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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12th March, 2018

Decided on: 23rd March, 2018

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CRL.A. 245/2017

INNOCENT NWAYO

... Appellant

Through: Mr. Harsh Prabhakar, Advocate (Amicus Curiae) with Mr. Anirudh Tanwar, Advocate

versus

THE STATE (NCT OF DELHI)

....Respondent

Through: Mr. Kewal Singh Ahuja, APP for State

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. The Appellant, a Nigerian national, is challenging the impugned judgment dated 23rd July, 2016 passed by the learned Additional Sessions Judge-03, West District, Delhi ('ASJ') in SC No.40/3/14 arising out of FIR No.236/2011 registered at Police Station ('PS') Uttam Nagar convicting him for the offences under Sections 302 and 201 of the Indian Penal Code ('IPC') and the order on sentence of the same date whereby he, for the offence punishable under Section 302 IPC was sentenced to life imprisonment with a fine of Rs.10,000/-; and in default of payment of fine to undergo six months simple imprisonment ('SI'). For the offence punishable under Section 201 IPC he was sentenced to undergo imprisonment for one year with a fine of Rs.2,000/-; and in default of payment of fine to undergo one month's SI.

Background facts

2. The background facts are that Gurudev Singh (PW-1) is the owner of House No.45, Mahesh Vihar, Phase-II, Uttam Nagar, Delhi. His cousin sister Paramjit Kaur was living on the ground floor of the said house. He had given the first floor of the said house on rent to the Appellant in February, 2011 at the rate of Rs.4,500 per month. The second floor of the house was vacant. The third floor of the house was also given on rent in August, 2010 to another Nigerian national, whom PW-1 called 'Michael', at the rate of Rs.4,000/- per month. PW-1 had verified both tenants passports and visas before giving them the premises on rent.

3. PW-1 states that around 7th May 2011, he had gone to the above address to collect the rent from both these tenants, but found both the floors locked. He called the Appellant on the mobile number he had provided to PW-1, but found it switched off. As far as the mobile number of the other tenant is concerned, it kept ringing but nobody picked up the phone.

4. PW-1 stated that he visited the tenanted premises thereafter but neither the Appellant nor the other tenant, Micheal, were found available. On 20th May, 2011, PW-1 had enquired from his sister about these two tenants but she replied that she had not seen both of them in the premises for the past 10/15 days. Even upon inquiry in the neighbourhood, PW-1 was informed by neighbours that they had not seen the two for around 10-15 days.

5. On the same day, when PW-1 went to the first floor of the house, he found that there was a foul smell emanating. In the evening, he telephoned

the police from his mobile number.

6. Inspector (Investigation) Sube Singh (PW-17) who was posted at PS Uttam Nagar, on receiving the information which was reduced into writing as DD No.36A as a result of the above call, marked it to Sub Inspector ('SI') Sarwan Kumar (PW18). This was at about 4.45 pm. PW-18 then accompanied by Constable ('Ct.') Ashok Kumar (PW-5); Ct. Krishan and Ct. Ritesh Kumar went to the premises. They were joined by the Station House Officer ('SHO') Inspector Jai Kishan with his staff. When they reached the place, they found PW-1 there. A foul smell was emanating from the room on the first floor which was locked from outside. Meanwhile, Inspector R.C. Dahiya, the then Additional SHO of P.S. Uttam Nagar also reached there. He was followed by PW-17 and Head Constable ('HC') Rajender Kumar (PW-10).

7. On the instructions of PW-17, PW-1 broke open the lock with the help of a hammer. One big sized, black colour travelling bag was found in the bedroom. It was opened by cutting the chain of the bag. The dead body was found in the bag beneath clothes, wrapped in a blanket and the blanket was tied with a rope. It was highly decomposed. The crime team arrived at and inspected the spot, and took photographs of the dead body. The dead body was taken out of the bag and it was again photographed.

8. The statement of PW-1 was immediately recorded (Ex.PW-17/A). PW-1 is stated to have produced the rent agreement in the name of the Appellant. *Rukka* was prepared (Ex.PW-17/B) and sent to the P.S. for registration of the FIR. Rough site plans were prepared in two parts, Ex.PW-17/C and Ex.PW-

17/D respectively. On search of the room, one ID Card in the name of Lalrinchhani, one medical treatment card of Ms.Cicilia and five green colour capsules were found. These articles were seized. PW-17 made efforts for getting the deceased identified. She was identified as Ms. Cicilia @ Chong.

9. The post mortem was performed by Dr.B.N.Mishra (PW-4). No obvious external injury seen on the body of the deceased, due to set up of mummification followed by partial putrefaction. On internal examination, he found that the whole brain matter changed into greasy and pulpy mass. The right cornua of hyoid bone was found fractured and adjacently collected blood clot changed into brownish greasy mess. The whole body and viscera had converted into greasy semi-solid mass without any distinctly identifiable parts. The spinal column was intact. The opinion given by him was that death could have been caused by manual throttling which was sufficient to cause death in ordinary course of nature as the hyoid bone had already been found fractured. This post mortem took place on 24th May, 2011. The time since death was stated to be one month prior to the post mortem.

10. After the post-mortem was complete, PW-17 got the scaled site plan (Ex.PW15/A) prepared. The investigation remained with him till 25th July, 2011.

11. In the meanwhile, Sub Inspector Davender Kumar (PW-16) who was posted at the Crime Branch Kotwali was informed by Head Constable ('HC') Jaswinder that the Appellant may arrive at House No.1605, Saini Mohalla, Kotla Mubarakpur to meet his friend Price Michael and was intending to escape from India to Nigeria via Nepal. On this, PW-16

constituted a raiding party with HC Jaswinder, HC Raja Ram, Constable Sushil and left with the secret informer in a private car and one motorcycle. They laid a trap near the said house.

12. At 9.30 pm, the secret informer pointed out towards the Appellant, who was coming there on foot. He was overpowered and upon making inquiries purportedly accepted his involvement in the case. He was arrested. His disclosure statement was recorded. Inspector Surender Rana (PW-20) was entrusted with the investigation on 30th May, 2011 and reached the SOS Section of the Crime Branch. PW-16 handed over relevant documents pertaining to the arrest of the Appellant to him. PW-20 then interrogated the Appellant; arrested him and undertook his personal search.

13. During the police custody remand, the Appellant led the police to the place of occurrence and a pointing out memo was drawn up. His medical examination was conducted in the DDU Hospital on the next day. The Appellant led the police to the INA Market from where he had purchased the bag in which he had wrapped the dead body of the deceased. He pointed out to Shop No.207 from which he had purchased the bag. The owner of the shop, Mohan Singh (PW-7), identified the Appellant as having purchased the black colour bag from him.

14. The statement of Tushar Bhatia (PW-14) was recorded on 3rd June, 2011. He stated that he was friends with Tashi, a resident of Dharamshala, Himachal Pradesh who was friends with the deceased. According to him, Michael @ Micky who was living on the second floor was a friend of one Ms. Sheldon, who was Tashi's roommate and the deceased was the

Appellant's girlfriend. According to him, on 28th April, 2011, there was a party at the house of the Appellant at Mahesh Vihar, Uttam Nagar. PW-14 along with Tashi, Sheldon and Michael went to the house of the Appellant. The deceased, who was a girl friend of the Appellant, was also present there. After some time, arguments started between the Appellant and the deceased over the issue of Ms. Sheldon. They tried to pacify the Appellant and the deceased. However, since they were disturbed PW-14 along with Tashi and Sheldon left the house the next morning at around 12 noon. A police party was sent to Himachal Pradesh to record the statements of Tashi and Sheldon. However, these two persons were not examined at the trial.

15. It must be mentioned here that Ms. Zampui (PW-3) along with Lalrinchhani identified the dead body of the deceased on 24th May, 2011. PW-3 stated that the deceased was earlier residing in Munirka with her husband Lian. PW-3 stated that the deceased had two tattoo marks of US\$ 100 on her back. At the time of the incident, according to PW-3, the deceased was residing in the area of Uttam Nagar along with her boyfriend, who was a Nigerian, as was told to her by Lalrinchhani @ Wendy.

16. At the conclusion of the investigation, a charge-sheet was filed against the Appellant and by an order dated 23rd November, 2011 charges were framed against him for the offences under Sections 302 and 201 IPC. On behalf of the prosecution, 20 witnesses were examined. When the circumstances were put to him, the Appellant denied them and claimed that he had been falsely implicated.

17. In the impugned judgment dated 23rd July, 2016, the learned trial Court

came to the following conclusions:

(i) The dead body was recovered from the first floor which was the rented accommodation of the Appellant.

(ii) PW-3 had identified the dead body as being that of Cicilia, who was having a tattoo mark of US\$ 100 on her back. PW3 was not cross-examined.

(iii) The post-mortem report confirmed that the death was as a result of manual throttling. Therefore, the death was homicidal.

(iv) The post-mortem was conducted on 24th May, 2011 and according to PW-4 the time of death was approximately 30 days earlier.

(v) PW-14 spoke about a fight having taken place between the Appellant and the deceased on 28th April 2011. This could only mean that the deceased was murdered soon after the party which was attended by PW14. Nobody had seen the deceased thereafter. Even the Appellant was missing since then.

(vi) Sometime in the month of May, 2011, the Appellant had purchased the bag of black colour from the shop of PW-7 and this was proved by PW-7 without contradiction by the accused.

(vii) The accused went absconding and could be arrested only on 29th May, 2011 from the area of Kotla Mubarak Pur, Saini Basti upon secret information being received by the police.

18. The trial Court came to the conclusion that under Section 106 of the

Indian Evidence Act ('IEA'), there was a strong presumption that the deceased was murdered by the accused if he could not reasonably explain the deceased dying an unnatural death in the room occupied by him as a tenant. This coupled with the fact that he was missing soon after the death, went against the Appellant. Consequently, the trial Court found the Appellant guilty of the offences punishable under Sections 302 and 201 IPC. By a separate order on sentence dated 23rd July, 2016, the Appellant was sentenced in the manner indicated hereinbefore.

19. The Court has heard the submissions of Mr. Harsh Prabhakar, Advocate (Amicus Curiae) appearing for the Appellant, Mr. Kewal Singh Ahuja, learned APP appearing for the State and perused the record.

20. The circumstances highlighted by the learned trial Court have already been discussed hereinbefore. As regards the circumstance of the last seen, the evidence of PW-14 regarding the party attended by him in the house of the Appellant has really not been challenged by the Appellant. That happened on 28th April, 2011. PW-14 has clearly stated that arguments had started between the Appellant and the deceased over the issue of Sheldon at around 9/10 pm on that day. This was soon prior to the day of the incident. This was in the house of the Appellant.

21. It has emerged in the evidence of PW-3 that at the relevant time, the deceased was staying with the Appellant. As rightly pointed out by the trial Court, although the evidence of 'last seen' is *per se* not by itself sufficient to bring home the guilt of the accused, under Section 106 of the IEA, it is the Appellant who should have special knowledge of the incident since the

deceased died an unnatural death in his house. Her dead body was found in the house which was under his occupation.

22. The evidence of PW-1 has comprehensively proved that the Appellant was his tenant living in the first floor of his house. In ***State of Rajasthan v Thakur Singh (2014) 12 SCC 214***, under similar circumstances, the Supreme Court upheld the conviction of the accused where again the deceased had died an unnatural death in the room occupied by her and the accused. There was no evidence that, “Anybody else had entered their room or could have entered their room.”

23. In the present case also, the Appellant has not set up a case of *alibi*. If he was not in his house he should explain where else he was. He has not led any evidence whatsoever in this regard. On the contrary, the Appellant was absconding for around 15-20 days prior to the body being found and could be arrested only on 29th May, 2011 at the instance of a secret informer. PW-1 has also proved the fact that the attempts to contact the Appellant proved futile with his mobile phone being switched off. Here again, the Appellant has not sought to lead any evidence to rebut the adverse inference against him.

24. Thirdly, that there was a quarrel that took place between the deceased and the Appellant on 28th April, 2011 stands proved again by PW-14. There has not been any serious challenge to the said evidence either.

25. In ***Padala Veera Reddy v State of A.P. (1989) Suppl. SCC 706***, the Supreme Court summarized the principles governing the proof of the guilt of

an accused based on circumstantial evidence as under:

- “(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

26. In the present case, the circumstances outlined by the prosecution have been conclusively proved beyond reasonable doubt. The only possible inference to be drawn from the proved circumstances is that it is the Appellant alone and no one else who has strangled the deceased and caused her death. The medical evidence has proved beyond reasonable doubt the homicidal death of the deceased by strangulation.

27. The only other factor to be considered is the nature of the offence. It is plain that the killing of the deceased had occurred as a result of a quarrel between him and the deceased. This was over the issue of the Appellant being friends with another girl Sheldon. This coupled with the fact that there was a single injury, viz., the fracture hyoid bone as a result of manual

throttling, persuades the Court to consider it to be a case of culpable homicide not amounting to murder within the meaning of Section 300 IPC. However, since death was by the throttling of the neck, it cannot be said that the Appellant had no intention of causing the death of the deceased.

28. Consequently, the Court is of the view that the offence is one not of murder but culpable homicide not amounting to murder punishable under Section 304 Part I IPC.

29. As regards the sentence, the Court is informed that there is no pending case against the Appellant. He also does not appear to have any past history of being involved in any crime.

30. In the circumstances, the sentence awarded by the trial Court to the Appellant is modified by sentencing the Appellant to ten years rigorous imprisonment ('RI') with the fine of Rs.10,000/-; and in default of payment of fine, to undergo further SI for six months. As far as the offence under Section 201 IPC is concerned, the conviction and sentence awarded to the Appellant by the trial Court is left undisturbed.

31. The appeal is disposed of in the above terms. The trial Court record be returned forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 23, 2018*/anb'/rd*