



* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 28th July, 2022
Pronounced on: 19th September, 2022

CRL. A. 885/2018

ASHOK GUPTA

..... Appellant

Represented by: Mr.Pramod Kumar Dubey, Sr.
Advocate (DHCLSC) with
Ms.Manika Tripathy (DHCLSC),
Mr.Shubham Hasija,
Mr.Kaustubh Chouhan and
Mr.Deep Narayan Sarkar,
Advocates.

versus

STATE

....Respondent

Represented by: Ms.Shubhi Gupta, APP for the
State with Inspector Varun Dalal,
P.S.Jahangirpuri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This appeal has been filed by the appellant assailing the judgment and order dated 29th May, 2018 convicting the appellant for the offence punishable under Section 302 IPC and order on sentence dated 02nd June, 2018 sentencing the appellant for life imprisonment and fine of Rs.10,000/- (simple imprisonment for six months in default of payment of fine) for the offence under Section 302 IPC.

The Incident:

2. On 29th August, 2011 dead bodies of two minor children were found on the second floor of the House No.H-1/393, H-1 Block, Jahangirpuri, Delhi where the appellant was staying as a tenant of the



father of PW-1, the complainant. On the basis of DD No.23A, SI BHJ Bhushan (PW-20) and Constable Satbir (PW-6) reached the place of incident and discovered that the two children had already been taken to BJRM Hospital by their father where they were declared as brought dead. Pursuant thereto, PW-1 Smt. Phool Kumari, mother of the two children recorded her statement that when she returned home that day at around noon and not being able to find her children, pursuant to a frenetic search, she went upstairs and found the appellant tenant leaving after locking his room. A bit later at around 2:00 p.m. PW-18, daughter Anjali, peeped into the room of the appellant and noticed the feet of the children beneath the cot. PW-5, the husband of PW-1, broke the lock and discovered the bodies of the two children with marks on their neck. On the basis of the statement and the MLC, FIR No.265/2011 was registered at PS Jahangirpuri. Pursuant to an investigation and Section 82 Cr.P.C. notice against the absconding appellant, he was arrested from Bihar on 19th November, 2011 and after taking transit remand, brought to Delhi. On conclusion of the investigation, charge-sheet was filed and charges under Section 302 IPC were framed against the appellant to which he pleaded not guilty and claimed trial. The prosecution examined 21 witnesses, the statement of the accused was recorded under Section 313 Cr.P.C. and no evidence was led in defence by the appellant.

Submissions by the Appellant:

3. In support of the appeal, the counsel for the appellant contended that there were various contradictions in the statements given by PW-5 (Raja Ram) and PW-18 (Anjali). As per the case of the prosecution, the lock of the appellant's room was opened after breaking it with the help of a grinding stone "silbatta" but it was not seized by the police



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officials. It was also contended that even though the broken lock was seized from the spot on 29th August, 2011, it was not shown in the “*naksha mokka*” whereas later, it was shown in the scaled site plan. Moreover, no chance prints were taken from the spot and no call location charts, showing the presence of the appellant at that time in that place, were exhibited. The appellant in his statement recorded under Section 313 Cr.P.C. clearly stated that he was innocent and he was being falsely implicated by PW-1, PW-5 and PW-18 over a dispute on rent and that he was apprehended and arrested and kept in wrongful confinement at his native village in Bihar by the police. Counsel for the appellant further contended that the house where the incident had taken place was a densely populated area and no witness was presented by the prosecution who saw the incident or the breaking of the lock of the door by the father of the deceased. Even the allegation of motive that the father of the deceased had refused to give Rs.500/- to the appellant on his asking would not be credible since the owner of the house in which the appellant was living on rent was father of PW-1.

Submissions by the Prosecution:

4. The learned Additional Public Prosecutor in support of the case of the prosecution contended that as per the *post mortem* report, the death was due to asphyxia consequent upon smothering and ligature strangulation. The doctor who conducted the *post mortem* (PW-10) had given a subsequent opinion on the black thread which was discovered on the deceased that the injury no.1 as mentioned in the *post mortem* report could be possible by that black thread. Relying on the statement of the appellant recorded under Section 313 Cr.P.C., in particular question no.93, it was contended that the appellant had admitted that there was a



dispute over rent which was corroborated by the testimony of PW-15 who had stated that there were quarrels between PW-1, the daughter of the landlord (PW-8 Uttam Chand) and the appellant.

The Evidence:

5. The following evidence, as gleaned from the records, and relevant for examination by this Court in relation to these facts and circumstances, is as follows:

(i) PW-1 Smt. Phool Kumari, the complainant and the mother of the deceased children deposed that on 29th August, 2011, the two deceased children viz. Suraj (aged about eight years) and Gopal (aged about six years) had gone for tuition classes with her husband at about 9:00-10:00 a.m. She had handed over one set of the keys to the room to Suraj as she had to go to the market for purchasing on the occasion of Ganesh Chaturthi. Her sons used to come back from the tuition classes at about 11:00-12:00 noon. When she returned at about 12:00-12:15 p.m. she did not find her children at home whereupon she asked the appellant (whom she identified in court) who used to reside on the same floor in a room on rent, and he mentioned that the children have gone downstairs to play in the *gali*. Having searched for her children in the *gali* unsuccessfully, she asked her daughter PW-18, Anjali (aged about eleven years) who was sitting on the stairs of their house as to the whereabouts of her brothers. Anjali mentioned that she had seen them going upstairs some time before and when PW-1 went to check upstairs, she saw the appellant hurriedly locking his room and leaving. On posing the query about the children to the appellant, he left without giving any answer to PW-1. Panicking, she called her husband who reached home at about 2:00 p.m. While they were still searching, Anjali peeped inside the room



of the appellant and saw the legs of the children under the cot inside the locked room. PW-5, PW-1's husband broke open the door of the room and found the two minor children lying under the cot with no movement in their bodies. With the help of neighbours, they took them to the hospital where they were declared brought dead. She further mentioned that the appellant used to borrow money from her husband frequently but could not repay the amounts. On the day of the incident, he was asking for a sum of Rs.500/- from the husband but the husband refused to give him the said money. The appellant also did not vacate the rented premises nor paid the rent in time. On the husband's refusal to give him the money, the appellant had threatened that "*the consequences will not be good*". In her cross-examination, she stated that even though the house was situated in a densely populated area and the approach to their floor was from a common staircase and people were residing on the floors below, at that time in the afternoon, no one was present as they had all gone for work.

(ii) PW-5 Raja Ram, the father of the deceased deposed that he was a driver by profession and that he had left for his job on 29th August, 2011 at about 9:00 a.m. Just when he was about to leave and drop his sons for tuition, appellant had approached and asked him to lend Rs.500/-. Upon PW-5's refusal and asking him to vacate the tenant premises the appellant became annoyed and said "*aaj tujhe maalum chal jayega ki mai kon hoon*". He further stated that the appellant (whom he identified in court) was kept as a tenant by his father-in-law and was residing on the second floor for the last seven years and used to pay Rs.500/- as rent. He further stated that upon spotting the bodies of the deceased children he broke open the lock with the help of the *silbatta* and found the bodies of the deceased. He further deposed that he had removed the blanket



from the bodies of the children and had noticed that there was one black colour thread on the body of his son Gopal.

(iii) PW-18 Anjali, the sister of the deceased deposed that on 29th August, 2011 when her father was going to drop her brothers for tuition, the appellant had demanded Rs.500/- from her father and father had scolded him whereupon the appellant had threatened her father saying that “*iska anjam achha nahi hoga sham ko aaoge toh pata chal jayega*”. She stated that at about 10:00 a.m. when her brothers came back from the tuition classes, she asked them to go upstairs and have food and she kept sitting on the stairs of the ground floor. At about 12:00-12:30 p.m. when her mother found the children missing, the appellant was standing at the door of the room at that time. She stated that she had not seen her brothers going downstairs since she was sitting on the stairs on the ground floor throughout. She further stated that she also saw the appellant locking his room and the process of leaving and later when they were searching for the brothers, she spotted through the window of the appellant’s locked room the feet of her brothers under the cot upon which her father broke open the lock of the room and they discovered the two dead bodies.

(iv) PW-10, Dr. Bhim Singh of the Department of Forensic Medicine deposed that he had conducted the *post mortem* examination on both the deceased and had found complete ligature mark (pressure abrasion) around the neck horizontally placed at the level of thyroid of brownish parchment like on both the dead bodies. His opinion was that the death was due to asphyxia consequent upon smothering and ligature strangulation. Later on, being presented the black thread, he gave his



subsequent opinion exhibited as Ex. PW-10/C stating that injury no.1 i.e. the complete ligature mark could have been caused by the black thread.

(v) PW-20, SI Brij Bhushan, the initial Investigating Officer (IO), deposed that on 29th August, 2011 after receipt of DD No.23A, he along with PW-6 had gone to the place of incident and later at the hospital they came to know of the two deceased children. He stated that the crime team officials had inspected the site and one black string was found on the neck of the deceased Gopal which had been seized and taken into possession. Blood was also found present in that room and the blood stained earth and earth control was lifted and duly seized by the police. A broken lock was also found which was also taken in possession. In his cross-examination, he volunteered that the lock seemed to be broken by force and that since he was standing outside when the crime team was carrying inspection inside, he could not say whether the chance prints were lifted or not.

(vi) PW-19, Inspector Dharampal, the subsequent IO, deposed that on 29th August, 2011 he had also gone to the place of the incident and was present when the crime team had visited and inspected the place and secured the seizures.

(vii) PW-21, Sh. Indresh Kumar Mishra, the Officer from Forensic Science Laboratory (FSL) testified as to his biological and serological reports exhibited as Ex. PW-21/A and Ex. PW-21/B, as per which he had opined that blood was detected on the following exhibits- one dirty underwear, one dirty t-shirt, one dirty half-pants, blood gauze while no blood could be detected on cementing material or the black thread with *tabiz*.



(viii) PW-13, the neighbour of the complainant PW-1, stated that he had heard some quarrels between PW-1 and the appellant on issues of rent and that PW-5 Raja Ram had told him that the appellant was not vacating the tenanted premises despite repeated requests.

(ix) PW-8, Sh. Uttam Chand, the father-in-law of PW-1 deposed that as he had increased the rent of the appellant to Rs.500/- two years prior to the incident, he had stopped paying any rent for the last few months and was not vacating the premises.

(x) PW-17, Head Constable Ram Dayal deposed that he had joined the investigation along with PW-19 and gone to Bihar in search of the appellant. On reaching Patna, they had met the real brother of the appellant on 07th November, 2011 and thereupon searched for the appellant. PW-19 had contacted various local police stations and took local help by pasting posters in different areas which are exhibited as Ex. PW-17/A. On 17th November, 2011 on information received regarding the location of the mobile phone of the appellant, they apprehended the appellant on 19th November, 2011 on the identification of his brother Kamal Dev vide an arrest memo Ex. PW-16/A. Subsequently, his disclosure statement was recorded and exhibited as Ex. PW-17/B. He stated that no enquiries regarding the key of the lock to his tenanted room were made and no key of the lock was discovered in the personal search. However, on the basis of a transit remand, they got the appellant back to PS Jahangirpuri, Delhi on 21st November, 2011 and his remand was obtained subsequently.

Analysis:

6. Pursuant to a detailed examination of the evidence on record and contentions of the parties, this Court is of the view that the prosecution



has been able to prove the guilt of the accused beyond reasonable doubt for the commission of the offence, for *inter alia* the following reasons:

(i) It is quite evident that the death of the two minor children found in the room on the second floor of the House No.H-1/393, H-1 Block, Jahangirpuri, Delhi was homicidal in nature. PW-10, the Doctor, who conducted the *post mortem* of both the deceased, had opined the death was caused due to asphyxia consequent upon smothering and ligature strangulation.

(ii) The place of incidence where the two deceased children were found is also not in doubt, even though the appellant has contended that the prosecution has been unable to establish that the deceased children were in fact murdered in the rented premises of the appellant. It is quite clear from the testimonies of PW-1 the complainant, PW-5 the husband of the complainant and PW-18 the sister of the deceased that they had discovered the bodies of the two children lying under the cot in the room on the second floor of the premises. The said witnesses PW-1, PW-5 and PW-18 have been also consistent in stating that the room had been rented out to the appellant by PW-8, the father of PW-1. PW-8, Sh. Uttam Chand confirmed that House No.H-1/393, H-1 Block, Jahangirpuri was his property and was allotted to him by DDA in 1976 that he had given one room on the second floor to his daughter PW-1 where she was residing with her husband PW-5, three sons and two daughters. He further confirmed that he had given space on the second floor to the appellant on rent of Rs.400/- per month and he was residing there for the last seven years prior to the date of the incident. He had increased the rent of the premises to Rs.500/- per month for the last two years. With regard to the place of the incidence, the testimonies of PW-



20, the initial Investigation Officer and PW-19, the subsequent Investigating Officer are also consistent in this regard. The scaled site plan Ex. PW-7/A also clearly identifies that the dead bodies of the children were found on the second floor room of that house. The testimonies of the other members of the police team are consistent in this regard.

(iii) As regards the minor discrepancies pointed out by the appellant in the testimony of PW-18, the young sister of the deceased children regarding the timing of the return of the deceased from their tuitions and the mention of the second floor as the third floor would not be material or would be substantial enough to discredit the annoyed consistent testimonies. The description of a floor by a number is often mistaken since it is common knowledge that ground floors are sometimes called the first floor by many people.

(iv) Considering that the dead bodies of the children were found in the room which was rented by the appellant, the burden is on the appellant to explain the presence of the two bodies in his room. Section 106 of the Indian Evidence Act categorically places the burden upon the appellant since the dead bodies were found in the confines of the room that he was occupying. In fact, in his answer to question no.93 of his statement recorded under Section 313 Cr.P.C., he stated that he was falsely implicated by PW-1, PW-5 and PW-18 over a “*dispute over rent*”. In other words, he has not denied the fact that he was indeed living on rent in that premises and therefore the burden is cast upon him under Section 106 to explain any circumstances which were especially within his knowledge, which he was unable to do.



(v) As regards the issue of whether the room was locked and the lock was broken, the appellant has contended that the site plan without scale does not show a broken lock while the scaled site plan does show a broken lock at the scene of the crime and therefore it would be a material improvement, denting the case of the prosecution. Before we address, this argument of the appellant, it is to be appreciated that PW-1 and PW-5 have been consistent on the fact that the lock of the room was broken when they discovered the legs of two bodies sticking out through the window of that room. PW-1 has clearly stated that “*my husband broke open the door of the room of accused Ashok and found my both sons Gopal and Suraj were lying under the cot*”. In her cross-examination, she does state that she could probably have told the police officials that the lock of the room was broken with the help of *silbatta* in her earlier statement but she did not remember at that stage. PW-5, the father of the deceased also categorically testifies that he broke open the lock of the room of the accused with the help of a grinding stone (*silbatta*). Although no *silbatta* was ever seized by the police, the broken lock was sealed as it is evident from the testimonies of PW-6, Constable Satbir who had gone to the spot of the crime after getting the FIR registered and the broken lock was sealed under the seizure memo Ex. PW-6/A. PW-9, SI Devender Singh, who was part of the crime team, also testifies that when he inspected the spot, he found the lock of the said room to be broken. PW-20, the initial Investigating Officer also deposed that the lock appears to be broken by force. All these testimonies being consistent that the presence of the broken lock was not noted specifically in the unscaled site plan would be irrelevant as also to the reason that it was later specified in the scaled site plan. Besides an omission in a site plan is not determinative of precipitative of the absence of the object



which may have been found in the premises. This Hon'ble Court has held in ***Bijender Singh v. State*** 2009 SCC OnLine 2925 in Para 28 and 29 that:

“The site plan is never treated as substantive evidence in law. Of course, the importance of a site plan has not to be belittled. The site plan is the only document available before a Court which is charged of the duty to appreciate and evaluate evidence which helps the Court in recreating the memorabilia as to what happened at the spot....But, an omission by the investigating officer would not be an escape route for an accused, if otherwise the prosecution has proved the case. After all, the task of a Judge is to decide as per law and evidence before the Court.”

(vi) The motive of the appellant for the crime is evident from the testimonies of PW-1, PW-5, PW-9, PW-13 and PW-18. Besides the history of the appellant not paying the rent in time being categorically asserted by PW-8 in his testimony and corroborated by PW-1 and PW-5, the specific incident of that day 29th August, 2011 when PW-5 refused to pay Rs.500/- as demanded by the appellant has also been clearly narrated as part of PW-1 and PW-5's testimonies.

(vii) It is also evident from the testimony of PW-1 that when she came back at 12:00-12:15 p.m. she first asked the appellant about her children when he diverted her by saying that they had gone to play downstairs in the *gali* but later when she came back again after the futile search, she saw the appellant hurriedly locking his room and leaving. This aspect has been fully corroborated by PW-18, the daughter of PW-1 in her testimony and therefore is highly credible last seen evidence.

(viii) The counsel for the appellant has raised a doubt relating to the recovery of the black string and it being doubted as the weapon of offence by the prosecution. However, this Court finds that the presence



of the black string is evident since PW-5 in his testimony categorically states that “*near the body of my sons namely Gopal, one black colour thread was also lying which was wrapped with Gopal*”. Since the injured children were taken and rushed to the hospital, the police could only see the bodies in the hospital when they were photographed. PW-20 has stated categorically that “*one black colour string (dora) was found on the neck of younger deceased namely Gopal*”. This Court has had the occasion to look at the photographs as well which formed part of the record and indeed there is a black string composed of many strands of black thread which was found alongwith one of the deceased bodies. The testimony regarding the black colour string has been corroborated by PW-19 who had sealed the same through seizure memo Ex. PW-19/A. A perusal of Ex. PW-19/A shows that what was seized was a black string of about 82 cms. which had knots at both ends and was composed of 7 thinner threads. Considering that the *post mortem* report opined that the cause of the death due to asphyxia from smothering and ligature strangulation and that the subsequent opinion was that the ligature mark could have been by the said black thread, this Court finds no reason to discredit this testimony and accept the contention of the appellant.

(ix) The other contention of the appellant regarding the fact that the place of incidence was accessible to the public and it was a crowded locality has been put to the witnesses in their cross-examination and PW-1 fairly stated the floors on which they were residing were easily visible from the floor of the opposite house but they had placed a curtain on that floor. Also, despite the fact that there was a common staircase coming up and people were residing on the floors below. PW-1 volunteered in her deposition that at that time none were present on the



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floors as they had all gone for work. PW-18 in her cross-examination also states that there was a curtain on their floor even though their floor would have been visible from the building in front. All this would be relevant if any strange incident had happened outside the confines of the appellant's room. It is quite clear from the testimonies and evidence on record that the crime was committed inside the room and later on the room was locked by the appellant and he had gone away. The question of anybody witnessing anything untoward would be difficult or well impossible in these circumstances.

Conclusion:

7. In light of the above discussion and analysis, this Court finds that the guilt of the appellant for the murder of the deceased has been proved beyond reasonable doubt. Consequently, this Court finds no error in the impugned judgment of conviction and order on sentence by the learned Trial Court.
8. Appeal is accordingly dismissed.
9. Copy of this judgment be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellant and updation of records.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 19, 2022/mk