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

+ **CRL.L.P. 782/2018**

STATE

..... Petitioner

Through Mr. Amit Gupta, APP.

versus

SUBODH & ANR

..... Respondents

Through None.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER

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16.01.2019

1. The present leave petition has been filed by the State under Section 378 (1) Cr.P.C. seeking leave to appeal against the judgment dated 11.09.2018 passed by the learned ASJ in SC No.7133/2016 arising out of FIR No.271/2015 registered at P.S. Sangam Vihar under Sections 302/201/34 IPC.

2. As per the prosecution case, on 05.05.2015, a PCR call was received at P.S. Sangam Vihar which was recorded vide DD No.33B to the effect that a dead body has been found at H Block, H.No.217, Sangam Vihar. On receipt of the above message, PW-17 SI Vineet Pratap along with Ct. Shambu Dayal reached the spot and found the house to be a vacant premises comprising of an open land and three rooms. The police officials found the dead body in one of the rooms of the house. The dead body was of a male aged between 35-40 years. The dead body could not be identified and it was

preserved in the mortuary at the AIIMS Hospital. A jute bag and a plastic bag were also separately found in other rooms. On the same day, Md. Asharful (PW-13) reached the police station at about 7:00 PM to lodge a report about his missing brother Manjoor Alam. The unidentified body was shown to him and he identified the body to be that of his missing brother. Sometime later, wife of the deceased, Mastara Khatoon (R-2, herein) also reached the police station and identified the body of the deceased to be that of her husband, from the photograph.

3. On the last date of hearing, the trial court record was summoned. Arguments have been heard from the learned APP for the State. We have also gone through the grounds taken in the appeal as well as the trial court record.

4. The prosecution has relied on the alleged illicit relationship between the respondents as the motive for committing the offence, pursuant to which the deceased (Manjoor Alam) was allegedly given knife injuries by the respondents, which resulted in his death. To prove the motive, the prosecution has examined PW-13 Md. Asharful, PW-16 Arshad, PW-4 Kayam Singh and PW-14 Anil Kumar.

5. PW-13 Md. Asharful has stated that he was not residing with his brother and he used to visit the deceased sometimes once in two weeks, once in 6 months and even once in a year. He stated that on 04.05.2015, he was in his village and on 05.05.2015, he received a call from R-2 who informed him that Manjoor Alam had gone to take money from someone in the area and had not returned. When the witness reached his brother's house, he found that R-2 was crying. Thereafter, he went to the police station to lodge a missing report.

6. We find that the above witness has not uttered anything about the alleged illicit relations between the respondents.

7. The prosecution has examined PW-4 Kayam Singh who happened to be the landlord of R-1. As per him, he had let out a room on the upper floor to R-1 at the asking of R-2 who had introduced R-1 as her brother. This witness has categorically stated that though R-2 used to visit R-1 frequently, he did not have any suspicion or doubts qua her and found her visits quite normal. As per the prosecution case, PW-4 had also seen both the respondents at about 2-2:30 am when they had come to the house of R-1.

8. The next witness examined was PW-14, Anil Kumar. This witness was residing as a tenant in the same house as that of the deceased. As per him, he returned from work on the intervening night of 4/5 May, 2015 at about 10:45 pm and the door was opened by R-2. She asked him “*mere budhe ko kahin dekha hai*”. In his deposition, he has categorically stated that there was no special relationship between the respondents as they did not conduct themselves in any such manner in his presence. He denied the suggestion by the learned APP of having informed the police about over hearing both the respondents speaking to each other in an objectionable way. The witness also stated about a quarrel that had taken place a day prior to the murder of the deceased (Manjoor Alam). The quarrel had taken place between Manjoor Alam and another tenant, Babloo as Babloo had told Manjoor Alam that his wife was conducting herself in an objectionable manner. In cross examination by the learned APP, this witness admitted as correct that both the respondents were maintaining a relationship that is usually between a husband and wife. On his cross examination by the learned defence counsel, he stated that he had not seen the respondents in

any objectionable position. As per this witness, it was Babloo who had informed the deceased about the objectionable conduct of his wife.

9. PW-14 has frequently changed his statement regarding the relationship between respondents, during his testimony. He has not taken a consistent stand. Surprisingly, the prosecution has not examined the other tenant, Babloo on this aspect and as such, the knowledge claimed by PW-14, appears to have been derived from what Babloo had stated to the deceased.

10. Another circumstance noted by the trial court is the CDR details. The CDRs show that there were several calls made by R-1 from both the mobile numbers, not only to mobile of R-2, but also to the mobile of the deceased. This circumstance, by itself, does not prove the case of any illicit relationship between the respondents.

11. The Trial Court has noted the discrepancy between the “time since death” given in the post-mortem report and the alleged “time of death”. We do not see any reason to differ with the Trial Court on this aspect.

12. The next circumstance used by the prosecution is the recoveries made at the behest of the respondents. Though PW-13, Md. Asharful is a witness to the recoveries at the instance of the respondents, his presence was not spoken about by PW-2 W/Ct. Manisha, PW-10 HC Rati Ram and PW-17 SI Vineet Pratap, who were the police witnesses to the alleged recoveries. PW-13, Md. Asharful has rather stated that he was shown the clothes and the knives at the police station, which means that he had not accompanied the police for the recoveries and had rather signed the documents of seizure of articles at the police station itself.

13. There is also discrepancy as to the place from where the clothes of the respondents were seized. Whereas PW-10 and PW-18 state that the clothes

were recovered from under a cot, PW-2 states that the clothes were taken out from the almirah.

14. As for the recovery of knife, PW-2 claimed that it was effected during the night. PW-13, Md. Asharful claimed that it was evening and PW-10 HC Rati Ram claimed that it was in the afternoon. Although the seizure memo of the knife does not mention the presence of blood on it, however, the FSL report mentions the presence of blood on the knife though no DNA could be isolated from them.

15. Even the cycle used for carrying the body of the deceased is stated to be recovered from different places by the witnesses. The cycle was not even sent to FSL.

16. As per the prosecution case, PW-8 Dr. Suminder Kaur, had collected the bloodstains from the room of the deceased on 25.05.2015. From a perusal of the trial court record, it is found that by this time the respondents were in judicial custody and the room of the deceased was in the custody of the IO, PW-18/Insp. Badruddin, which makes the collection of the material for scientific analysis, itself doubtful.

17. The house of the deceased was in a 50 sq. yd. plot, he had three children aged 13, 10 and 8 who were present in the house on the date of the offence, yet they were not examined by the Investigating Officer. Even though as per the prosecution case, 20 knife injuries were inflicted on the deceased, it is difficult to believe that the deceased would not have cried. No neighbour was examined on this aspect. There are several gaps in the chain of circumstances that have not been plugged satisfactorily. The Hon'ble Supreme Court in the case of ***'Sharad Birdhichand Sarda Vs. State of***

Maharashtra, (1984) 4 SCC 116 referred to the decision in ***Shivayi Sahebrao Bobade Vs. State of Maharashtra***, AIR 1973 SC 2622 and has held as under:-

“it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions; the facts so established should be consistent only with the hypothesis of the guilt of the accused; that the circumstances should be of a conclusive nature and tendency that they should exclude every possible hypothesis except the one proposed to be proved; that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

18. The law with regard to grant of leave is well settled by a catena of judgements. Leave to appeal can be granted only where it is shown that the findings of the trial court are perverse and that there are very substantial and compelling reasons to set aside the same. Reference is made to decision in ***Syed Peda Aowlia vs. Public Prosecutor, High Court of Andhra Pradesh reported as (2008) 11 SCC 394***.

19. From the evidence which has emerged on record, we concur with the conclusion arrived at by the Trial Court that the prosecution has failed to prove its case beyond reasonable doubt. We do not find any infirmity in the impugned judgement for interreference. The present leave petition is accordingly dismissed.

MANOJ KUMAR OHRI, J.

HIMA KOHLI, J.

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