

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

% Reserved on: 13th December, 2022
Decided on: 20th March, 2023

+ **CRL.A. 624/2018**

HARI OM

..... Appellant

Represented by: Mr. Kanhaiya Singhal with Ms.
Priyal Garg, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Mr.Laksh Khanna, APP for the State
with SI Parveen Kumar, PS Hari
Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By this appeal, the appellant challenges the judgment of the learned Trial Court dated 28th April, 2018 whereby the appellant was convicted for murder of his wife Ravinder Pal Kaur (deceased) and for assaulting his daughter Ms.Khushi (victim/complainant). The appellant also challenges the order on sentence dated 28th April, 2018 directing the appellant to undergo imprisonment for life along with fine of ₹5,000/-, in default whereof, rigorous imprisonment for six months for offence punishable under Section 302 of the Indian Penal Code, 1860 ("IPC"); and further directing rigorous imprisonment for three years along with fine of ₹1,000/-, in default whereof, rigorous imprisonment for one month for offence punishable under Section 324 IPC.

2. In nutshell case of the prosecution is that on 28th August, 2012 the appellant, deceased and the victim celebrated the marriage anniversary of

the appellant and deceased after which, all of them went to sleep. After some time, the victim heard the appellant and the deceased fighting and thereafter, saw her father/appellant stabbing her mother/deceased with a knife. The deceased asked the victim to run away and thereafter, the victim ran downstairs where she met one neighbourer and the *chowkidar*. The appellant came after the victim and while beating, took her away. Information was received by the police vide DD No.6A (Ex.PW-24/DA), pursuant to which SI Surender Ahlawat (PW-27) reached the spot at H.No.9, 1st Floor, Asha Park, Delhi and found blood and currency notes scattered in the room. The deceased was shifted to DDU Hospital where she was declared “brought dead”. Thereafter, IO Jagjit Singh (PW-33) reached and inspected the spot, after which, he went to the DDU Hospital and collected the MLC of the deceased, the victim and the appellant. Thereafter, statement of the victim (Ex.PW-3/A) was recorded, upon which FIR No.298/2012 dated 29th August, 2012 under Sections 302/307 IPC was registered at PS Hari Nagar (West). After interrogation, the appellant was arrested vide arrest memo (EX-PW-25/D) and his disclosure statement was recorded vide Ex.PW-25/F. Thereafter, the dead body was identified by Sukhdeep Singh and Jasvinder Singh (Ex.PW-11/A and Ex.PW-8/A respectively). The body was then sent for post-mortem examination and was handed over to Jasvinder Singh.

3. After completion of investigation, charge-sheet was filed and the appellant was charged for offence punishable under Section 302 IPC for murder of his wife and for offence punishable under Section 307 IPC for assaulting his daughter with knife. And for establishing its case, prosecution examined 33 witnesses including the victim eye-witness Khushi (PW-3).

4. Learned counsel for the appellant assails the impugned judgment on the ground that the prosecution relies on weak and unreliable witness and has thus, failed to prove its case beyond reasonable doubt. It was contended that the statement of the victim Khushi (PW-3) under Section 164 of the Code of Criminal Procedure, 1973 ("Cr.P.C") cannot be used as a substantive piece of evidence and can only be used for the purpose of either contradicting or corroborating the said witness. Reliance was placed on the decision in (2020) 7 SCC 722 Somasundra @ Somu vs. State. Before the Court, victim had not deposed in consonance with her statements recorded under Sections 161 and 164 Cr.P.C., rather had corroborated the version of the defence. Even though she was declared hostile and cross-examined by the Public Prosecutor, however, nothing came on record to support the case of prosecution. It was contended on behalf of the appellant that although as per the FSL report (Ex.PW-30/C) blood was present on the surgical blade, however, it is evident from the testimony of Dr.B.N. Mishra (PW-13) that the surgical blade was not used in the commission of the offence. It was further the case of the prosecution that the appellant had grasped the knife but the same was slipping away due to smearing of blood in the hands and efforts were made by the appellant to continue to hold the knife which resulted into multiple injuries at both the hands of the appellant, however, it was contended that the FSL report (Ex.PW-30/C) shows presence of blood of only the appellant on the knife and not of the deceased. It is thus, improbable that the appellant first inflicted injuries on his wife and his daughter and thereafter washed the knife and then inflicted injuries on himself. It was further contended that as per Ex.PW-33/E blood was smeared on all parts of the blade of the knife but not on its handle. The

injuries on the hands of the appellant were proved by MLC (Ex.PW-14/B) and the injuries were of such a nature that required stitches and thus, they cannot be considered to be superficial in nature. Even otherwise, when right hand of the appellant was injured from both front and back, it was improbable that he himself also inflicted injury on his left hand. It was also improbable that injuries on the body of the appellant were caused with one weapon and that on the deceased were caused with a different weapon. It was not the case of the prosecution that the thieves threw all the weapons inside the house or that the knife recovered was the only weapon used in the commission of the offence. Furthermore, Mehar Pahuja (PW-9) from whom the weapon was allegedly procured failed to identify the appellant as the person who had purchased the knife from him. It was further contended that in view of the deceased and the appellant residing together, a presumption may be raised against the accused regarding the commission of the offence, however, the same cannot relieve the prosecution from discharging its solemn duty to prove the guilt of the accused in the first instance. It is improbable that the appellant himself planted the scattered money because no bloodstains were found on the currency notes and if the same had been planted, blood ought to have been present on the currency notes and therefore, the version put forth by the defence is probable for which the benefit of doubt must go to the appellant. Reliance was placed on the decision in (2022) 5 SCC 438 Satye Singh vs. State of Uttarakhand. In the alternative, it was contended by the counsel for the appellant that in the absence of any motive, pre-meditation, any previous complaint of quarrel between the deceased and the appellant as also the absence of any evil

intention of the appellant against the deceased to commit such an offence, at best a case under Section 304 Part-I of IPC can be made out.

5. On the other hand, learned APP for the State contended that the learned Trial Court after proper appreciation of evidence, had rightly held him guilty vide the impugned judgment and the same be upheld, dismissing the present appeal. It was contended that the appellant used to raise doubt on the character of the deceased and therefore, he intended to murder his wife/deceased for which he procured a knife and surgical blades on the day of incident which was the marriage anniversary of the appellant and the deceased, the appellant inflicted repeated knife blows on his wife/deceased and also attempted to kill his daughter. After committing the murder, to save himself, the appellant scattered currency notes at the scene of crime and concocted a false story about robbers who committed the murder of the deceased. It was submitted that the chain of circumstances is unbroken and complete as the appellant was admittedly present at the scene of crime, the weapon of offence i.e. knife was seized at the spot (Ex.PW-25/B), the death of the deceased was opined to be homicidal in nature as per the post-mortem report (Ex.PW-13/A) and the same was caused by the abovesaid seized knife as opined in the subsequent opinion (Ex.PW-33/E). Further, as per the MLC (Ex.PW-14/C) of the eye-witness/victim (PW-3), the injuries sustained by her were grievous in nature. It was contended that no injuries were caused to the appellant except those found on his hands which were superficial in nature or caused during infliction of injuries on the deceased, for which reliance was placed on the subsequent opinion on injuries of the appellant (Ex.PW-33/D) and the MLC of the appellant (Ex.PW-14/B). Further, there was no evidence of any forced entry or any person/witness

hearing the shouts of “*chor chor*”. It was also contended that if in fact, there was any intrusion in the house, the appellant did not make any call to the police at No.100 and no satisfactory response was given by the appellant regarding this fact and his escape when it was put to him during his statement under Section 313 Cr.P.C.

6. In response to the contentions on behalf of the appellant it was submitted by the learned APP that as regards the testimony of the injured eye-witness (PW-3), the same was influenced and tutored as she herself stated that her grandfather used to visit her on a weekly basis. Dr.B.N. Mishra (PW-13) in his subsequent opinion (Ex.PW-33/D) and testimony clearly opined that the injuries sustained on the body of the appellant could have been inflicted during the infliction of the injuries on the deceased. Ravinder Kumar (PW-15) deposed that the body of the deceased was found lying in the balcony of the first floor of the house from where the body was removed and taken to DDU Hospital, and this testimony belies the version put forth by defence that the presence of blood of the deceased on the appellant and vice-versa was due to the appellant uplifting the deceased on his shoulders from the spot for shifting the deceased to the hospital. The fact that there were no signs of forced entry into the house (crime team report Ex-PW-12/A), no injury on the appellant except the superficial injury, no article being robbed, nobody hearing the shout of “*chor chor*”, and appellant even failing to specify the number of the alleged robbers who entered the house clearly establishes the fact that the story as put forth by the appellant was concocted with an aim to absolve him of any liability, and on the contrary the husband/appellant, the wife/deceased and the child/victim were alone in the house at night, the cries of child were heard

and seen by the witness, the PCR call of one person being dead, one with serious injuries and one with simple injuries, recovery of knife, the post-mortem report opining death to be homicidal, the subsequent opinion of the doctor opining that the injury caused to the appellant occurred while inflicting injuries to the deceased, clearly establishes the chain of circumstances unerringly pointing towards the guilt of the appellant. Further, the improbable defence of robbers entering the house and stabbing put forth by the appellant is an additional link in the chain of circumstances.

7. After hearing both the parties at length and perusing the record, the following evidences emerge.

8. Injured eye-witness/victim Khushi (PW-3) in her testimony, without oath, stated that on 28th August, 2012 it was the marriage anniversary of the appellant and the deceased and after celebrating, they all went to sleep. During her sleep, she heard shrieks of her mother/deceased upon which she was woke up and thereafter, saw her mother lying in a pool of blood. She further stated that she saw two thieves hidden behind the almirah and that her father was trying to stop blood coming out of the body of her mother/deceased, during which both the thieves ran away. Her father/appellant chased those thieves and one of those thieves assaulted her father on his hand with something which she could not see because of darkness. She and her mother/deceased followed her father/appellant and the other thief assaulted her mother/deceased because of which her mother fell down at the main door of the house at the first floor itself. Her father/appellant shouted “*chor chor*”, and after sometime the police came at the spot. The police took her, her mother/deceased and her father/appellant to some hospital. She stated that the next day she was taken to the learned

Magistrate for recording her statement and that the police threatened her that if she did not depose before the Magistrate that her father/appellant killed her mother/deceased, those police officials would kill her father/appellant too. Thereafter, she was declared hostile and in her cross-examination she stated that she was staying with her *chote dadu* (real chacha of the appellant) and that her *bade dadu* (father of the appellant) used to visit her on weekly basis. She further stated that her father/appellant used to love her mother/deceased very much.

9. Geeta Rani (PW-2) was a neighbor of the appellant and stated that that on the day of incident she heard the noise of a child weeping and she woke up. She came outside her house and saw Khushi (PW-3) weeping. Thereafter, Khushi went inside her house and PW-2 also went back to her house. After about 2½ hours, she heard noises coming from the street. Thereafter, she was declared hostile as she was not disclosing some material facts.

10. Ramesh Bahadur (PW-4) who was working as a *chowkidar* at B Block, Asha Park, Delhi stated that on the day of incident at about 2.30 AM, he heard noise of a child weeping from the first floor. As he could not ascertain as to who was weeping, he went away. After about half an hour when he came back to the spot, he found neighbours and police officials gathered at the spot and from the crowd he got to know that a murder had taken place. Thereafter, he was declared hostile as he was not disclosing some material facts and stated that he did not see any unknown person in the street or going inside the house of the appellant. It used to take him about half an hour to make a second round while patrolling.

11. Mohit (PW-5) stated that on 28th October, 2012 at about 2.00-2.30 AM he was sleeping at his house when appellant along with his daughter Khushi (PW-3) knocked the door of his house. He noticed some blood on appellant's body and that the appellant stated that two-three thieves had arrived at appellant's house and thus requested him/PW-5 to make a call at 100 number. Thereafter, he was also declared hostile as he was not disclosing some material facts.

12. Ravinder Kumar (PW-15) who was on duty of CATS Ambulance stated that he received a call at about 3.15 AM about robbery and injury. He reached the spot and in the balcony of the first floor, he found one lady lying in injured condition in a pool of blood with injury marks on her neck and other visible parts of her body. He stated to have removed her from the spot and took her to the DDU Hospital and got her admitted.

13. Mehar Pahuja (PW-9) who was a shopkeeper selling knife, chopper etc. stated that his shop was looked after by him, his son and his two servants and that he could not tell as to from whom the knife was purchased. He was declared hostile and, in his cross-examination, he stated that the knife as shown to him of make Crystal, Ace and Glare were freely available in the market and he does not put any identification mark of his shop.

14. Jasvinder Singh (PW-8), brother of the deceased who went to the DDU Hospital, identified (Ex.PW-8/A) the body of the deceased and received (Ex.PW-8/B) the same after post-mortem. Sukhdip Singh (PW-11) stated that he identified the body of his maternal aunt/deceased (Ex.PW-11/A).

15. The post-mortem on the dead body was conducted by Dr.B.N. Mishra (PW-13) at DDU hospital who submitted his report (Ex.PW-13/A) and opined:

EXTERNAL EXAMINATION: External Injuries:-

1. *Three a partly placed incised stab wound of size 4cm x 1cm x muscle deep present on upper part of inter scapular region of back below the process of seventh cervical vertebra. The margins are sharp and regular with area occupied by liquid and clotted blood.*
2. *Incised wound of size 7cm x 2cm x muscle deep present over the blade of left scapula with spindle shaped and sharp regular margins with area occupied by liquid and clotted blood.*
3. *Three apartly placed incised stab wounds of size 4cm X 1cm x muscle deep present on the back part of the neck with sharp regular margins.*
4. *Incised stab wound of size 4cm x 1.5cm x deep to larynx present on the left side of neck with horizontal placed and sharp regular margins.*
5. *Three apartly placed stab wounds of size 4cm x 1.5cm x muscle deep present on the postero-lateral aspect of neck on left side on area behind the left ear and below hair line with sharp regular margins.*
6. *Incised stab wounds of size 5cm x 2.5cm x deep to pharynx present on the left side of neck behind the left ear with appearing spindle in shape and cut ends of the large blood vessels i.e. left jugular vein and left carotid artery exposed on exploration of the wound with area occupied by liquid and clotted blood and passively oozing of blood present.*
7. *Multiple nail and finger marks (abraded bruising of finger tips) present on the anterior aspect of neck with underlined bruised soft tissue without fracture of underlined cartilages and hyoid bone (the findings are suggestive of that the deceased could have been throttled by accused person under unexplained conditional force and unable to kill her by that manner). The same injuries could have also been resulted during scuffle.*

Opinion

1. *The cause of death is due to haemorrhagic shock caused by cutting down of large vessels of neck by sharp edged weapon like knife etc.*
2. *All Injuries are ante mortem in nature and showing the duration of the same as alleged time of incident.*
3. *Time since death is approx 1½ days prior to commencement of post-mortem examination.*
4. *Manner of death is homicide.*
5. *TOTAL No. of inquest papers: Twenty seven (27) papers enclosed with signature.*

Dr.B.N. Mishra (PW-13) deposed that on examination of the appellant he observed that dressing was applied on both the hands of the appellant, and on opening which he observed that there were superficial incised wounds on all four fingers of each hand at their palmer aspect with inflammatory changes along with stitching at different locations. All incised wounds were presented with tailing towards lateral side of the hand. On the basis of these injuries, he concluded that it was possible that the said injuries on the hands of the appellant could have been inflicted during the instance of infliction of injury on the deceased. The said injuries would have occurred during the slipping of weapon of offence from the hands of the appellant because of blood on his hand and on the surface of the knife. He further stated that on examining the knife produced before him and the surgical blade (Scalpel), he was of the opinion that the external injury Nos.1 to 6 could have been inflicted by the knife. In his cross-examination, he stated that he did not find any skin tissue or flash stuck within the finger nails or other parts of the body and that the same is not mandatory as it depends upon the manner of scuffle or the growing of the nails. He further stated that as the injuries were inflicted by knife, hence the same was sketched and opined in the

subsequent opinion and denied the suggestion of surgical blades never been produced before him by the IO.

16. Dr.Anurag Ashoka (PW-14) at DDU Hospital stated that on 29th August, 2012, he examined the deceased who was found brought dead to the hospital (Ex.PW-14/A). He also examined the appellant (Ex.PW-14/B) and Khushi/victim and found the following injuries on the appellant:

- (1) *CIW over inner aspect of right hand approx. 3 cm x .5 cm*
- (2) *CIW over right hand middle phalynx (space between the fingers) over 2nd, 3rd, 4th finger*
- (3) *CIW proximal phalynx on 3rd, 4th and 5th finger*
- (4) *bruise over anterior aspect of interior forearm.*

He found the following injuries on Khushi/victim:

- (1) *CIW over fronto partial region of scalp approx. 4.5 x 1.5 x.3 cm with exposure of bone*
- (2) *CLW over left side of neck below ear approx. 1.5 cm x .3 cm x.2 cm*
- (3) *Punctured wound present on left back side middle region.*
- (4) *CLW approx. 1 cm x .2cm x .2 cm over right index finger*

17. SI Surender Ahlawat (PW-27) stated that on 29th August, 2012 he received DD No.6A, upon which he along with Constable Manoj Kumar reached the spot at H.No.9, 1st Floor, Asha Park. One PCR van had also arrived there who took the appellant and Khushi (PW-3) to the appellant and after sometime one CATS ambulance also reached the spot who shifted the deceased/ wife of the appellant to the hospital. Blood was found scattered in the room and outside the room and currency notes were also scattered in the room. He conveyed about the incident to the SHO (PW-33) who then reached the spot and carried out the investigation.

18. IO Jagjit Singh (PW-33) stated that that on 29th August, 2012 upon receiving the information he reached the spot where he got to know that the incident had taken place on first floor of B-9, Asha Park, Hari Nagar, Delhi. He inspected the spot and found blood scattered on the stairs leading to the first floor along with some currency notes scattered near the iron almirah near the kitchen. He reached DDU Hospital and collected the MLC of the appellant, deceased and the victim Khushi. He recorded the statement of Khushi (PW-3) upon which FIR was registered. Crime team was called to the spot and submitted its report (Ex.PW-12/A). He prepared the site plan (Ex.PW-33/A) and lifted the exhibits mentioned in seizure memo (Ex.PW-25/B) i.e. hair lying on the bed, two surgical blades and one handle, bloodstained bed sheet and pillow covers, one knife having length of 13 inch, bloodstained wall paper, bloodstained floor piece from the room, floor piece without bloodstained from the room, bloodstained floor piece from the gate of the drawing room and floor piece without bloodstains from the gate of the drawing room. He prepared the sketch of the knife (Ex.PW-25/A) and prepared the *pullanda*. He also collected the currency notes of different denomination totaling to ₹4,54,420/- and a *pullanda* was prepared vide seizure memo (Ex.PW-25/C). Thereafter, he again went to the DDU Hospital. Since the appellant was discharged, he interrogated the appellant and pursuant to his disclosure, the appellant was arrested (Arrest memo Ex.PW-25/D). His disclosure statement (Ex.PW-25/F) was also recorded. Thereafter, the appellant was got medically examined. The dead body of Ravinder Kaur was identified by Sukhdeep Singh and Jasvinder Singh and the post-mortem of the dead body was got conducted after which the dead body was handed over to Jasvinder Singh. Subsequent opinion of the doctor

was also sought on the injuries sustained by the appellant and statement under Section 164 Cr.P.C. of Khushi (PW-3) was got recorded. Thereafter, on 1st October, 2012 he sent the exhibits from *malkhana* to FSL through constable Rajesh (PW-1) and upon completion of investigation filed the charge-sheet.

19. Naresh Kumar (PW-30) conducted the FSL examination and submitted the biological report (Ex.PW-30/A) and the serological report (Ex.PW-30/B). Upon DNA examination he found blood of the appellant to be present on the bed-sheet (Ex.3a), the knife (Ex.4) and locket of Khushi (Ex.11B). The locket of Khushi was found to have blood of both the deceased as well as the appellant. The pillow cover (Ex.3c) was found containing blood of Khushi. And on the basis of the DNA profile generated, appellant and deceased were found to be biological parents of Khushi (Ex.PW-30/C).

20. In his statement under Section 313 Cr.P.C., the appellant Hari Om admitted that Ravinder Kumar (PW-15) received the call at about 3.15 AM who then reached the spot and found his wife/deceased with injury marks on her neck and other visible parts of her body in a pool of blood at the balcony of first floor of B-9 and removed her to DDU Hospital. He admitted his MLC (Ex.PW-14/B) and the MLC of his daughter Khushi (Ex.PW-14/C). He also admitted MLC (Ex.PW-18/A). As regards PW-27 and PW-24 finding cash scattered near the bed, he stated that a robbery was committed and injuries were also inflicted by the robbers on him, his daughter and his wife/deceased, and that the robbers had scattered the household articles during robbery. He stated that the IO and the police staff were negotiating with him to allow them to appropriate the cash scattered at the place of

incident which was refused by him and on which account he was falsely implicated in the case. He further stated that the bloodstains on his clothes were on account of him lifting his injured daughter Khushi from the first floor and bringing her downstairs to be removed to the hospital and also on account of lifting his wife/deceased to bring her downstairs for shifting her to the hospital, which he could not on account of injuries on his hand and the heavy weight of his wife. He further admitted that his daughter woke up on account of noise which was created by him in resisting the robbery and that the robbers suddenly attacked him, Khushi and the deceased. Further he denied having visited the shop of PW-9 along with the IO. He further stated that there were about ₹7 lakhs lying in his almirah, but when the robbers fled in panic, they left the currency notes scattered on the floor and the IO seized only ₹4,54,420/-.

21. As noted above, the case of the prosecution was based both on the eye-witness testimony as well as circumstantial evidence. However, during the course of trial Khushi, the injured eye-witness and daughter of the appellant and the deceased, did not support the case of the prosecution rather supported the case of the defence by saying that when she heard the shrieks of her mother she woke up and found her mother lying in a pool of blood. She saw two thieves hidden behind the almirah and her father was trying to stop the blood coming out of the body of her mother when the thieves ran away. Tutoring of Khushi before her examination cannot be ruled out as she admitted in her deposition before the Court that she was staying with paternal uncle of the appellant and that her real paternal grandfather also used to visit her often and they showered affection on her. The learned Trial Court undoubtedly committed an illegality in relying upon the

statement of Khushi recorded under Section 164 Cr.P.C. as an admissible piece of evidence. It is settled that the statement recorded under Section 164 Cr.P.C is not substantive evidence except if it falls under Section 32 of the Indian Evidence Act. Further, like any other previous statement it can only be used for the purpose of contradicting or corroborating the witness in terms of Sections 155 and 157 of the Indian Evidence Act.

22. Dealing with this issue the Hon'ble Supreme Court in Somasundram @ Somu (supra) held:

“81. Section 164 CrPC enables the recording of the statement or confession before the Magistrate. Is such statement substantive evidence? What is the purpose of recording the statement or confession under Section 164? What would be the position if the person giving the statement resiles from the same completely when he is examined as a witness? These questions are not res integra. Ordinarily, the prosecution which is conducted through the State and the police machinery would have custody of the person. Though, Section 164 does provide for safeguards to ensure that the statement or a confession is a voluntary affair it may turn out to be otherwise. We may advert to statements of law enunciated by this Court over time.

82. As to the importance of the evidence of the statement recorded under Section 164 and as to whether it constitutes substantial evidence, we may only advert to the following judgment i.e. in George v. State of Kerala [George v. State of Kerala, (1998) 4 SCC 605 : 1998 SCC (Cri) 1232 : AIR 1998 SC 1376] : (SCC p. 624, para 36)

“36. ... In making the above and similar comments the trial court again ignored a fundamental rule of criminal jurisprudence that a statement of a witness recorded under Section 164 CrPC, cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him.”

83. What is the object of recording the statement, ordinarily of witnesses under Section 164 has been expounded by this Court

in R. Shaji v. State of Kerala [R. Shaji v. State of Kerala, (2013) 14 SCC 266: (2014) 4 SCC (Cri) 185]: (SCC p. 279, paras 27-28)

“27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide Jogendra Nahak v. State of Orissa [Jogendra Nahak v. State of Orissa, (2000) 1 SCC 272: 2000 SCC (Cri) 210] and CCE v. Duncan Agro Industries Ltd. [CCE v. Duncan Agro Industries Ltd., (2000) 7 SCC 53: 2000 SCC (Cri) 1275])

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC, can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.”

84. Thus, in a case where a witness, in his statement under Section 164 CrPC, makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under Section 164 is not substantial evidence then what would be the position? The substantive evidence is the evidence rendered in the court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164.”

23. In the absence of eye-witness account the prosecution is left with circumstantial evidence to prove the guilt of the appellant. The case of the prosecution, which is not disputed, is that at night the appellant along with his wife (the deceased) and daughter was present in the home. Though the defence of the appellant is that thieves came and they injured the deceased

however, from the crime team report, it is evident that there were no signs of forced entry. The presence of the appellant at the time of alleged incident in the house also stands proved by the testimony of the hostile witness PW-3 who stated that the appellant was present and when he was attending her mother, the thieves ran away. Thus, there is no dispute to the presence of the appellant, the deceased and their daughter Khushi in the house at the relevant time. Besides this, the prosecution also heavily relies upon the conduct of the appellant after the incident. Despite the fact that the appellant had two mobile phones, he did not make the PCR call immediately nor called the neighbours on phone but went outside his house, knocked at the door of the neighbor and then asked him to make a PCR call. This Court is of the considered opinion that this conduct of the appellant is highly unnatural particularly when his wife was injured, he was injured and his daughter was also injured.

24. Further, the post-mortem report of the deceased demonstrates that before injuries were inflicted by the knife on the neck, an attempt was made to strangle the deceased, however, as she did not die due to the strangulation, repeated blows were inflicted at and around the neck area of the deceased. In this regard it would be also relevant to note the testimony of the two eye-witnesses i.e. Geeta Rani (PW-2) and Ramesh Bahadur (PW-4). As noted above, Geeta Rani stated that on the night of the incident she heard the noise of a child weeping and she woke up and went outside her house. She saw Khushi weeping. Thereafter, Khushi went inside the house and after around 2½ hours she heard the noise coming from the street. It is evident that the incident took some time as the child came out weeping and then went inside after sometime and only after a lapse of sometime,

thereafter, the incident took place whereafter PW-2 heard the noise. This time gap in the quarrel is also evident from the testimony of Ramesh Bahadur (PW-4) who stated that about 2.30 AM, he heard the noise of a child weeping from the first floor and as he could not ascertain who was weeping, he went away and when he came back for the next round after half an hour to the spot, he found neighbours and police officials gathered. Thus, from this evidence, it is clear that there was a quarrel between the appellant and the deceased when he tried to strangle the deceased and on being unsuccessful, he stabbed her. Since the quarrel took some time, Khushi went outside weeping and again came back inside and after sometime the incident took place, it cannot be said that the stab injuries were inflicted by the two thieves. In her deposition, Khushi stated that her father cried loudly '*chor chor*' however, none of the neighbours heard that noise rather two witnesses consistently deposed that they heard the weeping sound of the child. Further, despite the fact that there were fatal and serious injuries on the neck of the deceased, the injuries on the appellant were superficial, three in number with contused incised wound over the right-hand middle of phalynx; proximal phalynx and bruise over anterior aspect of interior forearm.

25. Dr.B.N. Mishra clearly opined that the injuries on the hands of the appellant were caused during the infliction of the injuries on the body of the deceased. Learned counsel for the appellant has contended that as per the DNA analysis report the blood on the knife was found to be that of the appellant that if the appellant had received injuries leistered and bleeding while inflicting injuries to the deceased, it cannot be said that the blood of the deceased was also required to be accounted. Absence of blood of the

deceased being accounted for on the knife which was found at the spot does not further support the case of the defence for the reason nothing has been elicited in the cross-examination of the witness i.e. the doctor who took the blood sample which accounted for the alleles of the deceased.

26. Further, on the locket of Khushi, blood of both the deceased and the appellant was found which shows that after the assault the appellant also touched Khushi resulting in the availability of the blood of the appellant as well as the deceased on her locket.

27. A contention has been raised by learned counsel for the appellant claiming that in case the knife on which appellant's blood was found was used for commission of the offence qua the deceased, the knife ought to have had the blood of the deceased as well and not only of the appellant. The reason for non-availability of the blood of the deceased is the place from where the blood was lifted from the knife, hence non-availability of alleles of the DNA matching to that of the deceased cannot result in a benefit of doubt to the appellant.

28. In view of this evidence on record, it is apparent that the appellant has not been able to render a plausible explanation as to the homicidal death of the deceased and rather took a false plea that thieves entered his house who allegedly committed the offence. This Court in the judgment cited as Crl.A.1243/2018 dated 19th September, 2022 Gurdeep Singh vs. State, held:

16. In the decision reported as AIR 2007 SC 144 State of Rajasthan vs. Kashi Ram, Hon'ble Supreme Court held that the principle in relation to provision of Section 106 of the Indian Evidence Act itself is unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to

how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act....

In the present case, the appellant failed to provide any plausible explanation about the facts of the case, when murder of his wife took place within the house. Onus on the appellant does not get discharged with the false and frivolous explanation rather the false and frivolous explanation can be treated as an additional link in the chain of circumstances.

29. Thus, from the facts noted above, it is evident that the prosecution has been able to complete the chain of circumstances. Consequently, this Court finds no merit in the contentions raised by the learned counsel for the appellant and no ground for appellant's acquittal is made out.

30. Appeal is accordingly dismissed.

31. Judgment be uploaded on the website of this Court and copy of the same be sent to the Superintendent, Tihar Jail for updation of record and intimation to the appellant.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

MARCH 23, 2023/'vn'