
(2010) 05 DEL CK 0079

In the Delhi High Court

Case No : Criminal Appeal No. 468 of 2010

Ashok Kumar

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 11-05-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313

Citation : (2010) 05 DEL CK 0079

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : K.K. Manan, Tarun Goomber, Gaurav Goswami and Nipun Bhardwaj, for the Appellant; M.N. Dudeja, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The appellant and co-accused Laxmi (since acquitted) were charged for the offence of having entered into a criminal conspiracy to murder Raj Kumari, the wife of the appellant, and in furtherance thereof having murdered Raj Kumari between 2:00 AM to 6:00 AM on the intervening night of 18th and 19th November 2007 at the matrimonial house of the appellant and Raj Kumari; being the ground floor of House No. 348/A/ Asha Ram Gali No. 4, Mandawali, Faizalpur, Delhi.

2. Vide impugned judgment and order dated 18.2.2010, acquitting Laxmi, against whom the only incriminating evidence which surfaced was of being in the company of the son of the appellant when the wife of the appellant was found dead, the appellant has been convicted inasmuch as his explanation as to how his wife died has been found to be unsatisfactory and it stands proved that the wife of the appellant was brutally assaulted with a wooden paaya (wooden leg of a wooden cot) Ex.P-5 inside the only room which was the matrimonial house of the parties. The learned Trial Judge has also held that the confessional statement Ex.PW-3/D made by the appellant u/s 164 Cr.P.C. before the Metropolitan Magistrate, Delhi was voluntary, and since in the said confessional statement the

appellant admitted having murdered his wife the same established the guilt. The learned Trial Judge has noted that the said confession was never retracted by the appellant and pertaining to it being non voluntary, said position was taken only by the counsel during final arguments, after evidence was led.

3. The learned Trial Judge has held that the discrepancy between the rough site plan Ex.PW-14/A prepared on the day of the incident by Insp. Keshav Kumar and the site plan to scale Ex.PW-10/A, pertaining to the spot where the dead body of the deceased was lying when the police reached the scene of the crime, does not demolish the case of the prosecution; noting that there were lapses on the part of the investigating officer while conducting investigation, holding the same to be innocuous omissions and hence inconsequential, the learned Trial Judge has held that the same have to be ignored. Holding that such omissions which amount to contradictions and hence militate against the meat or core of the case of the prosecution are alone material.

4. DD N.6-A, Ex.PW-2/A, proved through the mouth of the author thereof, ASI Nand Kishore PW-2, stands recorded at 5:48 AM on 19.11.2009 at PS Mandawali, containing the information that a lady has been murdered at House No. 348A/7 Asha Ram Gali, Subedar Chowk, Mandawali. It be noted that said testimony of ASI Nand Kishore has not been challenged when he was cross-examined.

5. A copy of said DD entry was handed over to SI Hari Ram PW-11 who left the police station accompanied by Const. Shri Pal PW-13. As deposed to by Insp. Keshav Kumar PW-14, even he received the information. All 3 police officers, as deposed to by them, reached House No. 348A/7 Asha Ram Gali No. 4, Mandawali and saw the dead body of a lady whose name was disclosed to them as Raj Kumari by another lady named Raj Bala PW-4, the sister of Raj Kumari. The dead body was lying with its face up and hand stretched out on the street just opposite the house in question, with blood all around the body. They noted trail of blood from the street to inside the solitary room in the house; the trail passing through an open court yard in between the room and the street. Crime team was summoned. HC Subhash PW-12, a photographer was a part of the mobile crime team, and as deposed to by him, he took 15 photographs Ex.PW-12/A-1 to Ex.PW-12/A-15 from different angles; negatives whereof were Ex.PW-12/A-16 to Ex.PW-12/A-30, as deposed to by HC Subhash. He was not cross-examined by learned Counsel for both accused.

6. 3 photographs show the dead body of Raj Kumari, with face upward and hands stretched, lying in a pool of blood on the street which appears to be about 5 feet wide; for the reason the outstretched hands of the deceased touch the two edges of the street and hence we can fathom the span. Photograph Ex.PW-12/A-14 shows a continuous trail of blood on the floor of a room and the open courtyard abutting the room. The remaining photographs show a trail of blood in the room as also a blood stained paaya on one bed and a blood stained pillow, blood stained towel and a blood stained sheet on a second bed which is perpendicularly placed to be bed on which the paaya is lying.

7. There were various other blood stained articles. As entered in the seizure memo Ex.PW-4/C, 6 exhibits, a cotton red & white coloured printed sheet stained with blood and a mat stained with blood (Ex.P-4 collectively). 2 pillows stained with blood (Ex.P-2 collectively), a light coloured towel having blue lining, stained with blood, and a T-shirt of a child stained with blood (Ex.P-3 collectively) were seized. The wooden paaya Ex.P-5 having blood on one side was seized as entered in the memo Ex.PW-4/B. Both memos have been signed by Insp. Keshav Kumar PW-14 as the author thereof and bear the signatures of Raj Bala, SI Hari Ram and Const. Shri Pal, as witnesses to the recovery. As deposed to by Insp. Keshav Kumar, he prepared the rough site plan Ex.PW-14/A showing therein the position of the two beds inside the room from where he lifted various exhibits as also the place where the dead body of Raj Kumari was lying. He marked the track of the trail of blood leading from the bed wherefrom the two blood stained pillows and the blood stained bed sheets and blood stained towel as also the blood stained T-shirt of a child were picked up by him till where dead body of Raj Kumari was lying. He recorded therein that the room was approximately 10" x 15". He further indicated the position of the courtyard, which occupies the mid half segment of the front wall of the room and where a door stands affixed being the place of entry to the room with a store and a kitchen on the western side of the open courtyard and a bath-cum-toilet on the eastern boundary of the courtyard. Adjoining the bath-cum-toilet, he showed the place where staircase commences leading up to the first and the second floor in the building. He dutifully recorded that the building was a 3 storeyed building. As entered in the memo Ex.PW-11/C, he lifted blood sample and blood control earth from the spot and seized the same.

8. Raj Bala PW-4, the sister of Raj Kumari volunteered a statement which was recorded; being Ex.PW-4/A by Insp. Keshav Kumar, in which she informed that she resides at House No. 262/C/568 Bharat Ram Akhada Gali, Mandawali, Faizalpur since last 12 years and that her sister Raj Kumari aged 28 years was married to the appellant about 4 years back. Ashok developed illicit relationship with Laxmi and he used to give money to Laxmi. Due to this there used to be tension between Ashok and her sister and that after consuming alcohol Ashok used to quarrel with her sister. Yesterday at 9:00 AM in the morning she had visited the house of her sister when she found Ashok drunk. She counseled Ashok that he was the father of a child and very soon would be the father of another child and hence he should live a family live. Today morning at around 5:30 AM, Raj Kumar, a tailor by profession, who resides in the neighbourhood of Ashok came to her and informed her that her sister Raj Kumari has been injured and she should see her. She reached the house of her sister and saw her body smeared with blood on the street and she rang up the police control room. Thereafter the police came. That Ashok was at the spot and was attempting to flee but people in the neighbourhood had caught him. That she suspects that Ashok has murdered her sister and that the room and the bed is smeared with blood. She desires action be taken against Ashok and Laxmi.

9. Making an endorsement Ex.PW-14/A beneath Raj Bala's statement Ex.PW-4/A, as deposed to by Insp. Keshav Kumar PW 14 he sent the statement and the investigation for FIR to be registered, recording therein that the teherir has been dispatched from the spot at 7:50 AM on 19.11.2007.

10. As deposed to by ASI Nand Kishore PW-2, he received the teherir from Const. Shri Pal and registered the FIR Ex. PW-2/B.

11. Appellant Ashok Kumar was apprehended at the spot itself and his disclosure statement Ex.PW-11/A was recorded, probably at the police station without his being formally arrested. The pair of chappals Ex.P-6 which he was wearing as also pant and the shirt, Ex.P-7 collectively which he was wearing were seized as entered in the memo Ex.PW-11/B. He was formally arrested, as recorded in the arrest memo Ex.PW-14/C at 3:45 PM.

12. As claimed by the prosecution, Ashok volunteered to make a confessional statement before the Magistrate and for this purpose Insp. Keshav Kumar filed the application Ex.PW-14/L on 19.11.2007 itself before the Duty Magistrate Karkardooma Courts for recording Ashok Kumar's statements u/s 164 Cr.P.C. It appears that the said application was actually filed on 20.11.2007 for the reason the Reader of the learned Duty Magistrate wrote thereon that since the Magistrate had gone to attend computer training, the application be put up before the learned Link Magistrate on 22.11.2007. The said writing is Ex.PW-3/B. Another application being Ex.PW-14/K dated 20.11.2007 was also filed praying once again that Ashok's statement u/s 164 Cr.P.C. be recorded on which the learned Metropolitan Magistrate passed the order Ex.PW-3/A that it may be put up before the Link Magistrate today itself.

13. There is nothing on record as to what happened before the Link Magistrate on 20.11.2007.

14. Another application Ex.PW-4/M dated 22.11.2007 was filed in the Court of the Link Magistrate by Insp. Keshav Kumar on which an order Ex.PW-3/C was passed by Shri Anand Swaroop Agarwal, Metropolitan Magistrate, Delhi recording that Ashok was produced before him at 2:40 PM on 22.11.2007 and he was giving time till 3:15 PM to Ashok so that he could think over the matter. He directed the police officers to leave the Court. He wrote that only the Court staff and the Judge would remain present with Ashok. Thereafter, at 3:15 PM, Shri Anand Swaroop Agarwal, Metropolitan Magistrate, Delhi recorded the confessional statement Ex.PW-3/D of Ashok Kumar. The same reads as under:

In the night of Sunday this month after 12:00 O'clock in between 2:00 AM - 3:00 AM on 19/11/07, I had hit three times a wooden "paaya" of the cot on the head of my wife Smt. Raj Kumari. A few days before the incident I had a quarrel with my wife on account of my late coming from my native village. But on the date of incident, there was no quarrel between myself and my wife. I used to reside with my wife and a child, Mt. Ankit Kumar (Anand Kumar) aged about 21/2 years. Further my wife was pregnant with a baby of 7/8 months. On the

date of the incident I had slept while watching the TV. Even my wife Smt. Raj Kumari had slept while feeding baby Mt. Ankit Kumar (Anand Kumar). At about 1:45 - 2:00 AM (night) on 19/11/07 I had demanded food from my wife because I am in the habit of taking the dinner at late night hours. I usually use to take dinner after 12:00 O'clock in the night. On the date of the incident I had demanded the food at about 1:45 AM - 2:00 AM because I had slept i.e. ankh lag gayi thi on the said date while watching the TV. My wife did not got up despite my repeated requests. Even my demand for the tea was not fulfilled by my wife. On this account, I got angry and I had hit my wife on her head with a wooden paaya of a cot but I had not hit on any other part of the body. I had hit my wife on her head with a wooden paaya of a cot lightly two times and with some force third time. I never intended to cause death to my wife.

When my wife was feeling pain and blood had come out of the head on account of injury given by me, I got afraid. Thereafter, I had asked for help from Mr. Dalip Pandey @Rinku, who is residing as a tenant at first floor of my house but he refused to give any help. Thereafter I had gone to bring one three wheeler for taking my wife to hospital: at that point of time I had given my child Mt. Ankit Kumar (Anand Kumar) to my neighbour/relative namely Ms. Laxmi, w/o Shri Ved Prakash R/o Saket Block, Mandawali. I had also asked for help from Pappu Nigam S/o no known R/o in the neighbourhood of above said Ms. Laxmi but he did not give any help to me. Thereafter I had brought one TSR but he refused to carry my wife to the hospital. Thereafter I felt helpless and I did nothing. Thereafter at about 7:00 AM in the morning police came at the spot at the call made by Mr. Dalip Pandey. Thereafter relatives of my wife arrived at my house including my sister-in-law/Sali, Raj Bala @ Rajjo.

15. The learned Magistrate has recorded an order of even date to the fact that he has explained to Ashok Kumar that he was not bound to make any confession and if he did so it would be treated as substantive evidence against him. He recorded in the order that he has questioned Ashok Kumar whether he had any fear, coercion or influence of any type or from any corner to compel him to make the confession to which Ashok Kumar responded that he was under no such pressure and was desirous of making a voluntary confession.

16. In the meanwhile, the dead body of Raj Kumari which had been seized in the morning of 19.11.2007 was sent to the mortuary of Lal Bahadur Shastri Hospital Khichdipur where as recorded on Ex.PW-14/H and Ex.PW-14/J, dead body of Raj Kumari was identified in the mortuary by Ram Prakash, the brother of Ashok Kumar and Smt. Shanti, mother of Raj Kumari.

17. Dr. Vinay Kumar Singh PW-16 posted at the mortuary of Lal Bahadur Shastri Hospital conducted postmortem on the dead body of Raj Kumari on 20.11.2007, commencing the post-mortem at 11:45 AM and prepared the post-mortem report Ex.PW-16/A recording therein that he had received the inquest papers at 11:30 AM on 20.11.2007 and that the dead body was brought at the mortuary at 9:45 AM on 19.11.2007, but surprisingly inspite of noting the fact that the dead body

had been in the mortuary for 25 hours and 45 minutes prior to his commencing the post-mortem thereon, wrote on the post-mortem report that in his opinion the probable time of the death was 8 hours to 16 hours prior to the time he commenced the post-mortem on the dead body of Raj Kumari. He noted 9 injuries on the dead body; being as under:

1. Lacerated wounds of 7 x 5 cm, bone deep underneath bone was fractured and brain mater was visible, present 4 cm above left ear over left fronto partial reason margins was irregular.
2. Lacerated wound of 3 x 2 cm, bone deep margin irregular present over left frontal region, underneath bone was fractured, 3 cm above medial end of eye brow.
3. Abrasion of 2 x 1 cm present just above lateral end of left eye brow.
4. Abrasion 2 x 2 cm present over tip of left shoulder.
5. Bruise, red in colour of 3 x 2 cm present over thenar aspect of left wrist.
6. Abrasion of 2.5 x 1.5 cm present over back of left hand 2 cm away from left middle finger.
7. Abrasion of 1.5 x .5 cm present over back of left index finger 2 cm away from tip over back side.
8. Bruise red in colour 2 x 2 cm present over back of left hand 4 cm away from middle knucle.
9. Abrasion 1.5 x 0.8 cm present over outer side of left side 3 cm away tip of little finger.

On internal examination in neck, chest and abdomen nothing abnormality was detected and in uterus female fetus was sound of body length 43 cm and 1700 grams weight. In head multiple compound fracture of skull of left side with brain mater lacerated, meninges torn with internal cranial hemorrhages .

18. He wrote that brain mater was coming out of the skull which was fractured and that cause of death was cranio cerebral damage to the brain consequent upon blunt force impact to the head. He opined that all injuries were ante mortem in nature and death would have been caused in the ordinary course of nature. He opined that the death was homicidal.

19. We note that he wrote on the post-mortem report that 2 glass bangles and 3 plastic bangles on the right hand and 3 glass bangles on the left hand were on the person of the dead body.

20. We note that the paaya Ex.P-5 was not sent to Dr. Vinay Kumar to list his opinion, whether the 2 fatal head injuries could be caused by the same. We further note that when Dr. Vinay Kumar Singh PW-6 proved the report Ex.PW16/A, he was not cross-examined as to how can he opine that the death was

homicidal. We are writing said fact for the reason that there may be a possibility of the injuries being the result of a person falling from a height. We are recording this observation for the reason, as would be noted by us hereinafter, the defence taken by Ashok Kumar was that his wife suffered the injuries when she fell from the roof of the house.

21. We are eschewing reference to the various memos pertaining to Laxmi, the co-accused of the appellant, who has been since acquitted.

22. Being a little unconventional, the object being to facilitate the issue being focused straightway, when incriminating circumstances were put to the appellant as he was examined u/s 313 Cr.P.C., conscious of the fact that he had to explain the injuries on his wife since his presence at the spot was not disputed by him, he said:

I am innocent and falsely implicated in this case. I have not killed my wife. She had sustained injuries after falling down from the roof. Rajbala got the present case falsely slapped upon me so as to grab my property as I am in Jail since the date of the incident. I do not know the fate of my property. I had no illicit relationship with Laxmi nor had any acquaintance with her. I was taken to police station immediately after arrival of police to my house and all the proceedings were fabricated by the police in my absence. I had not shown any intention to Insp. Keshav to get my statement recorded before the Court. I was under trauma and sorrow due to untimely death of my wife. I am not aware about my son also. My wife had died accidentally and I am innocent.

23. We may note that in respect of the various exhibits which were seized from his house and the photographs which were taken he replied that he did not know. Pertaining to his statement Ex.PW-3/D recorded u/s 164 Cr.P.C., which was a confessional statement he stated that being under trauma due to the untimely death of his wife, he was not capable of making any statement. Relevant would it be to note that even at this stage he did not retract his confessional statement.

24. Now, the photographs referred to above show that dead body of Raj Kumari was lying on the street. The explanation of Ashok as to how his wife died is that she fell from the roof.

25. This takes us straight to the question: Whether the deceased died when she fell on the street from the roof of her house or was it that she was injured inside her matrimonial house and the body dragged out on to the street.

26. The close up photographs of the dead body of the deceased, which as noted above show the face up and arms outstretched, show the glass and plastic bangles on her wrists. All of them are intact. We can understand the plastic bangles being intact but fail to comprehend as to how can the glass bangles which we can clearly see on the wrist of the dead body of the deceased in the photographs, being intact. Not one has been broken. The photographs do not show any pieces of broken glass bangles around the dead body.

27. Insp. Keshav Kumar PW-14 who has deposed that he drew the sketch of the rough site plan Ex.PW-14/A has not been questioned as regards its contents, and as noted above, on the said rough site plan he has noted that the building was a 3 storeyed building. If the deceased fell from the roof, it had to be from the roof of the 3rd floor and if this be so, there is no way that the glass bangles on her wrists would not have been smashed to pieces.

28. This disproves the explanation given by Ashok Kumar as to the cause of the death of his wife.

29. We have noted hereinabove that the information of a lady being killed in House No. 348/7 Asha Ram Gali No. 4, Mandawali, Faizalpur, Delhi was passed on to the police station at 5:48 AM. Raj Bala PW-4 has deposed in complete sync with her statement Ex.PW-4/A and additionally to the various exhibits being seized at the spot.

30. Raj Kumar, the person whom Raj Bala claims as the one who informed her that her sister was injured has deposed as PW-5 and has corroborated the fact that after he saw Raj Kumari lying on the street at 4:05 AM on 19.11.2007 he went to Raj Bala's house who lived a little distance away and passed on said information to Raj Bala. It is apparent that by 4:05 AM, Raj Kumari's dead body was on the street outside her house.

31. It is important to note that it was the 19th day of the month of November in the year 2007. In the city of Delhi by 19th November each year it is pitch dark. By 19th November dawn breaks not before 6:15 AM - 6:30 AM. The sun comes out by 7:15 AM - 7:30 AM. What could have led Raj Kumari to the roof of the building at such an unearthly hour remains a mystery, and in our opinion would always remain a mystery for it is mythical to think of Raj Kumari going to the roof of the building on the ground floor whereof she resided at such an unearthly hour.

32. This is our second reason to disprove and hold it to be false, the explanation furnished by Ashok Kumar, as to the circumstance under which his wife died.

33. The Supreme Court has visited various situations where the guilt of a husband whose wife was found dead in her matrimonial house was in issue. We had re-visited the various decisions of the Supreme Court in a decision penned by us (Coram: Pradeep Nandrajog, J. and Suresh Kait, J.) when we decided Crl. Appeal No. 615/2008 Mukesh v. State, as recently as 4th May 2010.

34. In para 52 of the said decision we had summarized the legal position which we could comprehend with reference to the various kinds of situations dealt with by the Supreme Court as under:

52. Having examined the decisions of the Supreme Court on the point of death of a wife in her matrimonial house, we deem it appropriate to classify the said judicial decisions into undernoted 4 broad categories for the reason we are finding considerable confusion in the minds of the subordinate Judges as to the

correct position of law:

I In the first category fall the decisions where it is proved by the prosecution that the husband was present in the house when the wife suffered a homicidal death and rendered no explanation as to how his wife suffered the homicidal death. (See the decisions reported as *State of Rajasthan Vs. Parthu*, , *Amarsingh Munnasingh Suryawanshi Vs. State of Maharashtra*, , *Ganeshlal Vs. State of Maharashtra*, , *Prabhudayal and others Vs. State of Maharashtra*, , *Dnyaneshwar Vs. State of Maharashtra*, , *Trimukh Maroti Kirkan Vs. State of Maharashtra*, , *Bija and Others Vs. State of Haryana*, and *State of Tamil Nadu Vs. Rajendran*,

II In the second category are the decisions where the prosecution could not prove the presence of the husband in the house when the wife suffered a homicidal death but the circumstances were such that it could be reasonably inferred that the husband was in the house and the husband failed to render any satisfactory explanation as to how his wife suffered a homicidal death. The circumstances wherefrom it could be inferred that the husband was in the house would be proof that they lived in the house and used to cohabit there and the death took place in such hours of the night when a husband was expected to be in the house i.e. the hours between night time and early morning. (See the decisions reported as *State U.P. Vs. Dr. Ravindra Prakash Mittal*, and *Narendra Vs. State of Karnataka*, .

III In the third category would be proof of a very strong motive for the husband to murder his wife and proof of there being a reasonable probability of the husband being in the house and having an opportunity to commit the murder. In the decision reported as *Udaipal Singh Vs. The State of U.P.*, the deceased wife died in her matrimonial home in a room where she and her husband used to reside together. The accused-husband had a very strong motive to murder the deceased which was evident from the letter written by him to his mistress, which letter clearly brought out the feeling of disgust which the accused had towards the deceased. The accused had the opportunity to commit the murder of the deceased as there was evidence to show the presence of the accused in the village where the house in which the deceased died was situated at the time of the death of the deceased. Noting the facts that the accused had a strong enough motive and an opportunity to murder the deceased, noting that there was no evidence that the appellant was seen in his house by anybody, the Supreme Court convicted the accused.

IV In the fourth category are the decisions where the wife died in her matrimonial house but there was no evidence to show presence of the husband in the house at the time of the death of the wife and the time when the crime was committed was not of the kind contemplated by the decisions in category II and was of a kind when husbands are expected to be on their job and there was either no proof of motive or very weak motive being proved as in the decision reported as *Khatri Hemraj Amulakh Vs. The State of Gujarat*, and *State of Punjab v. Hari Kishan* 1997 SCC Cri. 1211.

35. The instant case falls in the first category of the decisions noted by us i.e. the wife suffering a homicidal death and the husband being present in the house but unable to render any satisfactory explanation.

36. We have already commented, as above, with reference to the opinion expressed by the doctor who conducted the post-mortem on the dead body of Raj Kumari as to how could he categorically opine that the death was homicidal and have brought out that in the absence of any weapon of offence shown to him, he could probably not have rendered such an opinion. Thus, uninfluenced by the opinion expressed in the post-mortem report, since it is the primary duty of the Court to return a positive finding on the basis of the evidence before it, we would be failing if we did not record our finding that in view of the defence explanation, for the reasons afore-noted, it cannot be held even to the remote that Raj Kumari suffered the injuries when she fell from the roof, for had it been so the glass bangles on her hands would not have remained intact and we find it most unnatural for her to have gone to the roof of her house when it was pitch dark. It has to be held as a logical corollary that the severe head injuries on Raj Kumari were not the result of a fall from the roof of a 3 storeyed building but as a result of being hit with a heavy blunt object. As noted above, brain mater was found oozing out of the fractured skull.

37. In that view of the matter we need to discuss no further, but do so for the reason, as per the prosecution there is tell-tale evidence of Raj Kumari being injured inside the only room of her matrimonial house.

38. While narrating the facts we have noted the names of Raj Bala PW-4, SI Hari Ram PW-11, Const. Shri Pal PW-13 and Insp. Keshav Kumar PW-14 as the 4 persons concerned with the various memos which were prepared at the spot after Insp. Keshav Kumar, SI Hari Ram and Const. Shri Pal reached the spot.

39. Whereas Raj Bala PW-4 has deposed with consistency that at the spot the police picked up the various exhibits as recorded in the memo Ex.PW-4/B and the memo Ex.PW-4/C as also duly identified each exhibit produced in Court as the ones which were lifted from the spot and also affirmed that her signatures on the two memos were at the point "X" on the said memos, SI Hari Ram PW-11 corroborated Raj Bala but stated during cross-examination that he could not state who was the scribe of the said 2 memos as also various other memos which were prepared from time to time and which bore his signatures as a witness being the memos Ex. PW-13/DB, Ex. PW-7/B, Ex. PW-7/A, Ex. PW-14/C, Ex. PW-4/B, Ex. PW-4/C, Ex. PW-11/A, Ex. PW-11/B, Ex. PW-11/C, Ex. PW-11/E and Ex.PW-14/A. Further, he stated that when the exhibits were put inside a parcel, the seal "HR" i.e. the seal was affixed thereon and that thereafter the said seal was handed over to him.

40. Const. Shri Pal PW-13 to our bewilderment, commenced his examination-in-chief by throwing a bomb-shell inasmuch as he said that he does not know anything about this case. With this sole sentence after his examination-in-chief,

Const. Shri Pal was immediately declared hostile and was cross-examined by the learned APP and on cross-examination admitted that the various exhibits mentioned in the memo Ex.PW-4/B and Ex.PW-4/C were lifted in his presence and that they were immediately sealed with the seal of "HR" and that his signatures were at point "Y" on the same. He admitted that blood samples and blood control earth from the spot, as recorded in the memo Ex.PW-11/C were lifted in his presence and that is signatures are at point "B" on the said memos.

41. Insp. Keshav Kumar PW-14 deposed of having recorded statement Ex.PW-4/A of Raj Bala and having made an endorsement Ex.PW-14/A and getting the FIR registered. He deposed to have lifted blood sample, blood control earth as recorded in the memo Ex.PW-11/C as also various exhibits which he lifted and as recorded in the memos Ex.PW-4/B and Ex.PW-4/C. He deposed of having prepared the rough site plan Ex.PW-14/A. He deposed of having recorded to disclosure statements Ex.PW-11/A of the accused Ashok. He deposed that he arrested Ashok as per arrest memo Ex.PW-14/C. He deposed that he took possession of the pant, shirt and towel of Ashok as recorded in the memo Ex.PW-11/B. He deposed of having prepared inquest papers Ex.PW-14/D, Ex.PW-14/E, Ex.PW-14/F and Ex.PW-14/G. He deposed of having got the dead body identified in the mortuary as per statements Ex.PW14/H and Ex.PW-14/J. He deposed of having made the various applications before the Metropolitan Magistrate for recording confessional statement of Ashok as desired by Ashok. He identified the various exhibits which he had seized. He admitted that he used the seal "HR" belonging to SI Hari Ram but could not give any explanation as to why he did not use his seal. He stated that Ex.PW-4/A, Ex.PW-4/B, Ex.PW-4/C, Ex.PW11/A, Ex.PW-11/B, Ex.PW-11/C, Ex.PW-11/E and Ex.PW-14/A were in his own handwriting and that Ex.PW-13/DB, Ex.PW7/B, Ex. PW-7/A, Ex. PW-15/C, Ex. PW-14/DA and Ex. PW-14/DD were not in his handwriting and additionally stated that he could not state as to who wrote said memos, all of which, we note bear his signatures as author thereof.

42. He stated that he prepared the rough site plan with the assistance of Raj Bala. He further deposed that the various exhibits which he had seized were sent to the FSL Laboratory, admitting that they were sent after 70 days. He gave the explanation that the FSL Laboratory did not sent the priority letter. He admitted that the road certificate when the exhibits were sent for forensic evaluation was not filed by him in Court. He tendered the FSL report Ex.PW-14/N which evidences that the human blood of group "A" was detected on the various exhibits which were seized inside the room as also on the pant, shirt and chappal of Ashok. He stated that he did not remember as to whether site plan to scale Ex.PW-10/A was prepared at his instance.

43. SI Mahesh Kumar PW-10, the author of the site plan to scale Ex.PW-10/A stated that he prepared the site plan at the instance of the investigating officer.

44. It may be noted that the place where dead body of Raj Kumari was lying has been shown in the site plan to scale at a considerable distance from the place

where it is shown in the rough site plan Ex.PW-14/A. To this extent, there is a hiatus between the two site plans. It may further be noted that in the site plan to scale, spot "A" listed is the bed inside the room wherefrom the blood stained bed-sheet, the blood stained pillows, blood stained towel and the blood stained T-shirt of a child were lifted and it additionally stands recorded that this was the spot where Raj Kumari was killed.

45. Time to note and deal with the submissions urged during arguments of the Appeal.

46. It was urged that wherefrom Insp. Keshav Kumar wrote on the rough site plan Ex.PW-14/A or required SI Mahesh Kumar to record on the site plan to scale Ex.PW-10/A that Raj Kumari was killed on the bed inside the room at spot "A" when he was not an eye-witness.

47. Now, what has happened is explainable. One may not see something but may see something of the kind from which the human mind may perceive something to have happened. If a person sees pillows soaked with blood on a bed as also blood stains on the bed sheet and notices a towel and a T-shirt with blood stains on the bed, the percipient human mind, would automatically reach the conclusion, or so would it lead itself to believe, that somebody has been assaulted at the said spot and if the dead body of that somebody is found a little distance away with a trail of blood from the bed till the spot where the dead body is lying, the belief would be that the person was assaulted at spot "A". Thus, we do not find this to be an aberration and hence there is no question of using the same to discredit the investigation.

48. It was urged that Insp. Keshav Kumar has recorded that he prepared the rough site plan with the help of Raj Bala and Raj Bala could not have seen the crime as she was not an eye-witness. Thus, both site plans have to be ignored and if this be so there is no proof that the various blood stained exhibits were lifted from spot "A". We see no effect of Insp. Keshav Kumar recording that he prepared the rough site plan with the help of Raj Bala, for the reason he needed no help. He has picked up from spot "A" the 2 pillows which were stained with blood, the bed sheet which was stained with blood, a towel which was stained with blood, a T-shirt of a child which was stained with blood and from the floor next to the bed, a mat also stained with blood. Having lifted the same from the spot he saw the spot and could so record. Similarly, the place where dead body of Raj Kumari was lying was seen by him and he could so record through the medium of seeing through his eyes. He picked up a paaya stained with blood on seeing the same on the bed adjoining the bed at spot "A" and thus could list the said spot as "B" as a result of his personal knowledge. Likewise, he could list the spot "D" where he saw the dead body. He could mark spot "C" giving the spot an elliptical shape as the one where he saw the trail of blood, for he saw the same. The said spots can be visually seen by us in the photographs Ex.PW-12/A-1 to Ex.PW-12/A-15. Thus, it hardly matters that Insp. Keshav Kumar wrote that he prepared the rough site plan with the assistance of Raj Bala.

49. The weak argument sought to be advanced that the photographs are neither here nor there, has to be noted and rejected for the simple reason HC Subhash PW-12 who has proved the said photographs with reference to their negatives, deposed that he reached the place of incident as a part of the crime team and took the photographs; he has not been subjected to any cross-examination. Photographs of the scene of crime act as the eyes of the Court and tell their own story and if proved to be the photographs of the scene of the crime, are substantive evidence and are akin to direct and percipient evidence pertaining to the scene of the crime.

50. It is unfortunate that Const. Shri Pal PW-11 had to be declared hostile and then only did he admit to be a witness to the various memos signed by him as a witness as correctly reflecting what was lifted from the place of the crime. Corroboration to the various exhibits being lifted from the spot is to be found through the testimony of Raj Bala, Const. Shri Pal, SI Hari Ram and the author of the memos pertaining to the said exhibits being lifted i.e. Insp. Keshav Kumar.

51. With reference to the testimony of Insp. Keshav Kumar who could not identify who scribed some of the memos prepared by him as also with reference to the testimony of ASI Hari Ram who could not throw light as to who scribed the various memos, the controversy of Insp. Keshav Kumar not rendering any explanation as to who scribed some of the memos does not relate to the memos Ex.PW-4/B and Ex.PW4/C which pertain to the blood stained exhibits lifted from the scene of the crime. It also does not relate to the memo Ex.PW11/C which records blood samples and blood control earth lifted by him from the spot.

52. Thus, the blemishes while conducting investigation by Insp. Keshav Kumar, not relating to the material evidence have to be ignored for the simple reason it is settled law that lapses conducted during investigation require only such relatable evidence to be ignored as gets tainted and such evidence which remains intact and emerges with credibility has to be taken note of by the Court. See the latest decision reported as Aqeel Ahmad Vs. State of U.P.,

53. Similarly, the hiatus between the site plan to scale and the rough site plan, pertaining to the spot where dead body of Raj Kumari was lying, has to be ignored by us for the simple reason we have better evidence to show us where the dead body was lying through the medium of the photographs Ex.PW-12/A-1 to Ex.PW-12/A-15.

54. It was urged that the purity of transmitting the various blood stained exhibits to the FSL Laboratory has not been proved inasmuch as the road certificate under which they were sent from the malkhana to the FSL Laboratory has not been proved.

55. It is unfortunate that Insp. Keshav Kumar did not file the road certificate and prove the same, by which road certificate the various exhibits were sent to the Forensic Science Laboratory. It is equally unfortunate that Insp. Keshav Kumar did not use his seal to seal the various exhibits which he lifted. It is unfortunate

that having used the seal of SI Hari Ram he returned the seal to SI Hari Ram, thereby diluting the act of sealing the various exhibits. His negligent act would have under normal circumstances dented the credibility of the recovery of the various exhibits from the spot as claimed by the prosecution, but fortunately, we have before us the photographs of the scene of the crime and these photographs were taken before the various incriminating exhibits were seized and we can clearly see the blood stained paaya Ex.P-5 as also the blood stained bed sheet Ex.P-4 as also the blood stained pillows Ex.P-2. A towel can be seen by us but not any stains thereon for the reason it is partially eclipsed by a table just adjoining the bed on which the towel is placed. The trail of blood from the bed passing through the room and thereafter the courtyard leading up to the dead body can be seen by us. The trail of blood can also be seen on the street till the place where the dead body is lying.

56. It is also unfortunate that the paaya Ex.P-5 was not sent to Dr. Vinay Kumar PW-16 for his opinion. It is equally unfortunate that Dr. Vinay Kumar PW-16 wrote on the postmortem report that the probable time of death was 8 hours to 16 hours prior to when he commenced the post-mortem, ignoring that on the same form he has himself written that the dead body was received in the mortuary at 9:45 AM on 19.11.2007 and that he was conducting the post-mortem after 25 hours and 45 minutes, commencing the same at 11:45 AM on 20.11.2007. We note that said conduct of his had given birth to an argument that who knows whether at all the dead body to which the post-mortem report relates is that of Raj Kumari. We have on record the memos Ex.PW-14/H and Ex.PW-14/J which record that the younger brother of appellant Ashok and the mother of Raj Kumari identified the dead body in the mortuary. Besides there is other evidence to prove that the dead body was that of Raj Kumari. He has written on the post-mortem report that glass and plastic bangles were on the wrists of the dead body which conforms to the photographs of the dead body taken at the spot where the crime was committed.

57. We conclude on this issue by confirming the view taken by the learned Trial Judge that notwithstanding blemishes during investigation there is overwhelming evidence to establish that Raj Kumari was fatally assaulted and a heavy blunt object was struck on her head inside her matrimonial house. So great is the force used that the brain mater was found coming out of the fractured skull.

58. Re-visiting the defence i.e. the explanation of the appellant that his wife suffered the injuries when she fell from the roof, having ruled out the fall from the roof on to the street outside, we may only add that the question of the deceased falling from the roof inside her living room does not arise for the reason nobody can tumble and fall inside a room through the roof unless there is evidence that the roof had a puncture or a ventilation opening on the roof. The question of there being a puncture or a ventilation opening does not arise inasmuch as there are 2 floors above. Further, no suggestion has been put to the witnesses of the prosecution that it was possible for a person to fall from the roof

inside the living room, which was the matrimonial house of Ashok and his wife.

59. Pertaining to the confessional statement Ex.PW-3/D made by the appellant before the learned Metropolitan Magistrate, the controversy was that the accused was produced before the learned Magistrate at 2:40 PM and only 35 minutes cooling time was given to the accused to think over and at 3:15 PM the confessional statement was recorded. It was urged that the learned Magistrate ought to have given proper time after informing the accused the consequences of his confession to the crime and should have called the accused the next day and if still he desired a confession to be recorded, then alone the confessional statement ought to have been recorded.

60. Mr. M.N. Dudeja, learned Additional Public Prosecutor stated that this argument would have held good if the accused was produced from police custody. Learned Counsel pointed out that no investigation being required to be conducted with the assistance of the accused, appellant was sent to judicial custody on 20.11.2007 and he was produced in Court from judicial custody on 22.11.2007. Since appellant had expressed a desire to make a confessional statement before the Magistrate on 19.11.2007 itself an application was filed on 19.11.2007 itself for getting recorded his confessional statement but since the Duty Magistrate was not available an attempt was made to get the confessional statement recorded on 20.11.2007 even said event failed. The confessional statement was recorded on 22.11.2007. Meaning thereby, the appellant got sufficient opportunity to think about the consequences of his statement.

61. We render no conclusive opinion on this debate and leave the question open for further debate, for the reason even while excluding the confessional statement of the appellant, we have proof of the fact that the wife of the appellant i.e. the deceased was fatally assaulted prior to 4:05 AM on 19.11.2007 in the only room which was the matrimonial house of the appellant and his wife. The appellant's presence in the house has not only been proved but has been admitted by him. Law required the appellant to render a satisfactory explanation as to how his wife suffered the injuries and in the absence of any such explanation the guilt is plain upon the appellant. Having rejected the explanation furnished by the appellant and noting the various decisions of the Supreme Court in category-I, as noted in para 52 of our decision in CrI. Appeal No. 615/2008 and as reproduced in para 34 above we dismiss the appeal returning a finding of our concurrence with the view taken by the learned Trial Judge. But before bringing the curtains down would highlight the issue which needs to be further debated in law on confessional statements being recorded before the learned Magistrates.

62. As noted above, as per the State the confessional statement was recorded on 22.11.2007 and application for the same being recorded was filed on 19.11.2007, the date on which the appellant desired to make a confession. The appellant was in judicial custody since 20.11.2007 and thus had enough time to ponder over his desire to make a confession thus, the 35 minutes cooling period

given by the learned Magistrate on 22.11.2007 before recording the confessional statement was enough. The argument of the other side was that the cooling off period requires to be given by the Magistrate is after the accused is aware of the consequences of his making a confessional statement. The issue would be of an informed consent. From the side of the accused the plausible argument would be that it may be possible that the accused had some faint and gibberish knowledge of making a confession with justification for the conduct hoping that he may be let off with a lesser sentence and only when full contours of the nature of his act attracting a serious penal law is made known to him would it be the requirement then to give time to him after the said informed consent is obtained. Since learned Counsel just touched upon the issue by projecting the rival views without a full fledged debate and a look into precedents as none were cited on the issue, we have advisedly left the question open.

63. The appeal is dismissed.

64. Since the appellant is in jail we direct that a copy of the instant decision be sent to the Superintendent, Central Jail Tihar, for being made available to the appellant.