
(2012) 05 DEL CK 0403

In the Delhi High Court

Case No : Criminal A. No. 14 of 2011, Criminal M.A. No. 17940 of 2011 and
Criminal M. (Bail) No. 17 of 2011

Ashok Kumar

APPELLANT

Vs

State (Govt. of NCT) of Delhi

RESPONDENT

Date of Decision : 10-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 26, 27
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2012) 3 JCC 2189

Hon'ble Judges : S.P. Garg, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Rakhi Dubey, for the Appellant; Richa Kapoor, APP, for the
Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—This appeal challenges the judgment dated 18.08.2010 and order on sentence dated 21.08.2010 passed by Trial Court (Rohini) whereby the appellant was convicted of offence u/s 302 and 201, IPC and sentenced to life imprisonment and fine, and imprisonment for a period of ten years respectively. The prosecution case was that on 17.9.2007, complainant Kishan Lal registered FIR no. 13/07 at P.S. Swaroop Nagar under Sections 302 and 201, IPC. He alleged that his younger daughter, Kanchan had married to the appellant about 8 years previously and they were residing at Swaroop Nagar, Delhi. The couple had two children, a son aged about five years, and a daughter aged about 4 years. On 07.09.2007, his daughter Kanchan had gone to his house and stated that she apprehended danger to her life from the appellant; on 17.9.2007 and on 19.9.2007, the complainant and his wife Beena, went to Kanchan's matrimonial house but both times it was locked. He therefore got the complaint registered fearing that Kanchan had been hurt by the appellant, also not knowing about the whereabouts of his grand-children. The police investigated the case, the

appellant was arrested at the pointing out by the complainant; at his instance, the dead body of Kanchan was recovered from a Ganda Nalla (drain) at G.T. Karnal Road, By-Pass. The crime team was called in; it conducted the proceedings at the place of recovery. Photographs were also taken at the place of recovery. Thereafter, investigation was carried out at the house of the appellant from where one duppatta (stole) was recovered, which was allegedly used to strangle the deceased on 15.9.2007, and one rehri (cycle rikshaw) was recovered using which the dead body was carried to the nalla where it was dumped.

2. On 20.9.2007, the post mortem of the body was conducted. The dupatta was shown to the autopsy surgeon, and his opinion regarding the cause of death was taken. The disclosure statement of the appellant, and statement of other witnesses were recorded. After completion of investigation, charge-sheet was filed for offences u/s 302 and 201, IPC. The appellant was charged with the commission of the abovementioned offences. He denied guilt and claimed trial. During trial, the prosecution examined 14 witnesses, and produced documentary evidence in the form of recovery memo, seizure memo, photographs etc. The defense also examined one witness. After considering the evidence on record, and hearing the arguments of the APP for the state and learned amicus curiae, the Trial Court by judgment dated 18.08.2010 convicted the appellant for the charged offences, and by order dated 21.8.2010 sentenced him in the manner mentioned above.

3. Learned counsel for the appellant argued that the impugned judgment is erroneous because it is based mainly on the recoveries being held proved against the appellant; there was no other piece of incriminating evidence, and certainly the standard of proof for a case of circumstantial evidence was not met with as the appellant's guilt was not the only hypothesis, that could be possibly inferred from the evidence on record. It was argued that no motive was proved for which the appellant would have killed his wife. It was also urged that the absence of any public witness to prove the recovery of the dead body from the nalla at G.T. Karnal Road, By-Pass, which is a crowded public place, casts doubt on the prosecution story.

4. It was also argued that there was contradiction in the prosecution version about the recovery of the dead body from the nalla at the instance of the appellant, in as much as PW-3 Bablu, the diver who recovered the bori (gunny bag) in which the dead body was found, as well as all other prosecution witnesses deposed that it was upon instructions from police officials that Bablu dug out a gunny bag (bori) containing the dead body. Another contradiction that learned counsel highlighted about the prosecution, was that after registering the FIR at P.S. Swaroop Nagar, the complainant PW-1 Kishan Lal, his wife PW-2 Beena, and investigating officer with other police staff started searching for the appellant, that during the search when they reached near By-Pass, Azadpur, then upon the pointing out by both PW-1, the appellant was arrested; however, both

PW-1 and PW-2 testified that on 19.9.2007, after registration of the complaint at P.S. they were sent back, and while returning, when they reached near the nalla they noticed appellant handcuffed and many police and public persons gathered there. This inconsistency about the manner of the appellant's, arrest, and recovery alleged it was urged, shrouded the prosecution story with suspicion. As regards the testimony of PW-1 and PW-2, it was also pointed out that they stated that they put their thumb impression on several places, but they could not tell the number or content of any of those documents. Moreover, it was contended that the testimony of PW-1 and PW-2, who were interested witnesses, should not be believed in the absence of any corroboration particularly because the same were not consistent and definite.

5. It was also emphasized that if the prosecution version about the appellant strangulating the deceased is to be believed, there must have been some scuffle and screaming between the two. However, no witness from their well habituated residential area was examined to verify any such scuffle or screaming, which also makes the prosecution version uncertain. Another exonerating circumstance that learned counsel relied on was the testimony of PW-8 Sanjay, the videographer, who was declared hostile, and could not identify appellant Ashok as the one who was present at the time of the recovery, and at whose instance the recovery was made. Counsel also contended that non-examination of material witnesses like immediate neighbours, landlord and appellant and deceased's children also created doubt about the truth of the prosecution story.

6. Learned counsel also urged that absence of any explanation from the appellant in response to the allegedly incriminating evidence that was produced against him showed how the Trial Court's approach compromised on the fundamental principles of presumption of innocence of the accused, and burden of proving charges lies on the prosecution. He further argued that the learned Trial Court erred by completely ignoring the testimony of DW-1 Inderjeet, resident of Swaroop Nagar, who testified that the appellant had on 14.9.2007 and on 15.9.2007 enquired about the whereabouts of his wife from him, and that the appellant had cordial relations with his wife.

7. Counsel for the appellant argued that even though the allegation made by the complainant PW-1 in the FIR was only of disappearance of his daughter Kanchan and his grand-children, still a case u/s 302, IPC was registered. Counsel submitted that since as per the prosecution story, the dead body was recovered subsequent to the registration of the FIR, the mention of section 302, IPC in the FIR suggests that the appellant was falsely implicated. Counsel also pointed out that there was a manipulation of the time recorded on the Death Report of Kanchan (Ex.P-14/E). He further pointed out that the alleged time at which various events unfolded on 19.9.2007 as per the prosecution version also hinted that the whole case was a fabricated one. He called attention to the FIR (Ex.PW-1/C) which states the time of recording as 08:00 A.M; to the testimony of the investigating officer (IO) PW-14 Dayanand who stated that he left P.S.

Swaroop Nagar with the complainant and his wife in search of the appellant at about 10:00 A.M.; to the arrest memo of the accused (Ex.PW-2/A) which states the time of arrest of the appellant as 09:00 A.M.; to the overwriting of the date, apparently from 17/18.9.2007 to 19.9.2007 mentioned on the Memo regarding pointing out of accused (Ex.PW-1/E). Lastly, he pointed out that there was inconsistency as to the time of death of Kanchan; the prosecution version was that Kanchan was strangled, and her dead body was dumped on 15.9.2007; however, the Post Mortem report (Ex.PW-12/A) states the time of death as 3-4 days prior to conducting the examination on 20.9.2007, i.e. 16/17.09.2007.

8. The learned APP defended the Trial Court judgment arguing that the testimonies of both PW-1 and PW-2 had corroborated each other, and proved that Kanchan had expressed her fear about her husband threatening to take her life to her parents; there were no inconsistencies in the account given by various police witnesses, and thus the recovery of the dead body at the instance of the appellant stood proved; so did the recovery of the duppatta used to strangle Kanchan, and the rickshaw thela used to carry her dead body to the nalla; the Post Mortem also stated the estimated time of death to be 3-4 days prior to 20.9.2007. Learned APP argued that the chain of circumstances was complete and pointed only at the guilt of the appellant, and thus, there was no need to interfere with the impugned judgment.

Analysis of evidence

9. The FIR (Ex.PW-1/C) was registered upon information given by PW-1 Kishan Lal. As per the FIR PW-1 visited Kanchan's house on two occasions, both the time, it was locked. Kanchan had told PW-1 that the appellant had threatened to kill her, and had suspected her character; the FIR implicates the appellant as being responsible for the murder of Kanchan. According to the prosecution story, after the registration of FIR, the appellant was searched for, and was arrested. However, there is some difference in the testimonies of witnesses as regards his arrest. PW-2 Beena, deceased Kanchan's mother stated during her examination that after recording of the FIR, they (she and her husband PW-1 Kishan Lal) were sent back, and while they were passing the ganda nalla, they saw public persons, and police gathered there along with the appellant who was handcuffed. The version disclosed by the testimony of the investigating officer PW-14 Insp. Dayanand is, however, different. He deposed that after recording of the FIR, he along with PW-1, PW-2 and some police staff went in search of the appellant; when they reached near Bypass, G.T. Karnal Road, the complainant identified the appellant, and he was taken in custody. The testimonies of PW-9 S.I. Ranvir Singh, PW-10 Ct. Abhimanya and PW-11 corroborated PW-14's version. However, on none of the memos (Memo regarding pointing out of accused at the spot Ex.PW-1/E, Disclosure statement of accused Ex. PW-1/D, Arrest memo of accused Ex.PW-2/Z, Personal search memo of accused Ex.PW-2/B) are his (PW-10's) signatures present. This is an important inconsistency in the prosecution story.

10. Furthermore, it must be noted that on his own initiative, PW-1 Kishan Lal did not depose about his going to P.S. Swaroop Nagar to record the FIR, and from there, having gone with the police in search of the appellant and finding him near By-pass, G.T. Karnal Road. He was declared hostile, and cross-examined by the learned APP. It was only during his cross-examination by the APP that he agreed to the suggestion that he went to P.S. Swaroop Nagar, and from there, accompanied by police persons, went in search of the appellant who they found at near By-Pass. During his cross-examination by the defence counsel, he deposed about certain circumstances which cast some doubts about the prosecution story. He claimed to have been instructed by his counsel; that the police never recorded his statement; that he had just put his thumb impression on several papers prepared by police, and that since he was illiterate, he did not know what those contained. He also deviated from his earlier stand of pointing out the appellant to the police at By-Pass, by stating that after he found his daughter's house locked the second time, he started searching for her and while so searching, reached the nalla where his daughter's body was recovered; that the appellant was handcuffed and was present there along with many other persons including police officers and photographer; he stated that he was not called there by anyone, but reached on his own during morning time.

11. Thus, both PW-1 and PW-2 in their examination in chief or cross-examination deposed to versions inconsistent with the prosecution story. Here, it has also to be kept in mind that PW-9 HC Ranvir Singh stated during his cross examination that no public witness was available at Bypass, even though at the same time he admitted that many persons were standing at the By-pass bus-stop, and vendors were also present on the other side of the road. Thus, in these circumstances, in the absence of any independent witness corroborating the prosecution version, this Court considers that that the prosecution version as to the manner of arrest of the appellant to be shrouded in doubt. This doubt arises from the inconsistency caused by comparing the depositions of PW-1 and PW-2, on the one hand, and of the police persons (i.e. PW-14, PW-9, PW-10 and PW-11), on the other. Thus, it appears to us that the arrest of the appellant from near By-pass upon the pointing out of PW-1, when PW-1 and PW-2 along with police persons were searching for him, was a fabricated one.

12. Our attention was also brought to some alleged inconsistency in the description of the time of arrest of the accused. PW-14 stated that PW-1 and PW-2 met him at P.S. Swaroop Nagar at 08:30 AM on 19.9.2007, they left from P.S. at about 10 A.M., reached By-Pass from where the appellant was found and arrested, went to the ganda nalla, which was 10-15 feet away, and stayed there for 3 hours. The FIR states the time of recording as 08:00 A.M. and the arrest memo states the time of arrest of the appellant as 09:00 A.M. These by themselves may be considered to be minor discrepancies, but our attention was also brought to a more significant discrepancy in the form of overwriting of the date on the Memo regarding pointing out of Accused at the spot, probably from 17/18.9.2007 to 19.9.2007. This Court has also perused the other memos

(Disclosure statement of accused Ex. PW-1/D, Arrest memo of accused Ex. PW-2/Z, Personal search memo of accused Ex. PW-2/B). The date on each of them is 19.9.2007, which is however consistent with the prosecution story. Moreover, these time-related discrepancies, even though minor, when considered in light of the previously discussed inconsistency as regards the alleged arrest of the appellant on the pointing out of PW-1, make the prosecution story more implausible.

13. Another significant discrepancy that we note is that even though the FIR did not contain any concrete fact or allegation about the death of Kanchan, the case was still registered u/s 302, IPC; at most the FIR stated that the complainant/informant PW-1 was sure that his daughter Kanchan had been killed by the appellant. The core of the complaint was that she, her children and the appellant had been missing; there was no information about any dead body, or that Kanchan had for sure died. This too, is an extremely significant factor to suggest that the case against the appellant was framed, because if indeed the police were intimated about the disappearance of the complainant's daughter, they could not have automatically assumed that she had been killed.

14. The learned counsel had also argued that no motive was suggested for the appellant to murder his wife. In this regard, we have the testimonies of PW-1 and PW-2 who stated that Kanchan had complained that her husband suspected her of having extra-marital relations, and had threatened to kill her. PW-1 also deposed that on 7.9.2009, Kanchan had told him that the appellant had threatened her by stating "ab tera samay aa gaya hai, ab tu nahi bachegi". PW-2 stated that Kanchan had told this to her husband, but since her account is hearsay evidence, her testimony, to that extent is inadmissible. However, for the sake of argument, even if the threat and the alleged motive arising from Kanchan having extramarital affair are assumed to be true, these alone cannot be adequate proof of the appellant's guilt. At most, it made him a suspect. In holding him guilty, the Court, in such a case of circumstantial evidence, base it on the proof of circumstances which form a complete chain and point to only his guilt, leaving no room for any other possibility.

15. As per the evidence on record, the only other circumstance that could be considered incriminating was the recoveries allegedly made at the instance of the appellant. The prosecution story is that the appellant in his disclosure statement revealed that he strangled Kanchan using a duppatta, then carried her dead body in a rehri/rikshaw and dumped the body in the ganda nalla; that the body, the rikshaw and the duppatta were all recovered at his instance; the former from the nalla, and the latter from his house. However, since there is doubt as to the arrest of the appellant upon the pointing out of PW-1, as well as the origin of the FIR itself, which does not square up with the basic case of the prosecution, this Court cannot rely on the recoveries. It must be noted that no public witness was examined to prove that the recovery of the dead body from the nalla was at the instance of the appellant. This is despite the fact that all prosecution witnesses

(PW-1, PW-2, PW-3, PW-4, PW-5, PW-9) who were present at the spot i.e. the nalla stated that public persons had gathered there. It came on record that PW-8 Sanjay, a videographer, was called and videographed the proceedings at the spot. He was declared hostile and during cross examination by the APP, even denied the suggestion that the appellant was present at the spot, and that the recovery was made at his instance. PW-9 had also stated that the pointing out by the appellant of the bori (gunny bag) containing the dead body was recorded in the video. However, when during examination of PW-14 this video was played, the Trial Court did not record any observation which suggests that it was in fact the appellant who pointed out the bori in the nalla. Importantly, PW-3 Bablu, the diver did not state that he was told about the, location of the gunny bag containing the body by the appellant. Instead he deposed that after being shown the bori by the police, he dived and brought it out. Thus, the arrest of the appellant being itself shrouded in doubt, there is great uncertainty that the bori containing the dead body was pointed out by the appellant. The likelihood that the bori was instead sighted by either the police, or some public person who informed the police, after which the appellant's arrest and alleged disclosure took place, and the recoveries alleged to have been made at his instance, cannot be ruled out.

16. As far as the recoveries of the duppatta and rikshaw are concerned, we note that these recoveries too appear to be suspect. As per the prosecution story, these two were recovered from the appellant's house, after he was taken there by the police, and accompanied by PW-1 and PW-2. Seizure memo of rikshaw (Ex.PW-1/J) and seizure memo of duppatta (Ex.PW-1/H) reveal that the pointing out of the dupatta and the rikshaw was witnessed by PW-1, PW-2, PW-9 and PW-11. Since PW-9 and PW-11 were police persons, his alleged pointing out of the duppatta and the rikshaw was thus done whilst in police custody. Thus, by application of Section 26, the Indian Evidence Act, 1872 the said pointing out became inadmissible as evidence. Moreover, not even an iota of evidence was produced which could have linked the duppatta and the rikshaw with the crime de hors the testimonies of PW-1, PW-2, PW-9 and PW-11. Thus, we hold that the recovery of the dupatta and the rikshaw did not stand prove as against the appellant.

17. This Court notes that neither the children of the appellant and the deceased, nor the neighbours (including the landlord) were examined during trial. These could have been material witnesses to prove the allegation that the appellant used to harass and beat the deceased. Their non-examination also causes doubt about the prosecution story. Even though this doubt may not be significant by itself, it adds to the uncertainty of the prosecution version.

18. In view of the above discussion, having considered the evidence, this Court is of the opinion that the prosecution did not discharge its burden, and that the circumstances on which the Trial Court based his inference of guilt, did not stand proved. There is strong doubt as regards the prosecution version that the

appellant was arrested upon the pointing out by PW-1 when he, his wife PW-2 and police were in search of the appellant. The recoveries too, did not stand proved; they were inadmissible by virtue of Section 26, Evidence Act. Section 27, Evidence Act would be inapplicable as there was no reliable proof adduced for the fact that the information which led to the recoveries was distinctly received from the appellant.

19. Interestingly, the Trial Court completely disbelieved the testimony of the sole defence witness DW-1 Inderjeet. He deposed that he was a resident of Swaroop Nagar, and that on two occasions, i.e. 14.9.2007 and 15.9.2007, the appellant had asked him about the whereabouts of his wife Kanchan, and second time he had advised him to lodge a complaint to the police; he stated that later on 15.9.2007 he was told by the appellant that when he went to the P.S., he was told by the police to search for 2-3 days on his own. He further stated that on 19.9.2007, he along with the appellant and his relatives (namely Bhuri Devi, Ram Kilari, Krishan Chand) went to P.S. Swaroop Nagar, but there only the appellant was allowed to enter, and the others left after waiting for 3-4 hours; that later he came to know that the appellant had been implicated in the present case. The appellant, in his statement u/s 313, CrPC, also corroborated the version stated by DW-1. During his cross examination, DW-1 did not state anything which would make us disbelieve his version that the appellant did in fact ask about the whereabouts of his wife from him. The manner of arrest of the appellant is anyway shrouded in doubt, and the testimony of DW-1 adds to that. In any case, the prosecution itself did not satisfy the burden of proving the guilt of the appellant, thus even if the defence version was false it does not affect our inference that the charge against the appellant was not proved beyond reasonable doubt. The circumstances based on which the Trial Court held the case of circumstantial evidence to be complete were not, in our opinion, firmly established. In light of the aforementioned discussion, this Court is of the opinion that the appeal must succeed. The impugned judgment of the Trial Court is therefore set aside. The appellant is directed to be set at liberty, if not required in any other case. The appeal is, accordingly, allowed.