

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(PROCEEDINGS THROUGH V.C.)

CRA-D-405-DB-2017 (O&M)

Date of Decision: 21.02.2022

Nashim

..Appellant

Versus

State of Haryana

..Respondent

**CORAM:- HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present: Mr. Bijender Dhankar, Advocate
for the appellant.

Mr. Ankur Mittal, Addl. A.G., Haryana with
Mr. Saurabh Mago, A.A.G., Haryana
for the respondent-State.

ASHOK KUMAR VERMA, J.

1. This is an appeal preferred by the appellant against a judgment of conviction and order of sentence dated 22.02.2017 for commission of an offence punishable under Section 302 of the Indian Penal Code, 1860 (for short 'the IPC'), sentencing the appellant to undergo life imprisonment and to pay a fine of Rs.15,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of 02 years.

2. Brief facts relevant for disposal of the present appeal are that Rehman, father of the appellant, was working as Chowkidar in the house of Gulshan Kumar, complainant. The said house was under construction. Rehman and his wife-Kundan, parents of the appellant,

used to sleep on the ground floor whereas the appellant alongwith his wife Shakila and son Arshad used to sleep on the second floor of the house. On 10.06.2014 some altercation had taken place between the appellant and his wife but Gulshan Kumar intervened and made them to understand. On 11.06.2014 at about 8:30 a.m. Gulshan Kumar came to the house under construction and made a call to Rehman but he did not receive any response. He went upstairs and found Shakila and Arshad lying in a pool of blood and on seeing Gulshan Kumar, the appellant fled from the spot saying that he had taught a lesson to his wife for making quarrel with him and had also committed murder of his son by throttling. Gulshan Kumar informed the police and on the basis of that information, SI Gian Singh came to the spot and recorded statement of Gulshan Kumar. Police proceedings were carried out by SI Gian Singh and thereafter he sent the same to the Police Station through EHC Ajay Pal. On which formal FIR was recorded by ASI Ishwer who also made his endorsement and sent special reports to the learned Area Magistrate and higher police officers through HC Ram Niwas. SI Gian Singh carried out spot inspection and prepared rough site plan of the place of occurrence. Report under Section 173 of the Cr.P.C. was prepared and presented in the Court of Illaqa Magistrate. After complying with the provisions of Section 208 of the Cr.P.C., the Addl. Chief Judicial Magistrate, Rohtak vide order dated 19.09.2014 committed the case to the Court of Session. Vide order dated 01.10.2014, charge under Section 302 of the IPC was framed against the appellant to which he did not plead guilty and claimed trial.

3. In order to prove its case, the prosecution examined complainant-PW-1 Gulshan Kumar, PW-2 HC Sumit Kumar, PW-3 Rehman, PW-4 Kundan, PW-5 HC Ram Niwas, PW-6 Ishwar Singh, PW-7 HC Ajay Pal, PW-8 HC Manjeet, PW-9 Dr. Rahul Rathi, PW-10 ASI Virender Singh, PW-11 Mohammad Sahadat Mansuri, PW-12 Khalil and PW-13 Gian Singh and produced documents and material objects exhibited on record.

4. On perusal of the material on record and consideration of the submissions made by the learned Public Prosecutor for the State and the learned defence Counsel, the learned Sessions Judge, Rohtak vide judgment of conviction and order of sentence dated 22.02.2017 held accused-Nashim guilty under Section 302 for the I.P.C. and sentenced him to undergo life imprisonment and to pay a fine of Rs.15,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of 02 years.

5. Aggrieved against the above said judgment of conviction and order of sentence, the appellant has filed the present appeal.

6. Learned counsel for the appellant has vehemently submitted that the appellant has been falsely implicated in the present case. There is no eye witness in the present case. The case of the prosecution is merely based upon the circumstantial evidence. In the testimony of prosecution witnesses, there are great discrepancies, material contradictions and embellishment. In the cross-examination, PW1-Gulshan Kumar deposed that he had not seen appellant Nashim on that morning. He had not got recorded in his statement Ex.PC that accused-Nashim had fled away from the spot on seeing him. Ex.PC was not read over and explained to

him. He does not know as to whether Nashim was sleeping or not on that night in the house. Nashim, his son and wife had come to his father Rehman 8-10 days prior to the occurrence. He had not seen accused Nashim while killing his wife and son. Moreover, the recoveries allegedly made by the prosecution upon the disclosure statement of the appellant rather goes to show that the recovery of the articles are inconclusive and they do not connect the appellant with the commission of the alleged offence. The prosecution in order to cover up their case falsely planted the recoveries upon the appellant.

7. Per contra, learned State counsel has submitted that the appellant has been rightly convicted and sentenced by the trial court. There is cogent evidence on record to show that the appellant was involved in the commission of the offence. The prosecution has examined 13 witnesses to prove its case. After appreciation of the evidence on record, the Trial Court has rightly convicted and sentenced the appellant.

8. We have given our thoughtful consideration to the submissions made by learned counsel for the appellant and learned State Counsel and have gone through the lower court record.

9. We find no substance in the submissions of the learned counsel for the appellant. Merely because there is no eye witness in the present case, is not enough to come to the conclusion that the accused is not guilty of the offence. Admittedly, two brutal murders have taken place.

10. In the present case, the prosecution has examined Gulshan Kumar as PW-1 (owner of the house) who in his examination-in-chief

deposed that he had employed Rehman-PW-3, father of the accused/appellant, as Chowkidar in his house. Rehman and his wife-Kundan used to sleep on the ground floor whereas the accused/appellant alongwith his wife Shakila and son Arshad used to sleep on the second floor of the house. On 10.06.2014, some altercation had taken place between the accused/appellant and his wife-Shakila but he intervened and made them to understand. On 11.06.2014 at about 8:30 a.m. he made a call to Rehman but he did not respond and thereafter he had gone to the second floor of the house, where he saw Shakila and Arshad lying dead in a pool of blood. Thereafter, he informed the police who recorded his statement Ex.PC which bears his signatures. In his statement Ex.PC, PW-1 Gulshan Kumar stated that he saw the accused/appellant fleeing away from the spot while saying that he had taught a lesson to his wife for making quarrel with him and had also killed his son by throttling. The PW-1 in his examination-in-chief admitted that his statement Ex.PC bears his signatures. Further more, PW-1 further deposed in examination-in-chief that on 10.6.2014, some altercation had taken place between accused and his wife Shakila and he intervened and made them understand and this deposition has not been controverted and falsified in his cross-examination. This deposition is sufficient to connect the chain of events which resulted into two heinous murders by the accused of his wife and son and that too, his wife was having pregnant of about four months which is just after one day of the altercation i.e. on 11.06.2014.

11. Further more, PW-11 Mohammad Sahadat Mansuri in examination in chief stated that his niece Shakila was married with accused/appellant and they resided at Rohtak and worked as Labourer. On 11.6.2014, he had received a telephonic message that accused Nashim had murdered his wife Shakila and son Arshad and on this information he and his brother Khalil reached at Rohtak. He had identified the dead body of Shakila and her son Arshad at PGIMS Rohtak. In his cross-examination, he deposed that at the Police Station, the parents of accused Nashim were found present and they also apprised them that the appellant-Nashim had murdered his wife and son. To the same effect is the deposition of PW-12, Khalil who is father of deceased Shakila wherein he deposed that he had received a telephonic message that appellant had murdered his wife and his son.

12. In his deposition, PW-13 SI Gian Singh, Investigating Officer of the case has submitted that on 11.06.2014 he received information that a lady and a child were lying dead in Hari Nagar, Rohtak. On that information he reached at the spot where Gulshan Kumar met him and got recorded his statement Ex.PC whereupon he made his endorsement Ex.PC/1 and sent the same to the police station for registration of the case. He also summoned Dog Squad and FSL team at the spot and inspected the spot and dead bodies in the presence of higher police officers and FSL team and prepared rough site plan Ex.PX and Ex.PY of the place of occurrence and place of recovery of brick. He conducted inquest on the dead bodies and recorded statements of witnesses under Sections 175 and 161 Cr.P.C. Thereafter, he

dispatched the dead bodies through HC Hans Raj for conducting post mortem examination. On the same day at about 9:00 p.m. when he was present at Delhi by-pass Rohtak in connection with investigation, there Vidya Nand Thekedar had produced accused Nashim. After due inquires, he arrested him. On 12.06.2014, he recorded statements of Mohd. Shahadat Mansuri PW-11 and Khalil Mansuri PW-12. On 14.06.2014 the accused was interrogated in the presence of HC Ajay Pal-PW7 and Vidya Nand Thekedar. The accused suffered disclosure statement Ex.PI to the effect that he had kept concealed a brick in his house under the heap of cement bags lying in the corner of the room in his exclusive knowledge and offered to get the same recovered. Disclosure statement was signed by the accused and attested by HC Ajay Pal and Vidya Nand Thekedar. Thereafter, in pursuance of disclosure statement, accused got recovered a brick from the disclosed place, which was stained with blood and the same was used in the crime. Sketch Ex.PJ of the brick was drawn by him and the same was taken into possession vide recovery memo Ex.PK. Sketch and memo were attested by HC Ajay Pal.

13. The deposition of PW-13 SI Gian Singh was corroborated by the deposition of PW-7 HC Ajay Pal, who remained associated with SI Gian Singh during the investigation.

14. PW-9 Dr. Rahul Rathi testified that he had conducted post mortem examination on the dead bodies on 12.06.2014 vide post mortem reports Ex.PO and PT respectively. At the time of post mortem examination he noticed the following injuries on the person of Shakila:-

- (i) Lacerated wound of the size of 5x4 cm at high parietal region in midline on left side with fracture of left parietal and temporal bones with massive SDH positive.

On dissection external organs of generation were found healthy, uterus had a dead male body child of around four months and in his opinion the cause of death was due to injuries described which were ante mortem in nature.

PW-9 Dr. Rahul Rathi had also noticed the following injuries on the person of Arshad:-

- (i) A reddish abrasion of the size 2x1 cm over right side of neck and 1 cm below right angle of mandible.
- (ii) A reddish abrasion of the size 1 x 1 cm over right side of neck, 1 cm below the injury No.1
- (iii) A contused abrasion of the size 2 X 1 cm over left side of neck, 2 cm below right angle of mandible.

The doctor opined in the post mortem report Ex.PO that cause of death of deceased Shakila was on account of injuries suffered by her on the head and cause of death of deceased Arshad was on account of manual strangulation and accused himself disclosed on the same lines in his disclosure statement Ex.P1.

15. Report of Forensic Science Laboratory Exs.PA and PB reveal that stall, parna, shawl, baby banian, brick were stained with a few blood stains were containing human blood.

16. It is settled position of law that circumstances howsoever strong cannot take place of proof and that the guilt of the accused have

to be proved by the prosecution beyond reasonable doubt. At this juncture, it will be apposite to refer to the golden principles laid down by the Hon'ble Supreme Court in *Sharad Birdhichand Sarda Vs. State of Mahashtra : 1984 (4) SCC 116* which are reproduced as under :-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.**

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cr1 LJ 1783]* where the observations were made.

Certainly, 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.

- (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.**

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158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor General relying on a decision of this Court in *Deonandan Mishra v. State of Bihar [AIR 1955 SC 801 : (1955) 2 SCR 570, 582 : 1955 Cri LJ 1647]* to

supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

“But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, . . . such absence of explanation or false explanation would itself be an additional link which completes the chain.”

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:

- (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,
- (2) the said circumstance points to the guilt of the accused with reasonable definiteness, and
- (3) the circumstance is in proximity to the time and situation.”

17. Again in *Majendran Langeswaran Vs. State (NCT of Delhi) & Another : (2013) 7 SCC 192*, Hon’ble Supreme Court having found the material relied upon by the prosecution inconsistent and the infirmities in the case of the prosecution, considered number of earlier decisions, and held that the conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to the circumstantial evidence that all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else.

18. Overall analysis of above said events, unimpeachable evidence and the circumstances prove beyond doubt that the appellant/accused has committed two murders of his wife, who was having pregnancy of about four months and son in a brutal manner which evinces depravity and meanness. The accused/appellant has failed to prove his innocence. The prosecution has led cogent evidence to prove its case beyond reasonable doubt. In fact, the complete chain of link evidence stands established from the testimonies of various witnesses produced by the prosecution. The defence has not been able to elicit anything beneficial out of the cross-examination of the witnesses. The evidence produced by the prosecution proves the guilt of the appellant beyond reasonable doubt. Even otherwise, it is settled proposition of law that circumstantial evidence is in no way inferior to direct evidence and circumstantial evidence can be the sole basis of conviction. In the present case, there is sufficient evidence to establish the guilt of the appellant/accused.

19. Apart from this, the presumption, as contemplated under Section 106 of the Indian Evidence Act, 1872 goes against the accused. This provision of law stipulates that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. While aptly explaining the scope of Section 106 of the Evidence Act in criminal trial, Hon'ble Supreme Court in *Shambu Nath Mehra Vs. State of Ajmer : AIR (1956) SC 404* observed as under:-

“9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and

Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried.”

Applying this principle to the facts and circumstances of the present case, it was the bounden duty of the accused to explain how the death of Shakila and Arshad occurred, as both were residing with him and were lastly seen with him on 10.06.2014 in the night time by PW-1 Gulshan when some altercation took place between accused and Shakila. The statement of last seen witness i.e. Gulshan PW-1 has already been dealt with and no circumstances is there on the file to raise any doubt about his credibility and it has been proved by overwhelming evidence that it was the accused who had committed the murder of Shakila and son Arshad.

20. In view of the above discussions, we are of the considered view that there is no illegality in the judgment of conviction and order of sentence passed by the Trial Court. Accordingly, the present appeal stands dismissed and the judgment of conviction and order of sentence stand upheld. Pending applications in this case, if any, shall stand

disposed of accordingly. Registry to return back the Lower Court Record.

(ASHOK KUMAR VERMA)
JUDGE

(RITU BAHRI)
JUDGE

21.02.2022
MFK/Kothiyal

Whether speaking/reasoned
Whether Reportable

Yes
Yes