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

Judgment reserved on: 07.10.2022

Judgment pronounced on: 22.11.2022

+ **BAIL APPLN. 1395/2022**

MEENAKSHI @ MEENU

..... Petitioner

Through: Dr. LS Chaudhary, Dr. Ajay Chaudhary, Mr. Parambir Singh, Mr. Vishesh Kumar, Advs.

Versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. Aashneet Singh, APP

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. This is an application filed seeking bail in FIR No. 39/2020 dated 21.01.2020 registered at PS Jahangir Puri, District North-West Delhi under Section 302/120B/201/34 IPC.
2. It is stated that an FIR No. 39/2020 was registered at PS Jahangir Puri, District North-West Delhi, wherein it was mentioned that one PCR call was received regarding dead body of one 12 year old boy lying at House No. K-1136, Near Gurudwara Jh. Puri. When the I.O. reached the spot, he found the dead body of the boy, namely, Harsh @ Harshit. Another dead body of one female Pooja was also found at K-1135-36.
3. The applicant was not named in the FIR. After investigation, charge

sheet has been filed against the applicant and her husband and the applicant was arrested on 29.01.2020.

4. As per the chargesheet, the applicant and her husband, in a pre-planned conspiracy, have committed robbery and murdered the deceased Pooja and 12 year old boy Harsh @ Harshit. The chargesheet records confession and admission of the crime by the husband and the applicant who narrated the events leading to the crime. The investigation relies on the statement of Smt. Neelam who used to clean the house of deceased, CDR analysis and CCTV footage that shows the applicant and her husband entering and leaving the house of deceased Pooja on 16.01.2020.
5. The learned ASJ on 30.11.2021 has framed charges against the applicant and her husband under Section 302/120B/201/379/411 IPC.
6. Learned counsel for the applicant states that the case of the prosecution at best is of circumstantial evidence to prove the theory of 'last seen'. The prosecution has proposed to examine the 2 witnesses, namely, Mr. Naveen Kumar (PW-4) and another witness, Smt. Neelam. It has been stated that as far as Mr. Naveen Kumar is concerned, his testimony is not reliable and he appears to be a planted witness. He claims to have visited from Bahadurgarh, Haryana to the house of the deceased at Jahangirpuri, Delhi and stated to have stayed there only for 2 – 3 minutes. Mr. Naveen Kumar has stated that he had seen the petitioner during his visit. There is no explanation as to why he came from such a long distance only for 2 – 3 minutes.
7. As regards Smt. Neelam is concerned, it is submitted that she herself has stated in her statement under Section 161 Cr.PC that she visited the

house of deceased Pooja for the last time of 15.01.2020, so she has no occasion to have seen the applicant at the house of the deceased on 16.01.2020.

8. It is submitted that in the entire case including the post-mortem, there is no whisper about the time and date of the death of the deceased. To prove a theory of 'last seen', the accused and the deceased should have been seen together in close proximity at the date and time of the death.
9. It is further stated that it is an admitted fact that both the deceased and the accused were sex workers and there is nothing unusual if the petitioner was seen at the house of the deceased.
10. It is stated by Dr. Chaudhary, learned counsel for the applicant that as per the informant, Mr. Arun, who had called the Police, has specifically stated that many bad people used to visit the house of the deceased.
11. At best, the applicant is seen at the house of deceased on 16.01.2020 and the factum of death was reported on 21.01.2020 when PW-2 Arun saw the dead bodies on 21.01.2020 and made a PCR Call.
12. Hence, there is a gap of 5 days of the applicant being seen at the house of the deceased. Furthermore, there is no certainty with regard to time and date of death of the deceased.
13. The chargesheet alleged against the applicant that there are huge recoveries of cash and jewellery at the house of the applicant. It is stated that there is nothing unusual in having cash and jewellery at the house of the applicant. None of the witnesses have identified that the jewellery and cash belongs to the deceased, particularly, when in fact the brother and mother of the deceased have been examined.
14. As regards the recoveries of the knife and the vest which has matching

stains of the deceased, it has been stated that the recoveries are made about 15 days after the date of alleged incident i.e. on 29.01.2020. It has further been stated that there are no blood stains on the knife or on the gloves. As regards the blood stains on the vest of the husband of the applicant is concerned, it is stated that the same is planted and fabricated.

15. It is also stated that the prosecution's reliance on the judgment of '*Gurdeep Singh vs. State of Punjab*' [2018 SCC OnLine P&H 1843], is misplaced for various reasons. Firstly, the facts in *Gurdeep (supra)* are different from the facts of the present case in so far as the accused were present with two dead bodies and an injured person in the premises of one of the accused hence, the Court held that accused were required to explain the circumstances in *Gurdeep (supra)*. However, that is not the case in the present facts and circumstances. Secondly, *Gurdeep (supra)* states that sec. 106 of the Evidence Act can only be applied in exceptional cases where the prosecution is required to prove the foundational facts before relying on sec.106 which it has failed to do in the present case. Thirdly, the burden which is required to be discharged by the accused is not proof beyond a reasonable doubt but a probable explanation only, which is subject matter of trial.
16. It is also stated that the husband of the applicant had disclosed the events prior to recording of disclosure statement of the applicant. Therefore, disclosure statement of the applicant becomes meaningless in light of section 25/26/27 of the Evidence Act.
17. The learned APP *per contra* has stated that on the basis of CCTV footage and CDR, the applicant and her husband have been zeroed

down.

18. He relies on the theory of last seen to argue that the applicant and her husband were last seen with the deceased persons which establishes that they committed the crime of murder. Further, he argues that the applicant and her husband had motive as looted cash of Rs. 5.17 lacs and jewellery was recovered from them.
19. The witness Naveen stated that he had seen the applicant at the residence of the victim at about 5 pm. Furthermore, statement of witness Neelam is relied upon by the prosecution to state that witness Neelam was aware that the applicant would be at the house of the deceased Pooja on 16.01.2020.
20. He further states that during investigation, the blood stained clothes of the deceased Pooja, a blood stained banyan of the accused husband Pradeep, and the murder weapon i.e. knife were recovered. The FSL report indicates that DNA of the blood stains of the clothes of deceased and that of the blood on banyan of Pradeep matches.
21. According to sec. 106 Evidence Act, the burden of proving the fact is on the person who has especially known about that particular fact or circumstance. The prosecution relies on section 106 of evidence act that the fact of the events transpired leading to death of the deceased are within the knowledge of the applicant and husband which shows their knowledge of specific facts and involvement in the crime.

ANALYSIS:-

22. I am of the view that in the present case, the application needs to be allowed and the applicant deserves to be released on bail.

23. I am of the view that the case against the prosecution is at best of circumstantial evidence.
24. At the stage of bail, I am only to see the *prima facie* allegations and the quality of the evidence.
25. The applicant has been charge sheeted on the statement of 2 witnesses, namely, Mr. Naveen Kumar and Smt. Neelam.
26. Mr. Naveen Kumar has not substantiated as to why he came from Bahadurgarh, Haryana to the house of the deceased only for a 2 – 3 minute visit. No reason has been ascribed in his testimony.
27. As regards Smt. Neelam is concerned, she has only visited the house of the deceased Pooja on 15.01.2020 and had no occasion to see the petitioner at the house of the deceased on 16.01.2020. The post-mortem report has not given the date or the time of death of the deceased Pooja or Harshit.
28. Hence, it could very well be that after the visit of the applicant, numerous people could have/ would have/ may have visited the house of the deceased persons. There is nothing to suggest that the accused and the deceased have been seen together in close proximity of the date and time of the death (as the date and time of death of Harshit and Pooja is not clear). Admittedly, both the deceased Pooja and accused were sex workers and would have numerous people visiting them at odd hours.
29. As regards the recovery of cash and gold is concerned, the same itself is also not conclusive. The brother and mother of the deceased, who have been examined, have not been able to identify the jewellery or cash being that of the deceased.

30. So far as the knife and clothes are concerned, it is the prosecution's case, that the deceased was murdered using knife and gloves by the husband of the applicant. The FSL report has categorically stated that no blood was found on the knife and neither on the gloves. The knife, gloves and the vest of the husband of the applicant were recovered from the same spot.
31. It is also difficult to fathom as to why the husband of the applicant will take with him the blood stained vest and not destroy it. The question arises that why the knife and gloves, which are recovered with the vest, would have no blood stains? There is no satisfactory explanation.
32. These are all questions which require detailed evidence when the applicant and her husband enter the witness box.
33. It is not the bail application of the husband but that of the wife being the applicant.
34. In the present case, the applicant is a lady having a 5 year old minor daughter, Sanaya. The minor daughter was in the custody of the brother-in-law of the applicant, who has since expired. The daughter is now with the in-laws of the applicant who are senior citizens and work as labourers to make ends meet.
35. A single bench of this High Court in ***Jyoti v. State, Bail Appln. 4172/2020*** has granted bail in somewhat similar circumstances: -

“12. Looking into the entire facts and circumstances of the case, and the role attributed to the petitioner, and also the fact that she is young lady and mother of two minor children, her husband Sachin is also in judicial custody, therefore, petitioner is admitted to bail on her furnishing a personal bond in the sum of Rs.50,000/- with one surety in the like amount to the

satisfaction of trial court concerned.”

36. The Division Bench of this court in ***Kajal v. State, Crl A 194/2019*** wherein the trial court had found the appellant guilty of committing the murder of her minor stepson, has granted bail and suspended the sentence of the appellant by holding:

“5. We have considered the facts of the case. While on the one hand, the appellant has been found to be guilty of serious & heinous crime of committing murder of her own minor stepson, on the other hand, the son of the appellant – who is also minor and 7 years of age, is suffering due to the loss of care & company of his mother. The family of the appellant is poor and the father of the child is working as a rickshaw puller and has to work throughout the day to make both ends meet.

.....

8. In the peculiar circumstances of the case, we are inclined to grant bail to the appellant during the pendency of the present appeal. We, accordingly, allow the application and direct that the appellant be released on bail during the pendency of the appeal on the following terms and conditions....”

37. The Apex Court in ***Ravinder Singh @ Kaku v State of Punjab Crl. A 1307 of 2019*** has held that :

“13. When a conviction is based solely on circumstantial evidence, such evidence and the chain of circumstances must be conclusive enough to sustain a conviction....”

38. The jurisprudence on last seen theory reflected in ***Shailendra Rajdev Pasvan And Others v State of Gujarat and Others, (2020) 14 SCC 750*** has held:

“15. Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between

the point when the accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In the case of Bodhraj v. State of J&K,(2002) 8 SCC 45, Rambraksh v. State of Chhattisgarh(2016) 12 SCC 251, Anjan Kumar Sarma v. State of Assam(2017) 14 SCC 359 following principle of law, in this regard, has been enunciated:

(Shailendra Rajdev Pasvan case, SCC OnLine Guj para 16)

“16....The last seen theory comes into play where the time gap between the point of time when the Accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the Accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the Accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that Accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

39. The Apex Court in ***Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116]*** while dealing with circumstantial evidence, has held that the onus was on the prosecution to prove that the chain is complete. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are :

“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 where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

“19.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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

40. The circumstantial evidence relied upon by the prosecution is not conclusive to establish a conviction upon the applicant. The applicant being last seen with the deceased is also not in close proximity with date and time of death of the deceased since there is a time gap of almost 5 days from the day, it is alleged that the accused visited the deceased and the day when the death was first reported, thereby negating the last seen theory. In such fact situation, basing a conviction on doubtful circumstantial evidence would be unjust.
41. In the present case, the applicant has already been in custody for more than almost 3 years and has a 5 year old minor daughter. Additionally, the husband of the applicant is in custody. The brother-in-law of the applicant who was taking care of the applicant's minor daughter has expired and the applicant's parents are old and unable to take care of the minor child.
42. Hence, for the aforesaid reasons, the application is allowed and the applicant is granted bail on the following terms and conditions:
 - i. The applicant shall furnish a personal bond and a surety bond in the sum of Rs. 10,000/- each, to the satisfaction of the trial court;
 - ii. The applicant shall appear before the court as and when the matter is taken up for hearing;

- iii. The applicant shall provide her mobile number to the Investigating Officer (IO) concerned, which shall be kept in working condition at all times. The applicant shall not switch off, or change the same without prior intimation to the IO concerned, during the period of bail;
 - iv. The shall report to the local Police Station on the first Monday of every month at 10.30 AM. She shall not be kept waiting for more than 30 minutes;
 - v. In case the applicant changes her address, she will inform the IO concerned and this Court also;
 - vi. The applicant shall not leave the country during the bail period and surrender her passport, if any, at the time of release before the trial court;
 - vii. The applicant shall not indulge in any criminal activity during the bail period;
 - viii. The applicant shall not communicate with, or come into contact with any of the prosecution witnesses, or any member of the victims' family, or tamper with the evidence of the case.
43. The observations are only *prima facie* and for the purposes of granting bail to the applicant.
44. The application is disposed of in the above terms.

JASMEET SINGH, J

NOVEMBER 22, 2022 / (MS) [Click here to check corrigendum, if any](#)