last seen and when the dead body was recovered also becomes a significant factor. The position was stated as such by the Supreme Court in *Nizam and Ors. v. State of Rajasthan (2016) 1 SCC 550* as follows:

“Undoubtedly, "last seen theory" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on "last seen theory". "Last seen theory" should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

39. In the present case, the deceased was last seen leaving his house between 3:00 and 3:30 pm and his dead body was recovered not far from his house at 4:30 pm on the following day. Therefore, there was considerable gap between when the deceased was last seen, if at all, with the Appellant and when the homicidal death was discovered. This important factor has not been accounted for by the trial Court.

40. Furthermore, with the dead body being found in the vicinity of Samosa Chowk (from where the Appellant was purportedly arrested), the claim of PW-9 that they kept searching for the deceased throughout the night and during the day on 7th April 2011 and yet could not find him is not believable. The rough site plan and the scaled site plan show that the dead body was lying in an open playground and could not have been hard to detect.

41. A careful perusal of the deposition of PW-9 shows that he had in fact left Delhi in the month of April 2011. He appears to have returned to Delhi only one day prior to the date of the occurrence. Although, in his examination-in-chief, he asserted that he had stayed at the house of the deceased on the night of 6th April 2011, in his cross-examination, he stated that he had made a telephone call to the deceased at around 9:30 pm. He stated that he met and had a conversation with Noor Mohd. for around five to ten minutes at the latter's residence at 9:30 pm. PW-9 later stated, however, that he was confused as to whether he had gone to the house of Noor Mohd. at around 9:30 pm or between 8:30 to 9:30 pm. PW-9 was also unable to recollect if he had told the police that he "knew the name of Firoz as he had met me and Rafedeen on the morning of 6th April 2011 when we were going to the place of work". He also admitted, "It is correct that I came to know about the name of Firoz in the morning of 7th April 2011". In his further cross-examination, PW-9 stated "I had slept in the room adjoining the room of Rafedeen on the intervening night of 6/7th April 2011.

42. The overall reading of the deposition of PW-9 does not inspire confidence that he is speaking the truth. He seems to have an incomplete

recollection of events. As a sample, the following statements may be noted:

"I do not remember as to how many times police had recorded my statement. After 07.04.2011, police had not recorded my statement. At this stage, witness again states that perhaps police had recorded his statement once even after 07.04.2011.

43. Turning to the evidence of PW-19, the Court finds that in fact he has turned hostile and did not support the case of the prosecution at all. Therefore, PW-19 was of no assistance to the prosecution. There was no other evidence as far as the evidence of last seen is concerned. Consequently, the Court is not satisfied that the prosecution has been able to prove beyond reasonable doubt that the deceased was last seen with the Appellant on the night of 6th April 2011.

Arrest of the Appellant

44. The arrest of the Appellant, which is the third circumstance, is also shrouded in doubt. The Appellant was apparently residing in the same area and made no attempt to abscond after the commission of the crime. From a perusal of the site plan, it is seen that the Samosa Chowk from where the Appellant was purportedly arrested is hardly 50 ft. from where the body of the deceased was found. It seems improbable that the Appellant would be available there for the police to arrest him without difficulty.

45. On the other hand, the evidence of DW-1, which remained unshaken in his cross-examination, that the Appellant was picked up from his house, appears probable. The Court is unable to concur with the trial Court that the evidence of DW-1 cannot be believed only because the two co-workers at the bakery were not examined.

Conclusion

46. With the above important links in the chain of circumstances not being proved, the mere fact that the prosecution has been able to prove that the death of the deceased was homicidal will not carry the case of the prosecution very far. Unless each link in the chain of circumstances is established beyond reasonable doubt and the circumstances so proved point unerringly to the guilt of the accused, it is not possible for the Court to conclude that it is the Appellant and the Appellant alone who is guilty of the offence with which he has been charged.

47. Consequently, the Appellant is entitled to the benefit of doubt. He is acquitted of the offence under Section 302 IPC. The impugned judgment of the trial Court and order on sentence are hereby set aside. The Appellant shall be released forthwith unless wanted in some other case. He shall fulfil the requirement of Section 437A of Cr PC to the satisfaction of the trial Court at the earliest.

48. The appeal is allowed and the application is disposed of in the above terms. The trial Court record be returned forthwith together with a certified copy of this judgment.

S.MURALIDHAR, J.

I.S.MEHTA, J.

APRIL 04 2018/ 'dc'